

# IMPLICITLY UNJUST: HOW DEFENDERS CAN AFFECT SYSTEMIC RACIST ASSUMPTIONS

*Jonathan A. Rapping\**

*This article examines the power of implicit racial bias on all major players in the criminal justice system, focusing specifically on the criminal defense attorney—whose role in defending his or her client makes racial bias particularly devastating to the criminal justice system we would like to believe we have. If a criminal defense attorney is to be maximally effective in the defense of his or her client, this Article argues, it is critical for said attorney to fight to affect systemic racial assumptions built into the American court system. The article suggests a three-prong strategy for the criminal defense lawyer working against our racialized criminal justice system that includes: 1) working to overcome his or her own racial biases, 2) developing strategies to educate others about their biases, and 3) continuing to focus on racial justice even when everyone else in the system seems to disregard it.*

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\* Associate Professor, Atlanta’s John Marshall Law School, and President/ Founder, Gideon’s Promise. Thanks to Rachel Morelli for her research assistance and to Professor Elayne Rapping for her editorial advice. Thanks also to Professor Paul Butler and Ira Mickenberg for their ideas. To learn more about the work of Gideon’s Promise and its efforts to promote defender-driven criminal justice reform, visit [www.gideonspromise.org](http://www.gideonspromise.org).

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INTRODUCTION

Arguably, no feature of America’s criminal justice system is more obvious than its disparate impact on people of color. That so many well-intentioned people working within this system help to reinforce this status quo is at first blush mystifying. But understanding the influence of implicit racial bias (IRB), that subconscious association between race and crime that affects us all, helps one appreciate how people who deeply believe in justice can help perpetuate a racially unjust system. Defense attorneys must be conscious of this subversive force and develop strategies to counteract it if they are to achieve just outcomes for so many of their clients. Reflecting upon my own evolution as a public defender helps me understand the subtle ways the criminal justice system can shape our assumptions about race and crime.

It was the summer of 1993 when I first walked into Courtroom C-10. This was the basement courtroom of the Superior Court of the District of Columbia where arrestees were brought for “first -appearance hearings.” It was where the accused would first see a judge, discover the charges made against him, and learn whether he would be released pending his next court date. There was no better place to learn first-hand who was likely to be arrested in Washington, DC.

I had just completed my first year of law school and was working as an intern investigator at the Public Defender Service (PDS). I had lived in Washington, DC for three years and knew the city was racially diverse. While there were certainly a larger percentage of African-Americans residing there than in the nation generally, there was

still a significant white population. Although I had previous experience working in economically disadvantaged communities, and I understood the correlations between race and poverty, and poverty and crime, I expected to see a cross section of arrestees that more closely resembled the racial make-up of the city at large. I was surprised to see that every arrestee I saw that day was black.

But as I continued to work in DC's criminal justice system—for two more years as an intern and then as a public defender—my surprise morphed into acceptance. In fact, over time I found myself more surprised to see the occasional white defendant. When I did, I assumed there must be some extraordinary story behind the arrest. The image did not fit the narrative I was being socialized to accept: one in which criminality and skin color were inextricably intertwined.

I spent the next eleven years living in the corridors and courtrooms of that courthouse, and nine years since involved in indigent defense reform across the country. For the last six years, I have studied and taught criminal justice issues as a law school professor. I now understand that what I witnessed that day during the summer of 1993 was not anomalous; it was a snapshot of the harsh racial realities in our nation's criminal justice system. I also understand that my waning sensitivity to this reality is not unusual. Our justice system obviously punishes people of color disproportionately. Many well-intentioned people lose sight of that phenomenon and end up perpetuating it.

All across the country, African-Americans are disproportionately processed through a maze of courts and prisons. Individually, many are unable to overcome the many obstacles they experience every day. Collectively, they come from communities torn apart by these traumas. The national implications of a criminal justice system that so disproportionately impacts minorities, in a world divided along racial and socioeconomic lines, are alarming. Our criminal justice system has emerged as the greatest barrier to our most cherished American ideals: equal justice and equal opportunity for all.

And yet, I observed that so many of the professionals whose jobs ensured that the system functioned effectively were African-American. It was not uncommon to walk into a courtroom in which the judge, prosecutor, and defense counsel were all black. African-American police and probation officers frequently provided the evidence necessary to lock away the accused. And in Washington, DC, white professionals in the system were frequently progressive on issues of race outside the criminal justice context.

Puzzled by this situation, I frequently found myself wondering how so many people who presumably cared about racial justice could

preside over such a system. I then began my own soul searching. Despite my commitment to my clients, did I harbor subconscious biases about them? Was I enabling the system by participating in it? Did I have an obligation to racial justice beyond the individual interests of my client? If so, what was my appropriate role? These are the questions I address in this article. It intends to initiate thoughtful discussions among defense attorneys about the impact of race in the criminal justice system and strategies that can be utilized to neutralize or mitigate such impact.

The remaining sections of this article will articulate the widespread problem that inspired it, specifically focusing on implicit racial biases that affect everyone, including those who are progressive on issues of race, as well as members of the same race that are experiencing the bias. The last two sections tackle the roles that criminal defense lawyers have within the justice system and suggest more ways in which defense attorneys can move beyond racially slanted judicial outcomes.

Section I provides critical foundation for the rest of the article. In it, I will explore the ways racial disparity is driven by virtually every aspect of the criminal justice system to show how prevalent this phenomenon is, and the driving need to combat it. In the second section I then look at the ways implicit racial bias works to explain how even well-intended people can actually facilitate the functioning of such an unjust system. Scholars have examined how this unconscious racial bias can cause decision-makers in the criminal justice system to unknowingly contribute to racist outcomes by skewing their perceptions of events that occur within the system. However, an area left relatively unexplored in these studies is the role of the criminal defense lawyer.<sup>1</sup> In what ways might the defender inadvertently facilitate a racist system and is it possible for him or her to help mitigate such unjust outcomes? In the third section I will argue that a focus on systemic

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1. At the time I began writing this article I found two articles that touched on the impact of implicit racial bias on criminal defense lawyers. The first looked at racial attitudes of capital defense lawyers. Theodore Eisenberg & Sherri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004). The second looked at how implicit racial biases can impact both the ways that defense lawyers interact with clients and how they select juries. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012). As I was finishing this article another was published that looks at how implicit racial bias can impact how overworked public defenders elect to allocate scarce resources. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013). While I will also examine how implicit racial bias affects defense lawyers, in this article I also explore what role defenders can play in trying to mitigate its impact of racial justice.

reform is consistent with the defender's singular obligation to the client,<sup>2</sup> and that the conscientious, client-centered criminal defense lawyer can play a critical role in raising consciousness of the racism that plagues the criminal justice system and work to engender resistance to it. I further argue that by shining a light on the racism in the system, the defense attorney helps all of his or her clients, not just those who are of color. I argue that a racialized system is also a less humane system that enforces punitive policies that unfairly affect everyone accused of a crime. Finally, I suggest a three-prong strategy for the criminal defense lawyer working against our racialized criminal justice system that includes: 1) working to overcome his or her own racial biases, 2) developing strategies to educate others about their biases, and 3) continuing to focus on racial justice even when everyone else in the system seems to disregard it.<sup>3</sup>

## I.

### CRIMINALIZING RACE

#### A. *Racially Disparate System and its Devastating Consequences*

2.2 million people are currently incarcerated in America.<sup>4</sup> With a population of approximately 315.5 million,<sup>5</sup> roughly 1 out of every 143 people in the country is locked up at any point in time, or 0.7% of the total population. While 75% of Americans are white,<sup>6</sup> over 60% of those incarcerated are racial and ethnic minorities.<sup>7</sup> While 0.4% of white Americans are among those incarcerated, the figure for black Americans is 2.2%.<sup>8</sup> In short, African-Americans are nearly six times

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2. Although there will be times when this agenda will have to give way to the interests of an individual client.

3. Certainly I do not mean to suggest that even the most committed and race-conscious defense lawyers can eradicate systemic racism. See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236 (2013). But, conscientious defense counsel can develop strategies to fight against racist influences that negatively impact their clients.

4. *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited May 15, 2013).

5. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (last visited May 15, 2013).

6. *White U.S. Population Grows but Drops in Overall Percentage*, CNN (Sept. 29, 2011, 6:07 PM), [http://articles.cnn.com/2011-09-29/us/us\\_census\\_1\\_census-figures-racial-statistics-branch-hispanics?\\_s=PM:US](http://articles.cnn.com/2011-09-29/us/us_census_1_census-figures-racial-statistics-branch-hispanics?_s=PM:US).

7. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited May 15, 2013).

8. Peter Wagner, *Incarceration is Not an Equal Opportunity Punishment*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/articles/notequal.html> (last updated Aug. 28, 2012).

as likely to be incarcerated as their white counterparts.<sup>9</sup> For African-American men in their thirties, one in every ten is in prison or jail at any given time.<sup>10</sup> In fact, soon after I began my career as a public defender in Washington, DC, a study revealed that, in that city, nearly 50% of all black men between the ages of eighteen and thirty-five were under the supervision of the criminal justice system.<sup>11</sup>

In her much acclaimed book, *The New Jim Crow*, Michelle Alexander makes the argument that these racial disparities are exacerbated by the War on Drugs. Alexander argues that although whites and blacks use and sell drugs at similar rates,<sup>12</sup> blacks are far more likely to be incarcerated for drug crimes. To support this argument, she points to a 2000 study that found that “in seven states, African-Americans constitute 80 to 90 percent of all drug offenders sent to prison” and that “[i]n at least fifteen states, blacks are admitted to prison on drug charges at a rate from twenty to fifty-seven times greater than that of white men.”<sup>13</sup> These trends are national in scope.<sup>14</sup>

That the American criminal justice system disproportionately impacts communities of color, and African-Americans in particular, is beyond question. And the impact is devastating as its ripples have impact well beyond the rate and duration of incarceration.<sup>15</sup> The impact of non-criminal penalties is described by the American Bar Association Task Force on Collateral Sanctions:

[Once convicted, a person] may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver’s license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. If he is convicted of another crime he may be subject to imprisonment as a repeat offender. He will not be permitted to enlist in the military, or possess a firearm,

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9. *Interactive Map*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/map/map.cfm> (last visited May 15, 2013).

10. *Racial Disparity*, *supra* note 7.

11. *Half of Young Black Men in Nation’s Capital in or Being Pursued by Criminal Justice System*, *NewsBriefs*, NAT’L DRUG STRATEGY NETWORK, <http://www.ndsn.org/sep0ct97/blackmen.html> (last visited May 15, 2013) (accounting also for those in prison or jail, on probation or parole, out on bond or being sought on an arrest warrant).

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97 (2010) (arguing that, if anything, whites are more likely to sell and use drugs than blacks).

13. *Id.* at 96, (citing HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* 12 (2000)).

14. *Id.*

15. See ALEXANDER, *supra* note 12, at ch. 4.

or obtain a federal security clearance. If a citizen he may lose the right to vote; if not, he becomes immediately deportable.<sup>16</sup>

Erma Faye Stewart's story provides a chilling example of how the non-criminal consequences that accompany conviction can wreak more havoc than the criminal sanction itself.<sup>17</sup> Stewart was one of twenty-seven people arrested as part of a drug sweep in Hearne, Texas.<sup>18</sup> The prosecutions were based on the word of a lone informant, later proven to be unreliable. The lack of evidence forced the district attorney to drop the prosecutions.<sup>19</sup> However, before the problems with the state's case came to light, seven of the arrestees had already pled guilty in order to secure their release from jail.<sup>20</sup> One of them was Erma Faye Stewart.<sup>21</sup> Unable to pay her bond, and desperate to return home to her two small children, Stewart accepted a plea offer that resulted in a ten year prison sentence, as well as a \$1,800.00 fine.<sup>22</sup> She did not realize that by pleading guilty she lost her eligibility for food stamps, which she needed, and for federal educational assistance.<sup>23</sup> She lost her right to vote.<sup>24</sup> She was evicted from public housing and separated from her children who had to sleep in various homes.<sup>25</sup> She had to use the money she made at her minimum wage job as a cook to pay her fines, leaving her unable to afford her young son's asthma medicine.<sup>26</sup>

Despite her probable innocence, Stewart was rendered unable to be the mother she needed to be, ruining not only her life, but the lives of her two children. When we consider these consequences, coupled with the fact that they so disproportionately impact communities of color, we begin to see how disparities in our criminal justice system

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16. Marc Mauer & Meda Chesney-Lind, *Introduction* to *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 5* (Marc Mauer & Meda Chesney-Lind eds., 2002) (quoting Am. Bar Ass'n, *Introduction* to Proposed Standards on Collateral Sanctions and Administrative Disqualification of Convicted Persons (Jan. 18, 2002) (unpublished draft, on file with author)).

17. See *The Plea, Erma Faye Stewart and Regina Kelly*, FRONTLINE (June 17, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html>.

18. *Id.*

19. *Id.*

20. *Id.* Those who refused to plead guilty but could not post bond had to sit in jail for five months before the charges were dismissed. The seven who pled guilty remain convicted felons.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

can render entire communities unable to fully participate in our society.<sup>27</sup>

*B. The Role of the Criminal Justice Professional*

It is certainly disquieting to learn that these racial disparities have such devastating consequences. But even more alarming is the role that skin color plays in driving this outcome. In a powerful essay entitled *Racism: The Crime in Criminal Justice*, Professor William Quigley makes the case that the criminal justice system in America “is a race-based institution where African-Americans are directly targeted and punished in a much more aggressive way than white people.”<sup>28</sup> He shows how, at every step of the process, those tasked with ensuring systemic fairness contribute to these racial disparities. Like Alexander, he starts out by explaining that mass incarceration in America is largely driven by the war on drugs,<sup>29</sup> and that African-Americans are arrested for drug offenses at an alarmingly higher rate than their white counterparts, despite similar rates of involvement.<sup>30</sup> This is partly explained because police investigative practices often target people of color and their communities for surveillance and investigation.<sup>31</sup> Despite similar rates of involvement in drug selling and using, police monitor communities of color more heavily.<sup>32</sup> Evidence shows that police are significantly more likely to stop people of color, whether they are walking or driving, and search their clothing or cars.<sup>33</sup>

Once in the system, the disparate treatment continues. Prosecutors have ultimate discretion to determine whether to charge an arrestee and, if so, with what charge. Studies suggest both factors are influenced by the race of the accused.<sup>34</sup> African-Americans, who are 13% of the population and 14% of drug users, are not only 37% of the people arrested for drugs, but 56% of the people in state prisons for

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27. Hence, Michelle Alexander’s position that our system of mass incarceration represents a new era of “Jim Crow.” See ALEXANDER, *supra* note 12.

28. William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 417 (2012).

29. *Id.*

30. *Id.* at 418 (“[W]hile African-Americans comprise 13% of the U.S. population and 14% of monthly drug users, they account for 37% of the people arrested for drug offenses . . .”).

31. See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 378–79 (1999).

32. See *id.*

33. Quigley, *supra* note 28, at 418–19.

34. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806–13 (2012).

drug offenses. People of color are also significantly more likely to be detained pending trial than white arrestees,<sup>35</sup> and disproportionately must rely on the services of an overworked and under resourced public defender.<sup>36</sup>

Roughly 95% of convictions are the product of guilty pleas,<sup>37</sup> and perhaps no factor is more greatly correlated with whether one gives up their right to a trial than the fact that they were detained pretrial.<sup>38</sup> Having a lawyer without the time and resources to adequately prepare only exacerbates this disparity.<sup>39</sup> However, even where people of color exercise their right to go to trial, there is a greater chance that the fact-finder—whether a jury or a judge—will interpret the facts in a manner consistent with guilt because of the defendant’s skin color.<sup>40</sup> Therefore, defendants of color are more likely to plead guilty and to be found guilty at trial due to forces independent of their own culpability or the merits of the case.

Either way, once in the system, the process for non-white defendants is more likely to result in conviction and sentencing. At this stage, judicial sentencing practices further drive systemic racism, as judges are both more likely to sentence African-American defendants to prison terms, and for longer periods of time, than similarly situated white defendants.<sup>41</sup>

35. Quigley, *supra* note 28, at 419–20.

36. Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact on Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 220 (1994).

37. *Felony Defendants, Summary Findings*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=231#pubs> (last visited May 17, 2013).

38. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 36–37 n.311 (2005) (suggesting the “strain of being incarcerated” encourages the defendant to accept a plea).

39. See Marcus, *supra* note 36.

40. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347–50 (2007) (discussing the likelihood that judges and jurors “‘misremember’ facts in racially biased ways” at all steps of a legal proceeding).

41. See U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES 23 (2010), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Publications/2010/20100311\\_Multivariate\\_Regression\\_Analysis\\_Report.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf) (finding that in the federal system male African-American defendants receive sentences that are 5% to 23% longer than their white counterparts for the same crimes); See also David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence for the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (finding that African-American defendants in federal court received sentences that were, on average, 12 percent longer than similarly situated whites); *Unfairness in the Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178 and H.R. 18 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th

Indisputably, race plays a significant role in whether a person is thrust into the criminal justice system at all and how (s)he is treated once in it. What is less clear is why, at every stage of the process, those who are meant to ensure judicial fairness contribute to racially disparate outcomes. It would be easy to chalk this up to a community of professionals who harbor outwardly racist attitudes, as such stories occur quite frequently and are always newsworthy.

For example, accounts of rampant racism in the Los Angeles Police Department in the wake of the Rodney King beating, served as a reminder that there are some who take the oath “to protect and to serve”<sup>42</sup> who are overtly biased in their attitudes toward African-Americans. In the wake of this teachable moment, we sadly learned how often LAPD officers used racial epithets to describe African-Americans including “monkey hunt, tar buddy, [and] gorillas in the mist.”<sup>43</sup>

That prosecutors will at times take advantage of racist stereotypes was evidenced in a recent trial during which a federal prosecutor cross examining an African-American defendant explicitly sought to use race as evidence of propensity to sell drugs. To rebut the defendant’s claim that he did not intend to associate himself with the drug activity of others around him, the prosecutor asked, “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, this is a drug deal?”<sup>44</sup>

We were recently reminded that some judges also harbor disturbing stereotypes about African-Americans which they will even ex-

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Cong. 92, 97–98 (2009) (statement of Marc Mauer, Executive Director, The Sentencing Project), available at [http://judiciary.house.gov/hearings/printers/111th/111-27\\_49783.pdf](http://judiciary.house.gov/hearings/printers/111th/111-27_49783.pdf) (revealing that African Americans are 21% more likely to receive mandatory minimum sentences than white defendants and 20% more likely to be sentenced to prison than white drug defendants, and that African Americans who are 13% of the population and 14% of drug users, are not only 37% of the people arrested for drugs but 56% of the people in state prisons for drug offenses).

42. This is the motto of the Los Angeles Police Department. *The Origin of the LAPD Motto*, THE LOS ANGELES POLICE DEPARTMENT, [http://www.lapdonline.org/history\\_of\\_the\\_lapd/content\\_basic\\_view/1128](http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128) (last visited May 17, 2003).

43. Seth Mydans, *Los Angeles Force Accused From Within*, N.Y. TIMES, Mar. 29, 1991, at A10.

44. *Calhoun v. United States*, 133 S.Ct. 1136, 1136 (2013). (While Calhoun’s petition was denied for other reasons, Justice Sotomayor expressed her disgust at the prosecutor for “suggesting that race should play a role in establishing a defendant’s criminal intent.” She went on to say, “It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century . . . We expect the government to seek justice, not fan the flames of fear and prejudice . . . I hope to never see a case like this again.”).

press publicly, as when Richard Cebull, then Chief Judge of the federal District Court in Montana, admittedly made a racist joke about President Obama.<sup>45</sup>

From time to time citizens who harbor racist attitudes make it onto juries where they are asked to judge those they hold in disdain. For example, following Gary Sterling's death sentence in Corsicana, Texas, "one of the 12 jurors who voted to send him to death row freely used the word 'nigger' during a post-trial interview."<sup>46</sup>

And, sadly, even some defense attorneys charged with representing the most marginalized among us harbor racial animosity towards their own clients of color. Curtis Osborne, who was executed by the State of Georgia on June 5, 2008, was represented by a lawyer who did not inform him of a plea offer that would have spared his life<sup>47</sup> because, in the lawyer's words to another client, "'that little [racial epithet] deserves the death penalty.'<sup>48</sup>

But while disturbing, stories of explicitly racist attitudes and behaviors by those responsible for operating our justice system are too infrequent to account for the magnitude of the system's racially disparate outcomes. Something else must be at work here. Something less obvious and far more pernicious must cause well-intentioned people to participate in a clearly discriminatory system of justice.

So how does a community of people who believe in the color-blind administration of justice collectively enforce a system that is anything but that? The answer lies in the concept of implicit racial bias (IRB).

## II.

### IMPLICIT RACIAL BIAS

We all unconsciously harbor attitudes or stereotypes about race that shape the way we understand the world around us. We make decisions based upon that understanding, and act on those decisions, often unaware we have these attitudes. This reflexive way of responding to

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45. See Editorial, *Judge Cebull's Racist 'Joke'*, N.Y. TIMES, Mar. 5, 2012, at A26.

46. Timothy K. Lewis, Commentary, *A Black Defendant, a Racist Juror*, L.A. TIMES, May 19, 2005, at B13.

47. William S. Sessions, Op-Ed., *Death Penalty: Osborne Sentence a Stain on Justice*, ATLANTA J.-CONST., June 3, 2008, at A11.

48. Bill Rankin, *Racism 'Infected' Killer's Defense? Inmate's Trial to Be Scrutinized As Lawyers Ask Board to Commute Osborne's Death Sentence*, ATLANTA J.-CONST., May 30, 2008 at D1.

racial stimuli is called IRB.<sup>49</sup> Social scientists have demonstrated how certain stimuli cause us to subconsciously draw stereotypic associations and how they can affect our decision-making.<sup>50</sup> In the criminal justice context, it manifests itself as a subconscious association of race—particularly blackness—with criminality, and influences how actors in the criminal justice system behave when confronted with the application of race to decision-making.<sup>51</sup> No matter how weak the association between race and criminality, the decisions that result from that association can have very serious implications.

That we, as a society, are inclined to see African-Americans as subhuman, and therefore more readily endorse cruel and violent treatment towards them, was the subject of a series of studies by a group of respected social psychologists, aimed at gauging the extent to which we view blacks as less human than non-blacks and the consequences for our criminal justice system.<sup>52</sup> These researchers found “evidence of a bidirectional association between Blacks and apes that can operate beneath conscious awareness yet significantly influence perception and judgments.”<sup>53</sup> The studies further established that these associations do not depend on one harboring explicitly racist attitudes, and facilitate a general acceptance of harsher treatment and punishment of Blacks in the criminal justice context.<sup>54</sup>

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49. CHERYL STAATS, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 6 (2013), available at [http://kirwaninstitute.osu.edu/docs/SOTS-Implicit\\_Bias.pdf](http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf).

50. For an excellent summary of the social science behind IRB, see Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 9 (Justin D. Levinson & Robert J. Smith eds., 2012); see also STAATS, *supra* note 49.

51. See Levinson, Young & Rudman, *supra* note 50, at 22; see also ALEXANDER, *supra* note 12, at 103, (citing Betty Watson Burston, Dionne Jones & Pat Robertson-Saunders, *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC. 19, 20 (1995)) (describing a 1989 survey in which 95% of participants were asked, “Would you close your eyes for a second, envision a drug user, and describe that person to me?” pictured a black drug user); STAATS, *supra* note 49, at 36–45 (discussing studies that measure the association between race and criminality in the criminal justice context).

52. Jennifer L. Eberhardt, Phillip Atiba Goff, Matthew Christian Jackson & Melissa J. Williams, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008).

53. *Id.* at 304.

54. *Id.*; see also Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 252 (2006) (arguing that “the denial of full humanness to others, and the cruelty and suffering that accompany it, is an all-too-familiar phenomenon,” and that it is most frequently considered in the context of race and ethnicity).

IRB affects us all regardless of whether we believe ourselves to be free of racial biases,<sup>55</sup> have positive associations with members of other races,<sup>56</sup> or are members of a minority group, including African American.<sup>57</sup> Scholars have more recently turned their attention to the effects of IRB on criminal justice professionals, giving us additional insight into how its influence drives the racial disparities discussed above. They have studied its impact on police, prosecutors, jurors, and judges, concluding that implicit biases drive each of these players to behave in ways that work to create racial disparities in the justice system.<sup>58</sup> Each step of the criminal justice system will be further elaborated to illustrate IRB in practice.

### A. Police

Beginning with police, whose decisions determine who will come in contact with the criminal justice system in the first place, IRB works in three ways: who they choose to monitor, how they interpret the behavior of those they scrutinize, and how they react to their conclusions about that behavior.<sup>59</sup> Initially, IRB drives the increased scrutiny of young African-American males because of a subconscious and automatic association between this group and danger.<sup>60</sup> These involuntary and “rapid threat reactions towards black men” occurs independent of our conscious attitudes about race.<sup>61</sup> In fact, it affects even the most race conscious among us as demonstrated when the Reverend Jesse Jackson told an audience, “There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery . . . Then look around and see some-

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55. STAATS, *supra* note 49, at 11 (describing the automatic process in which we categorize an individual as “‘either one of us,’ that is a member of our in-group, or different from ourselves, meaning a member of our out-group.” Members of our in-group are favored over those in our out-group, resulting in “in-group bias”).

56. See ALEXANDER *supra* note 12, at 104.

57. See STAATS, *supra* note 49, at 27 (discussing why minorities may favor out-groups); see also ALEXANDER *supra* note 12, at 104.

58. There is a rich field of research that explains how IRB works and how it applies to actors in the criminal justice context. This article is not meant to provide an exhaustive survey of those studies but rather to provide sufficient explanation for how IRB operates in the criminal justice context to allow a meaningful discussion of how defense counsel can play a role in addressing the resulting racial disparities. For a fuller treatment of IRB and its application to the criminal justice system, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 50; see also STAATS *supra* note 49.

59. See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043–52 (2011).

60. *Id.* at 2044–45.

61. *Id.* at 2044.

one white and feel relieved.”<sup>62</sup> This unconscious association between blackness and crime can drive policing patterns that target black communities,<sup>63</sup> as well as increased and prolonged scrutiny of individuals based on skin-color.

Once an officer focuses on a subject or a group, IRB influences how (s)he interprets observed behavior. Studies show that in a variety of situations, individuals are more likely to interpret ambiguous behavior conducted by blacks as more aggressive or consistent with violent intentions while the same behavior engaged in by whites is more likely seen as harmless.<sup>64</sup> Furthermore, when faced with a situation in which there is more than one appropriate response, studies suggest IRB can cause subjects to react more forcefully when interacting with blacks than whites.<sup>65</sup>

These studies suggest three points at which IRB can cause police to behave in ways that perpetuate racial injustice. First, the very decision to monitor African-Americans more closely is due to subconscious belief that they pose a greater threat. Second, there is an increased subliminal tendency to associate ambiguous behavior by blacks as criminal. And third, there is a greater propensity to treat black suspects more harshly than their white counterparts, and to more readily exercise their discretion to arrest.<sup>66</sup>

### B. Prosecutors

Once arrested, a person's odyssey through the criminal justice system is largely controlled by the discretion exercised by prosecutors. In a thoughtful study of how IRB drives these decisions, Professors Robert Smith and Justin Levinson conclude that “implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”<sup>67</sup> They examine the impact of IRB on

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62. Mary A. Johnson, *Crime: New Frontier: Jesse Jackson Calls it Top Civil Rights Issue*, CHI. SUN-TIMES, Nov. 29, 1993, at 4.

63. See ALEXANDER, *supra* note 12, at 120–24.

64. See Richardson, *supra* note 59, at 2046–48.

65. *Id.* at 2049–50.

66. The conclusion that police are more likely to arrest black suspects when there is an option is supported by studies that show that “black boys are disproportionately suspended, expelled, and arrested for behaviors committed in school” even though they do not seem to “commit infractions at greater rates than their white counterparts”. Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 50, at 53 (citing Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 4 (2002)).

67. Smith & Levinson, *supra* note 34, at 797.

prosecutorial discretion at various stages of the process, including charging decisions, pretrial strategy, trial strategy, and post-trial.<sup>68</sup>

With respect to charging decisions, Smith and Levinson conclude that there is little reason to believe prosecutors do not harbor the same racial stereotypes as the rest of us,<sup>69</sup> and that prosecutors are both more likely to proceed with a prosecution, and to institute more serious charges that carry graver consequences, against an African-American than a similarly situated white defendant.<sup>70</sup>

In the pre-trial stage, IRB probably impacts the bond request the prosecutor deems appropriate for the accused, how the prosecutor evaluates evidence in determining whether it is exculpatory and therefore subject to disclosure to the defense, and what plea offer the prosecutor considers fair under the circumstances. In each of these arenas, the subconscious association between race and criminality almost certainly influences the prosecutor to act less favorably towards black defendants.<sup>71</sup>

Once at trial, IRB is likely to explain why “egalitarian-minded prosecutors nonetheless disproportionately strike black jurors.”<sup>72</sup> It also can cause the prosecutor to use animal imagery in closing argument, oblivious to the way these arguments play on the jury’s unconscious association with blacks as less human and, therefore, less deserving of compassion.<sup>73</sup>

Finally, Smith and Levinson argue that IRB infects prosecutorial decision-making beyond trial, such as how they might respond to re-

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68. While the instant article identifies the stages of the process where IRB can influence prosecutors to exercise discretion in ways that exacerbate systemic racial disparities, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* provides illustrations of how this occurs at each point. *Id.*

69. *Id.* at 810.

70. *Id.* at 806–13.

71. *Id.* at 813–18.

72. *Id.* at 819 (citing Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005)).

73. *Id.* at 819–20. I am reminded of two trials I had towards the end of my career as a public defender in Washington, DC, both with African-American clients. In one in which my client was accused of sexually assaulting a student at the high school where he worked, the prosecutor argued that my client turned the high school into a jungle in which he acted as the predator. In another, the prosecutor used an analogy in which her large black dog, left alone in a room with dinner on the table, took some food off the table when she was not looking to suggest that in the same way the jury should know my client was guilty despite the fact that no witness saw him commit the crime. I assume neither of these prosecutors intended to suggest the jury should use race as a factor in evaluating the evidence in the case.

quests for post-trial relief or how they develop office-wide policies that impact communities of color.<sup>74</sup>

### C. Jurors

As we continue to consider how IRB can cause racial disparities in the criminal justice system, we turn to the role of jurors in driving this phenomenon. Several scholars have contributed to our understanding of the ways that jurors can unconsciously draw conclusions that increase the likelihood that blacks will be convicted relative to similarly situated white defendants. This occurs at three points: when evaluating evidence as it is presented, later remembering facts, and applying this data during the decision-making process.

With respect to the former, research has shown that “even the simplest of racial cues introduced into a trial might automatically and unintentionally evoke racial stereotypes, thus affecting the way jurors evaluate evidence.”<sup>75</sup> Studies suggest that when confronted with ambiguous facts, jurors process that evidence through a racially biased lens.<sup>76</sup> As a result, they are more likely to associate ambiguous behavior with evidence of criminality when the defendant is black rather than when he is white.<sup>77</sup>

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74. *Id.* at 821–22.

75. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309–10 (2010).

76. One scholar suggested several ways implicit racial bias operates to the detriment of black defendants, including:

- It can affect how jurors react to assertions that someone acted in self-defense.
- It can affect assertions that there was excessive force by the police.
- It can affect whether there really is a presumption of innocence.
- It can affect whether the jury believes that remaining silent, which is a defendant’s constitutional right, is an admission of guilt.
- It can even affect how the jury perceives an expert witness who is a person of color.

Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 256–57 (2010) (internal citations omitted).

77. See Levinson & Young, *supra* note 75 (discussing the tendency of mock jurors to find ambiguous facts about a black suspect as more likely to indicate evidence of guilt than when viewing a lighter skinned suspect); see also Levinson, Young & Rudman, *supra* note 50, at 15 (describing “shooter bias” studies in which participants play a videogame where they are asked to shoot perpetrators (who are holding a gun) but not innocent bystanders (who are unarmed). When confronted with white and black suspects, participants more quickly decided to shoot black perpetrators than white perpetrators and more quickly decided not to shoot white bystanders than black bystanders.).

Research has also shown that, when asked to recall facts, jurors are inclined to misremember information in racially biased ways. One study revealed that when asked to recall facts from a fictional story, mock jurors were significantly more likely to recall the fictional defendant as being aggressive when he was African-American than when he was Caucasian or Hawaiian.<sup>78</sup>

Not only are facts understood by jurors in racially biased ways—either because of how the evidence is evaluated or remembered—but once asked to use these facts to make decisions, jurors again rely on racially tainted filters to do so. In one compelling study, researchers demonstrated that jurors are more likely to associate black defendants with guilt, thereby undermining the power of the presumption of innocence—a bedrock principle of our justice system—for an entire class of defendants.<sup>79</sup> This suggests that while jurors are expected to consider evidence in light of the presumption of innocence, they are less likely to do so when the defendant is black.

#### D. Judges

Last, but certainly not least, we consider the influence of IRB over trial judges. Judges play a particularly important role in the criminal justice system as their decisions define the fairness of the process used to adjudicate guilt. While the hallmark of a good judge is impartiality, studies suggest jurists, like other professionals in the system, are susceptible to the implicit biases that promote racial disparity.<sup>80</sup>

Judges, like jurors, are prone to “stereotype-consistent memory errors,” causing them to remember facts through a racially biased filter.<sup>81</sup> This can have an impact on how judges set bail,<sup>82</sup> rule on fact-determinative pretrial motions and trial objections, assess guilt when they are the trier of fact, decide how to instruct during jury trials,<sup>83</sup> and determine the appropriate sentence in a given case.

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78. Levinson, *supra* note 40, at 345–50.

79. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 189–90 (2010).

80. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

81. Levinson, *supra* note 40, at 381.

82. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

83. The instructions a judge decides to give can also have the effect of triggering racial stereotypes in jurors. See Levinson & Young, *supra* note 75, at 343.

## III.

A STRATEGY FOR THE DEFENDER IN A RACIALLY  
UNJUST SYSTEMA. *The Defender's Role as Reformer: Cause-Lawyering Meets  
Client-Centered Representation*

Before we go on to consider strategies for the defense attorney to combat the disparate racial impact fostered by the effects of IRB discussed above, it is worth addressing whether this is the appropriate role of defense counsel. While many defense attorneys choose their career based, in part, on a deep commitment to justice—including racial justice—they are duty bound to pursue this end through the representation of individual clients. Yet, they must be careful to not allow the client to merely become a vessel for achieving an independent goal. Criminal defense lawyers owe a duty of fidelity to one individual; the client.<sup>84</sup> To use the client as a vehicle to promote the lawyer's own agenda diminishes the lawyer's role in giving respect and voice to the client, who frequently does not otherwise have access to the system.

There is a body of scholarship that considers the potential tension between what is coined “cause-lawyering” and a more traditional model of unwavering fidelity to the goals of the individual client.<sup>85</sup> There is no universally accepted definition of a “cause lawyer,” nor is it clear whether the criminal defense lawyer can responsibly serve that role. Arguably, the answer depends on whether the criminal defense lawyer in question is free to choose his or her clients or whether (s)he is a public defender; a lawyer whose clients do not enjoy the luxury of shopping for an advocate. In the former situation, the lawyer can inform the client of his or her intentions and allow the client to choose whether to retain him or her nonetheless. In the latter case, the client will probably not have the option to select another lawyer should (s)he not wish to be part of the lawyer's “cause”.

While this discussion could be the topic of a wholly separate article, for purposes of this paper, I rely upon several assumptions without engaging in exhaustive analysis. These assumptions stem from my fi-

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84. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also* Jonathan Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y. REV. 161, 164–65 (2009).

85. *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance Policy” Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 379–80 (2012) (discussing the ethical implications between cause-lawyering and client-centered representation).

delity to the concept of client-centered representation and the duty of the lawyer to serve as the representative of the client who does not have the education and experience to advocate for himself in a complex legal system. While once informed, a client may elect to defer to the lawyer, and his or her “cause,” this author takes the position that without permission to do otherwise, the lawyer must respect the client’s decisions.<sup>86</sup>

The first assumption is that the criminal defense lawyer should never pursue a cause through his or her representation of a client that is inconsistent with the goals of the client. This arguably places different obligations on the public defender than it does on the private lawyer whose clients have some choice over who represents them. For example, in an article about the ethics of “cause lawyering,” Professor Margareth Etienne introduces the reader to a prominent criminal defense lawyer who refuses to represent any client who desires to cooperate with the prosecution.<sup>87</sup> Finding such representation “personally, morally, and ethically offensive, [this lawyer] would no sooner represent a snitch than he would represent ‘Nazis or an Argentine general said to be responsible for 10,000 disappearances.’”<sup>88</sup> Assuming the lawyer fully informs the client of this, or any other conditions of his service, before the client retains him, the client has the opportunity to decide whether he wishes to hire the lawyer with these limitations. This may be an appropriate exercise of a private lawyer’s prerogative to provide individual representation while simultaneously pursuing a “cause,” since the client gets to decide if he accepts a lawyer with that

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86. In a previous article, I noted:

Many scholars, lawyers, and legal clinicians charged with training future lawyers embrace a philosophy that gives the client significant autonomy over the decisions that impact her case. The popularity of this approach stems from a recognition that “most [clients] are in a better position to make case decisions because so many decisions ultimately turn on the values and priorities that the client alone best appreciates.” While deference to a client’s decisions must be preceded by sufficient counsel to ensure that the decisions are informed and that the risks have been appropriately conveyed and considered, “[u]nder this view, the client has the right to make his own choices because it is he who stands to gain or lose the most from decisions made in his case.” This way of thinking comports with the *Strickland* Court’s construction of the defense attorney as assistant to the client.

Rapping, *supra* note 83, at 167–68 (footnotes omitted).

87. Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005).

88. *Id.* at 1196 (citing Gail D. Cox, *Fighting and Flaunting It: The Criminal Defense Bar’s Best Defense is Barry Tarlow – Just Ask Him*, NAT’L L.J., Apr. 19, 1993, at 28).

particular “cause.” But for the indigent client who does not get to choose his lawyer, but who may wish to consider cooperating with the government, it would be inappropriate for his appointed counsel to deprive him of this option because of the lawyer’s personal beliefs.

Because eighty percent of people accused of crimes rely on the services of a court-appointed lawyer,<sup>89</sup> if defense counsel is going to have a meaningful impact on the way the system treats people of color, public defenders will be a big part of that effort. There may be times when the public defender has an individual client who will not benefit from systemic awareness of IRB. When representing that client, the lawyer’s desire to promote racial justice by raising awareness of IRB must give way to the goals of the client.<sup>90</sup> However, because indigent defendants, disproportionately clients of color, so frequently bear the brunt of our system’s racial biases, it will be the rare case where the lawyer’s desire to promote racial justice will conflict with the client’s interests.

In many cases in which the defendant is non-white, a direct strategy of promoting systemic consciousness of IRB will be helpful to the client. However, in addition, there is a less direct benefit to every person accused of a crime from raising the public awareness about our subconscious assumptions about race. To the extent that our collective dehumanization of African-Americans facilitates our promotion and acceptance of a draconian criminal justice system that confronts every person accused of crime, all defendants benefit from a more racially sensitive public. By racializing crime and exploiting a public willingness to accept harsh treatment of a criminal population perceived to be black, politicians have been able to expand the categories of behavior defined as criminal and enact increasingly punitive sentencing schemes.<sup>91</sup> While these forces have certainly been fueled by the association between race and crime, they have harshly impacted everyone accused of crime regardless of race.

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89. See BUREAU OF JUSTICE STATISTICS, *Indigent Defendants Systems: Summary Findings*, <http://www.bjs.gov/index.cfm?ty=tp&tid=28> (last updated Oct. 14, 2011).

90. There may be times when the accused derives an advantage from the biases of a judge, juror, or prosecutor, particularly where biases about a victim or witness inure to the defendant’s benefit. As distasteful as those biases may be, it would undermine the primary responsibility of the defender—to zealously and faithfully advocate for the client—to educate the relevant actors about their misguided assumptions. In this situation, the duty of loyalty to the individual client trumps the lawyer’s interest in promoting systemic racial justice. The cause may not interfere with the duty to the client.

91. See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 532–35 (2013).

Tough-on-crime politicians have understood the power of invoking race to drive public fear about crime. In the 1960s, conservative politicians like Barry Goldwater and George Wallace began to exploit the public association between race and crime to oppose politicians with pro civil-rights campaigns.<sup>92</sup> By the 1980s and 1990s, politicians on both ends of the spectrum sought to benefit from tough on crime stances with more subtle racial messages.<sup>93</sup> The result has been a harsher criminal justice system that impacts every client the defender represents, regardless of race.

In short, while defense lawyers owe a duty of allegiance to pursue the client's goals, it will frequently be the case that using strategies to minimize the impact of IRB will be in the client's interest. Even where such a strategy does not clearly benefit a particular client, chipping away at the impact of racial stereotypes serves to benefit all clients, as the result is a fairer and more humane system of justice. While it may be the extraordinary case where undermining the influence of IRB is inconsistent with the client's goals – and, this author would argue that the individual client's goals must prevail – this will be the rare exception. Therefore, to be an effective advocate for our clients, the criminal defense lawyer must be equipped with strategies for addressing IRB.

In the following sections, we examine a three-prong approach for criminal defense lawyers to address the disparate impact of IRB in the criminal justice system: 1) raising our own self-awareness, 2) devising strategies to educate others, and 3) staying inspired to continue pushing forward despite systemic pressures to do otherwise.

### B. *Self-Awareness*

As we consider how we can combat IRB driven racial disparity in the criminal justice system as defense lawyers, we must first ask whether we are affected by it and if so, how we can overcome it within ourselves. As I have discussed above, the literature demonstrates that we all harbor implicit biases, including those of us who hold egalitarian views.<sup>94</sup> There is no reason to believe that those of us

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92. *See id.* at 529.

93. *See id.* at 530.

94. In his compelling essay on the subject, U.S. District Court Judge Mark W. Bennett, a former civil rights lawyer and seasoned federal judge with a “lifelong commitment to egalitarian and anti-discrimination values,” describes how he eagerly took the Implicit Association Test, certain he would “pass.” He did not, motivating him to intensely study IRB, concluding “we unconsciously act on implicit biases even though we abhor them when they come to our attention.” Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias In Jury Selection: The Problems of Judge-Dominated*

who choose criminal defense as a profession are immune to the influences of IRB. In fact, if our biases are shaped by the world around us,<sup>95</sup> there is every reason to believe that those of us who spend our days immersed in such a racist criminal justice system develop even deeper IRB. This effect is only heightened by the fact that public defenders operate in a world in which they are forced to make quick decisions, with imperfect information, under intense pressure.<sup>96</sup>

In their work examining how IRB influences public defender decision-making about how to allocate their very limited time amongst clients, Professors L. Song Richardson and Phillip Atiba Goff identify three areas in which IRB influences defenders: 1) in their evaluation of evidence, 2) in their interactions with their clients, and 3) in their acceptance of punishments.<sup>97</sup> At each of these stages of the process, through their subconscious assumptions about their clients, what the evidence against them means, and what consequences are appropriate, defenders can be pushed to accept a lower standard of justice, and to fight a little less aggressively, for their clients of color.

To further clarify this point, artist Frank Wu depicts several pairs of mechanical legs walking past a homeless veteran huddled on the sidewalk in a fetal position in his chillingly insightful piece of artwork entitled “Indifference.” The robots walking past represent us; bombarded on a daily basis with tragedy, we become desensitized to the injustice. Although the symbolism is clear, the message is punctuated with the statement, “When we walk by a homeless person, ignoring him, we lose a little bit of our own humanity.”<sup>98</sup>

Walk into a courtroom anywhere in the country and you can see defense lawyers who have been exposed to repeated injustices for so long that they have become immune to its effect.<sup>99</sup> Exposure to racial injustice is no different and, as my opening anecdote demonstrates,

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*Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 149–50 (2010).

95. See Jerry Kang, *Communications Law: Bits of Bias*, in *IMPLICIT BIAS ACROSS THE LAW* 132–45, 134 (Justin D. Levinson & Robert J. Smith eds., 2012) (“even if nature provides the broad cognitive canvas, nurture paints the detailed pictures – regarding who is inside and outside, what attributes they have, and who counts as friend or foe”).

96. Richardson & Goff, *supra* note 1, at 105–07.

97. *Id.* at 108–115.

98. Frank Wu & Christina Song, *Indifference*, FRANK WU <http://www.frankwu.com/indifference.html> (last visited May 31, 2013).

99. See Jonathan Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J. L. & SOC. CHANGE 331, 333–36 (2009–2010) (discussing the “culture of injustice” that occurs when defense attorneys are overworked and under resourced).

working in the vortex of a system that so clearly associates race and criminality can serve to break down our egalitarian beliefs and cause us to more deeply accept the race/crime association narrative.

In her insightful commentary on this issue Professor Andrea Lyon, a long time public defender, discusses her experience with IRB among her defender colleagues in Chicago.<sup>100</sup> She shares the story of a career public defender whom she overheard counseling a young, black client during a first meeting. The lawyer wanted the client to accept a plea that he had worked out. Clearly frustrated with the client's lack of enthusiasm for the deal, the lawyer called him "stupid. . . [a] 'mope' and [an] 'ignorant gangbanger.'"<sup>101</sup> He went on to tell his client that "he—the client—could 'do six [years] standing on his head.'"<sup>102</sup> When Professor Lyon, convinced the lawyer would not have talked to a white client in the same way, raised these issues with her colleague, he responded with anger.<sup>103</sup> When she raised the matter in a supervisors meeting in an effort to get the staff to confront racial attitudes, she was accused of being "overly sensitive."<sup>104</sup>

That none of the supervisors in the office were willing to consider such clearly racist behavior, or even see it as racist, speaks volumes about the existence of IRB among defenders. Professor Lyon's anecdotal conclusion is further supported by research suggesting that death penalty lawyers, arguably among the most race-conscious of defenders, share the same racially biased attitudes as the rest of the population.<sup>105</sup> With these lessons in mind, before we can begin to take on IRB across the system, we must address it among our own ranks.

For those of us who strive to be color-blind in our decision-making, perhaps the greatest obstacle to overcoming the powerful influence of IRB is our own lack of awareness of it.<sup>106</sup> For we who spend our careers committed to people who have been victims of systemic injustice, there is a greater risk that we can have a "bias blindspot—the belief that others are biased but that we are not."<sup>107</sup> The fact that

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100. Lyon, *supra* note 1.

101. *Id.* at 756–57.

102. *Id.* at 757 (alteration in original).

103. *Id.*

104. *Id.*

105. Eisenberg & Johnson, *supra* note 1, at 1553.

106. See Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUSTICE RESEARCH 129, 138 (2004) (arguing that awareness of implicit bias is the first step to eliminating it).

107. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173–74 (2012).

education is foundational to addressing this issue is supported by psychologists who have made careers out of studying the influences of unconscious biases:

An important first step is making people aware of discrepancies between their conscious ideals and automatic negative responses. By making these non-conscious negative responses conscious, it may be possible to take advantage of the genuinely good intentions of aversive racists to motivate them to gain the experiences they need to unlearn one set of responses and learn the new set that they desire.<sup>108</sup>

Therefore, the first steps towards developing a corps of defenders poised to take on the issue of IRB in our criminal justice system is a campaign designed to raise self-awareness. This should include recruiting defenders who are motivated to address racial inequities, training these lawyers to understand the role their own IRB can play in driving disparate outcomes, and building an office culture in which resistance to the pressures that drive IRB is an explicit value.<sup>109</sup> Defenders must understand that they harbor these subconscious biases so that they can combat their influence and overcome the subtle pressures to associate race and criminality. Only then can the defender appreciate the power of IRB, a prerequisite to continuing with a strategy to illuminate the problem for others in the system.

### C. *Educating Others*

Once (s)he understands that IRB determines how well-intentioned criminal justice professionals unknowingly behave in ways that drive racially disparate outcomes, and that raising awareness of subconscious bias is the first step in addressing it, the defense lawyer must look for opportunities to educate others in the system about their own unconscious biases. At least for those committed to a color-blind system of justice, understanding the role that IRB plays in their own decision-making will encourage them to work to combat it.<sup>110</sup> There-

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108. John F. Dovidio, Kerry Kawakami, Craig Johnson, Brenda Johnson & Aidaiah Howard, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 535 (1997).

109. Transforming office culture through values-based recruitment, training, and mentoring is at the heart of the indigent defense reform movement being built through Gideon's Promise (formerly The Southern Public Defender Training Center). This model is introduced in Rapping, *supra* note 83. As recognized in the work of Professors Richardson and Goff, what Gideon's Promise is doing through recruitment, training, and transforming office culture is a critical piece of the effort to address IRB among defenders. See Richardson & Goff, *supra* note 1, at 116–117.

110. See Kang et al., *supra* note 107, at 1172–85 (arguing that education is a critical component of a strategy to reduce implicit racial bias in judges and jurors).

fore, defense lawyers should be vigilant about identifying opportunities during the course of litigation to educate others about IRB. Several vehicles exist through which creative defense lawyers can raise the issue of IRB. They are: motions practice, voir dire, use of experts, narrative, jury instructions, and sentencing advocacy. And even if trial courts are reluctant in the short term to allow defense counsel to pursue all of these strategies, through the process of demanding and litigating these requests, counsel can begin to educate the court and raise awareness of this concept.

### 1. *Motions Practice*

Defense counsel should think about how IRB is relevant to the resolution of motions and seek to introduce evidence of it whenever possible. While the Supreme Court has made it difficult to raise the issue of race in the litigation of criminal procedure,<sup>111</sup> IRB studies may provide a new avenue through which to do so. This is because how criminal justice professionals evaluate and remember facts necessary to determining the outcome of such motions—two factors influenced by IRB—will always be relevant. One illustration is defense challenges to the legality of searches and seizures.

Despite the intention of the drafters of the Constitution to ensure that a neutral magistrate determines when governmental interference with personal liberty is reasonable,<sup>112</sup> Supreme Court jurisprudence has given the police powerful tools that expand their ability to conduct searches and seizures under the Fourth Amendment. Most arrests today are justified by a police officer's determination of probable cause

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111. See Robin W. Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24, 25 (arguing that “[t]he legal standard for proving impermissible invidious racial discrimination is hopelessly tied to overt intent at a time when the social opprobrium attached to overt expressions of racial bias is significant.”); See also ALEXANDER, *supra* note 12, at 108 (arguing that in addressing police/citizen contact in the context of the war on drugs, “the [Supreme] Court adopted rules that would maximize – not minimize – the amount of racial discrimination that would likely occur.”). Both Professors Sterling and Alexander provide examples of Supreme Court rulings that had this effect. ALEXANDER, *supra* note 12, at ch. 3 (referencing *Whren v. United States*, 517 U.S. 806, 813 (1996) and *McCleskey v. Kemp*, 481 U.S. 279 (1987) in particular).

112. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)

“[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”

*Id.*

without prior approval by a judicial officer.<sup>113</sup> Through the Search Incident to Arrest doctrine, whenever police arrest an individual, they may search the person, their clothing, and any containers within their reach without any additional justification.<sup>114</sup> If the arrestee recently occupied a vehicle, the police may also search the entire passenger compartment including containers within.<sup>115</sup> Through the Automobile Exception, if an officer concludes that there is probable cause to believe contraband, or evidence of a crime, may be found in a vehicle, (s)he may search it without a warrant, regardless of whether it is related to an arrest.<sup>116</sup> Through the Exigent Circumstance doctrine, police are authorized to conduct a warrantless search when they conclude that, in addition to probable cause to search, there exists an emergency that justifies dispensing with the warrant requirement.<sup>117</sup> And, in perhaps the greatest shift of power to police in the attempt to appropriately balance the needs of law enforcement with the liberty interest of the individual. In *Terry v. Ohio* the Court sanctioned searches and seizures—coined “stops” and “frisks”—based on reasonable suspicion, a bar significantly lower than the already permissive probable cause standard.<sup>118</sup>

The result of this jurisprudence is that there is an incredibly broad universe of behavior in which police may engage without antecedent scrutiny by a neutral arbitrator.<sup>119</sup> An officer may monitor a car, waiting for the driver to inevitably violate one of the thousands of minor traffic violations, justifying the arrest of the driver and subsequent search of the vehicle. An officer who has cause to search a home may

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113. See *Gerstein v. Pugh*, 420 U.S. 103, 112–13 (1975).

114. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

115. A broad application of the search incident to arrest doctrine as it applies to automobile searches following the arrest of an occupant was authorized in *New York v. Belton*, 453 U.S. 454, 459–60 (1981). The Court later held in *Thornton v. United States*, 541 U.S. 615 (2004), that the *Belton* rule applied whenever an arrestee was a “recent occupant” of a vehicle. While the Court narrowed the scope of the *Belton* rule in *Arizona v. Gant*, 556 U.S. 332 (2009), to apply only when the arrestee has access to the vehicle at the time of the search or when the officer has reason to believe that evidence of the offense for which the occupant was arrested is in the car, the law still leaves officers wide latitude to search cars incident to the arrest of an occupant.

116. *United States v. Ross*, 456 U.S. 798, 823–24 (1982).

117. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

118. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

119. The Supreme Court has repeatedly cautioned against deferring to “the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’” *Illinois v. Krull*, 480 U.S. 340, 351 (1987) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Despite this concern, the exceptions to the warrant requirement have come to swallow the rule. See Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 *VAND. L. REV.* 473, 500–03 (1991).

get around the warrant requirement by knocking and announcing his presence, then listening for sounds consistent with the destruction of evidence, or some other emergency, justifying a warrantless entry. An officer may aggressively enter a “high crime” neighborhood and look for anyone trying to avoid contact with him to justify detaining, and potentially patting down, that individual.

In these situations, the officer evaluates the facts before him or her and determines whether the requisite justification exists to detain and search individuals and their property. The officer’s judgment about how to interpret the facts before him or her necessarily determines whether she or he believes there is cause to act. While an officer’s belief that blacks are more likely to commit crimes is not an appropriate basis to justify a search or seizure of a person, the Court has given the police officer who is motivated by the race of a target broad latitude to act on such race-based motivations. In *Whren v. United States*, the Court held that as long as the facts give rise to an objectively reasonable basis for an officer to conduct a search or seizure, the fact that the officer was in fact motivated by the race of the target may not be considered by a court assessing the legality of the officer’s actions.<sup>120</sup>

Therefore, in the wake of *Whren*, if an officer uses the search and seizure authority granted by the Court to solely target blacks, the defense cannot challenge the police conduct based on the racist motives. According to the Court, the only relevant issue is whether there existed an objective justification for the behavior.<sup>121</sup> Whether that was the actual basis, or the interaction was motivated by the race of the target, is irrelevant. As long as the consciously racist police officer waits to develop an objective basis—of which there are many—to search a citizen of color, (s)he is shielded from having the defense challenge his or her true motivations. In this way, the Supreme Court has precluded defense counsel from attempting to ferret out conscious racism in policing when asking the trial court to evaluate legality under the Fourth Amendment.

But the social science discussed above suggests two ways that IRB may be relevant to a judge’s determination whether a search or seizure was justified, providing an opening to use Fourth Amendment litigation to educate the court about this phenomenon. First, because IRB affects how police evaluate the facts before them, causing them to more likely interpret ambiguous behavior as consistent with criminal

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120. *Whren v. United States*, 517 U.S. 806, 813 (1996).

121. *Id.*

involvement where the target is black, a trial court should consider this influence when evaluating whether justification for the conduct in question actually exists. Second, because IRB affects how we later remember facts, causing us to more likely misremember them in ways consistent with criminality when relating to blacks, trial courts should consider this influence when determining how much credit to give an officer's testimony regarding his memory of facts used to justify the conduct in question.

Raising these issues allows the defense lawyer to avoid the hurdle raised in *Whren*. Unlike in that case, the defense is not suggesting that despite objective facts justifying the conduct, the court should find the officer's conduct unreasonable because it was motivated by an improper motive. Rather, the defense is arguing that the influence of IRB undermines the objective basis claimed by the officer, both by improperly skewing how (s)he evaluated the facts on the scene and how (s)he recollects them at the hearing on the motion to suppress.

For example, when determining whether there is a reasonable basis to stop and frisk a suspect, the officer is entitled to make reasonable inferences from the facts in light of his experience.<sup>122</sup> But, he may not base his conclusions on biases about the association of race and crime. Therefore, a court should ensure that an officer's conclusions were reasonable (i.e. unbiased) inferences based on experience rather than based on unconscious assumptions of criminality based on the skin color of the target. Likewise, the court's findings will be based on the officer's recollection of the facts that gave rise to the conduct in question. The court should similarly guard against those recollections being tainted by impermissible bias. In order to do this, the judge must understand how implicit racial bias works. Therefore, it is relevant to introduce evidence of implicit racial bias among police officers in the context of this hearing.

Defense counsel should consider asking the court to hear expert testimony about the impact that IRB has on a police officer's evaluation of facts at the moment of decision-making and on his or her recollection of facts at a subsequent hearing. If the court is reluctant to consider expert testimony without knowing whether the particular officer is influenced by IRB, defense counsel might consider requesting that the officer either be evaluated by the expert or submit to testing

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122. *Terry v. Ohio*, 392 U.S. at 27. Police may also rely on experience when interpreting facts to determine whether probable cause exists. See *Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.").

designed to answer this question.<sup>123</sup> And while many courts will be reluctant to devote much time or resources to considering the effect of IRB on an investigating officer, through the filing, and arguing of these pleadings the judge and prosecutor will begin to become educated on this issue.

Finally, while I use Fourth Amendment litigation as an example of an area where defense counsel may begin to press this issue, because it influences decisions in a variety of contexts, defenders should look for openings to raise IRB broadly in their motions practice.

## 2. *Voir Dire*

While defense counsel can begin to educate judges and prosecutors about IRB through a thoughtful pretrial motions practice, there will be other opportunities throughout the trial as well. The next will be during voir dire. The value to addressing IRB through voir dire is that it not only continues to educate judges and prosecutors, but it is the first time counsel can begin to blunt the impact IRB will have on the jury; the group of citizens ultimately responsible for rendering the most important decision in the case. Through voir dire we can both begin to educate potential jurors about the impact of IRB, and so influence how they respond to triggers, and to identify future jurors who will more likely consider the role IRB may play in their own decision-making.

Before we go on to discuss these two strategies, it is important to note that I am not suggesting that through voir dire we can change people's deeply held beliefs. People are influenced by a strong value system that is the product of a lifetime of experience. It is folly to believe that we can tell jurors to set those beliefs aside and they will be capable of abandoning them throughout the trial. It is also important to recognize that if asked by the judge if they can set aside a deeply held belief, especially where they believe the socially acceptable answer is "yes," many will claim the ability to do so.<sup>124</sup> This may be because they are averse to giving what they see as a socially unacceptable response to such an authority figure,<sup>125</sup> or it may be that be-

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123. Evaluative tests might include the Implicit Association Test (IAT), the most common measure of social cognition, or "shooter bias" evaluative video games. Both are discussed in Levinson, Young & Rudman, *supra* note 50, at 15–19.

124. See Bennett, *supra* note 93, at 160 (citing Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987)).

125. See Jones, *supra* note 124, at 132.

cause they are unaware of the power of their subconscious biases, they honestly believe in their ability to do so.

I embrace the view that the most effective approach to voir dire is to use it to identify jurors' immutable belief systems and then to select (or de-select) jurors based on whether their belief systems are consistent with your theory of the case.<sup>126</sup> However, what the IRB social science tells us is that there are times when we act inconsistently with our own belief systems because of unconscious biases that cut against the values we embrace. There is an important distinction between the "explicit racist" (i.e. the person who consciously believes, for example, in the association between black skin and criminality), and the "implicit racist" (i.e. the person who believes themselves to be egalitarian but subconsciously is influenced by societal pressures associating race and crime). The former may respond "yes," to the question, "can you disregard the race of a person when making important decisions about them." (S)he knows (s)he will not disregard race, but understands that this is a value that we aspire to in our system of justice and is unwilling to publicly denounce it. That this juror provided a socially acceptable response, even when coupled with an instruction by the judge to be "fair" or to "disregard race," should not necessarily mean that (s)he can set aside his or her deep beliefs about race. We must identify these jurors and keep them from judging our case. On the other hand, the implicit racist, unaware of the role race plays in their decision-making, wants to make decisions free of racial considerations. If educated, this person might be able to understand that there are pressures that may cause him or her to act inconsistently with his or her values about race, and if warned that such pressures may crop up during trial, is more likely to be motivated to guard against those pressures and resist the pull of IRB. In the context of how each may contribute to racial disparity in the criminal justice system, what distinguishes these two groups is that the former holds racist beliefs that consciously drives their decisions while the latter is influenced by subconscious biases that may undermine their desire to promote racial justice.<sup>127</sup>

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126. See Ira Mickenberg, *Voir Dire and Jury Selection*, NORTH CAROLINA DEFENDER TRIAL SCHOOL 5–7 available at <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf> (last visited Sept. 12, 2013).

127. For purposes of this section I use the word "beliefs" to mean a set of assumptions and views about the world that the juror is conscious of, and that help shape his or her value system that guides how (s)he thinks and acts, regardless of whether (s)he is comfortable admitting it publicly. This is distinguished from implicit biases that the juror is unaware of, and which may be contrary to the values the juror espouses and believes shape his or her decision-making.

As we consider how to use voir dire to combat IRB we must have two goals in mind. First we want to identify potential jurors who harbor racist beliefs, as opposed to those with egalitarian views subconsciously tainted by societal pressures, and get rid of those jurors. Next we want to educate the latter group about IRB and the racial pressures that may exist in our case in order to raise their awareness and combat the likelihood that they will succumb to those pressures. While ideally, there would be a third group—those who are unaffected by subconscious racial attitudes—the social science discussed in this article suggests this group probably does not exist.

Therefore, identifying the latter group and developing strategies to mitigate the impact of IRB must be a goal in jury selection. I recommend that we start by educating the venire about IRB, a concept that will be foreign to most, if not all. Follow up questioning can then focus on two areas: 1) gauging jurors' reactions and receptiveness to the concept of IRB and 2) exploring jurors' relevant belief systems.

*i. Educating the Venire*

Counsel should begin by considering ways to educate the entire jury panel about the concept of IRB. This may be done by having jurors examine their own IRB, by requesting judicial instruction, and through attorney conducted voir dire. None of these three approaches is mutually exclusive.

Counsel might begin by considering whether to request that the entire venire submit to the Implicit Association Test (IAT),<sup>128</sup> the most common evaluative instrument designed to indicate the presence of implicit bias in an individual, as “research has indicated that the process of taking the IAT and seeing the results can help address implicit bias.”<sup>129</sup> By requesting that the court use the IAT as an educational tool,<sup>130</sup> he or she can begin the process of raising juror

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128. For a discussion of the IAT, see Levinson, Young & Rudman, *supra* note 50, at 16–21.

129. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 873 n.346 (2012) (quoting Reshma M. Saujani, “The Implicit Association Test”: A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 409–10 (2003) (“Studies show that the IAT test-taker’s prejudices can actually be reduced once an individual is confronted with his unconscious prejudices . . . Once individuals take the IAT and get their results, they can then stop and ask whether thoughtless adherence to racial stereotypes is affecting their decisions. If so, decision-makers can take remedial measures to prevent or diminish unconscious use of race-specific criteria.”)).

130. Some scholarship has cautioned against using the IAT as a “screening” device to weed out jurors, as it is not a proven predictor of juror behavior. See Kang et al., *supra* note 107, at 1179–80; Roberts, *supra* note 129, at 854–57. *But see* Levinson,

awareness. This request might well be denied because of its perceived impact on efficiency, the logistical challenges associated with it, and judicial resistance to any significant change to the traditional way of doing things. However, the process of making this request would serve to further educate the court, as it would probably come in the form of a pre-trial motion supported by information about IRB and the potentially destructive role it plays in the fair administration of justice.

A second consideration which should be met with much less resistance is to request that the court explain IRB to the jury and instruct the venire on the influence it has over all of us and the risk it poses to the jury's ability to reach a verdict based solely on appropriate considerations. Federal Judge Mark W. Bennett includes a discussion of IRB in a PowerPoint presentation to the venire before he allows the attorneys to begin questioning.<sup>131</sup> A request for such an explanation from the court would likewise serve to educate the judge because it would be supported by an explanation of the social science.

A third option is for the lawyer to inform the venire about IRB during voir dire.<sup>132</sup> While this may be less effective than an instruction from the court, which may carry a greater air of neutrality, it is certainly preferable to abandoning attempts to inform the jury. In the following sub-section we will see how, through further voir dire, the lawyer can follow up on these attempts to educate the jury to get a better sense of how receptive individual jurors are to the concept of IRB.

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Young & Rudman, *supra* note 50, at 20–21 (noting “the predictive validity of the IAT generally, particularly when it is employed in socially sensitive domains such as race.”). However, even if not a proven predictor of future behavior, there is value in having jurors take the IAT as it can reveal that a person harbors implicit biases. By educating jurors about their own biases, this strategy can help them guard against succumbing to IRB in the future. In this way, merely taking the IRB into account can serve a debiasing function. It can also help lawyers exercise peremptory challenges by providing relevant—if not predictive—information. Questioning designed to learn relevant information about jurors during voir dire need not be proven to be predictive, and in fact almost never will be. Relevant questioning that is not proven predictive is the coin of the realm in jury selection. The IAT is at least as useful in making informed decisions during jury selection. The alternative is to exercise peremptory strikes based on stereotypes, a troubling aspect of jury selection, which lawyers engage in regularly.

131. Bennett, *supra* note 93, at 169.

132. If the lawyer is concerned that the court will preclude such voir dire, this again provides an opportunity to file a motion requesting permission to do so that lays out the applicable social science.

*ii. Identifying Educable Jurors*

Once defense counsel has educated the venire about IRB, voir dire provides an opportunity to identify racially conscious jurors who appreciate its influence and the role it may play on their own decision-making. By exploring jurors' own attitudes about race, their receptiveness to the idea that subconscious biases may influence them, and their willingness to be introspective and self-critical, the lawyer can begin to identify jurors who are better equipped to overcome IRB during trial.

In order to do this it is critical that the lawyer be allowed to engage in attorney-conducted voir dire.<sup>133</sup> This is important for two reasons. First, lawyers are more likely to elicit candid responses, as jurors are apt to provide "socially desirable" responses to judges regardless of their truth.<sup>134</sup> Second, defense counsel, who knows the case better than the judge, is in a superior position to consider how IRB may affect the outcome, to craft questions to reveal juror biases, and to evaluate responses to those questions.<sup>135</sup>

Voir dire designed to identify jurors who have the capacity to overcome the influence of IRB should fall into two categories: 1) questioning that builds off attempts to raise awareness of IRB, designed to learn the extent to which jurors appreciate its influence, and 2) a more general examination of jurors' life experiences that help reveal relevant attitudes and belief systems.

*a. Questioning about IRB*

Once the jury panel has been successfully informed about IRB using one or more of the approaches above, the lawyer must try to learn whether they are receptive to, or critical of, the concept. Keeping in mind that jurors are reluctant to provide answers that they believe are socially unacceptable,<sup>136</sup> in order to increase the chances that ju-

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133. See Jones, *supra* note 125, at 144 (suggesting jurors are more comfortable with lawyers than judges and are therefore more likely to candidly disclose personal information to the former); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 222 (2001) (suggesting that attorney-conducted voir dire facilitates the introduction of racial issues and promotes the expression of jurors' racial bias). See generally, Bennett, *supra* note 93, at 159–61 (arguing that "judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases").

134. See Bennett, *supra* note 93, at 160.

135. *Id.*

136. While the pressure to provide a socially acceptable response is greatest when the answer is invited by the judge, the desire to appear to hold conventional opinions will exist even when the question comes from a lawyer.

rors will provide forthcoming answers, counsel should give them “permission” to provide an answer that might otherwise be considered unpopular. By “normalizing” a contrary response,<sup>137</sup> the lawyer can make jurors feel more comfortable providing it. Attorney questioning is critical in this regard as many judges instinctually attempt to rehabilitate jurors.<sup>138</sup> Afraid of eliciting responses that will disqualify a juror or, even worse, taint the panel, judges tend to ask questions that minimize potential problems and stifle honest discussion. Judges’ questions are frequently leading and suggest the way the question should be answered. An example of how a judge might follow up an antecedent attempt to educate the venire is:

You have all just heard how we are all impacted by implicit, or subconscious, biases. In this case, where the accused is African-American, we are particularly concerned about subconscious biases that may cause you to unfairly evaluate the evidence due to the accused’s race. Will each of you be able to guard against such biases and do your best to treat Mr. Client fairly?

This question invites the jurors to give the obviously socially acceptable response, “yes.” Providing any other response is made even more difficult by the fact that the judge is the questioner, clearly wanting an affirmative answer.<sup>139</sup>

A more effective approach would be for the lawyer to ask something like:

You have just learned about the concept of IRB. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.

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137. See Mickenberg, *supra* note 126, at 14. Ira Mickenberg informed me that he got the idea of “normalizing” from Ann Roan, the Training Director for the Colorado Public Defender system. The concept is a component of the highly touted “Colorado Method” of jury selection.

138. See Caroline B. Crocker & Margaret B. Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 J.L. & HUM. BEHAV. 212 (2010) (finding that many judges attempt to rehabilitate jurors to address juror bias).

139. Lawyers should never ask questions like “Can you be fair?” This question is worse than meaningless in that it causes the juror to perceive what (s)he is “expected” to say and creates an additional hurdle to learning his or her true opinions and assumptions. Judges frequently ask these questions to either rehabilitate a juror who has exposed a bias or to insulate a juror from being subject to a strike for cause. Counsel might consider requesting the judge not ask this or similar questions through a motion in limine.

The lawyer may then ask jurors to share their thoughts, using the responses to draw in other jurors, or may call on individual jurors. But the point is that by giving the jury permission to question this concept, and by asking the question in an open-ended manner, the lawyer is more likely to generate a thoughtful and candid discussion of this topic. Once a juror expresses skepticism, the lawyer can further invite skeptical responses by validating the response in a non-judgmental way. For example, the lawyer might say, “I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about IRB . . . do others share Juror Number X’s skepticism?”

While questioning aimed at exploring which jurors are most receptive to the concept of IRB both generally, and as it may affect them personally, could take many forms, it is critical to learn which jurors will be educable throughout the trial.<sup>140</sup> It is equally important to ferret out those resistant to the concept of IRB who may be less motivated to consider how it impacts them. The lawyer who runs from the bad response cannot make informed decisions on how to exercise challenges, and is destined to have the “wrong” jurors deciding the case.<sup>141</sup> The same is true when looking for IRB skeptics. The lawyer should work to identify those skeptics, and not hide from their responses.

*b. Exploring Juror’s Relevant Experiences*

While a line of questioning that builds on antecedent efforts to educate the jury about IRB—and explores jurors’ receptiveness to the concept—will be an important component of our strategy, the lawyer also wants to mine for attitudes and belief systems that are relevant to the jurors’ ability to overcome the influence of subconscious racial bias.

Obviously, the lawyer will want to explore jurors’ beliefs about race in general. But (s)he should also look for attitudes that make it more likely that a juror will consciously guard against the influence of IRB. Research that focuses on “de-biasing,” or strategies to combat implicit biases, point to a couple factors defense counsel might con-

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140. Because being motivated to achieve egalitarian outcomes impacts the extent to which a person will seek to control expressions of prejudice, it is important to consider motivation in determining who will most likely overcome IRB. See STAATS, *supra* note 49, at 17. Therefore ferretting out potential jurors who lack such motivation can frustrate efforts to address IRB.

141. Ira Mickenberg, borrowing from the incredibly successful Colorado Method of jury selection, refers to this as “Running to the Bummer.” See Mickenberg, *supra* note 126, at 14.

sider in formulating voir dire questions. One is the fact that people with egalitarian motivations are more likely to be conscious of bias pressures and, therefore, better able to counteract them.<sup>142</sup> Another is that people with positive associations with members of an “out-group,” or group that engenders implicit biases, will be better prepared to guard against those subconscious biases.<sup>143</sup> This is especially true where exposure includes out-group members who contradict common stereotypes,<sup>144</sup> and where exposure involves working with members of the out-group to achieve common goals.<sup>145</sup>

As we develop lines of questioning to help us identify jurors that will be best equipped to overcome IRB, we should consider that people often aspire to act in ways that do not perfectly match how they have behaved in the past. “The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.”<sup>146</sup> Therefore, we want to develop questions that explore how potential jurors have behaved in past analogous situations.

To learn about racial assumptions, rather than asking:

- “How do you feel about racism?” or
- “Do you believe it is ever appropriate to judge someone based on their skin color?”

the lawyer might ask:

- Describe your most significant interaction(s) with a member of another race.

This forces the jurors to discuss how they actually responded in a relevant situation as opposed to allowing them to describe how they hope they would act.<sup>147</sup> A technique that can prove useful in eliciting experiential responses is to broaden the question to include friends, family, or others. For example, perhaps the lawyer would ask:

- Describe a particularly impactful interaction that you or someone close to you had with a member of another race.

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142. See STAATS, *supra* note 49, at 60–61 (suggesting research shows “fostering egalitarian motivations can counteract the activation of automatic stereotypes.”).

143. *Id.* at 56–58.

144. *Id.* at 56.

145. *Id.* at 58.

146. Mickenberg, *supra* note 126, at 6.

147. In addition to allowing the lawyer to learn about racial beliefs, questions about race can also have a de-biasing effect. Studies show that jurors will more readily guard against IRB when they are made aware of the fact that race plays a salient role in the case. Introducing race in voir dire by asking about racial beliefs can play this role. See Sommers & Ellsworth, *supra* note 133, at 222.

This formulation of the question may be preferred in order to: “a) [g]ive the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them [, or] b) [t]o give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.”<sup>148</sup>

Additional questions that explore associations with members of out-groups to determine if they are motivated by egalitarian values might inquire into the best or worst experience the juror has had with a member of another race or may ask about who the juror most admires and why.

In order to gauge jurors’ willingness to be introspective and self-evaluative, the lawyer might ask the juror to describe a prejudice that they have about others, a time that they relied on a stereotype, or a time that they made an assumption about another person that turned out to be wrong. Obviously, with follow up questioning, and techniques to pull other jurors into the discussion, these and other lines of questioning can begin to help the lawyer understand past experiences that are relevant to the issues raised in this section. Although of course jurors may not always be willing to be forthcoming in such situations, it is still worth exploring this approach since many may well provide useful information.

Voir dire is a particularly difficult phase of the trial, but it can serve as a critical piece of a larger strategy to address the effect of IRB at trial. To summarize, the lawyer can use carefully crafted voir dire questions to identify those jurors who harbor attitudes and beliefs that will make it hard for them to overcome the influence of IRB, either because they are explicit racists; they are unreceptive to the concept of IRB; they are reluctant to admit that they may rely on stereotypes personally; or they struggle to be introspective and self-evaluative. One goal is to select egalitarian-minded jurors who are open to the concept of IRB and willing to believe it may influence their decision-making. A second goal is to begin the process of educating the jurors who will ultimately decide the case about IRB and promoting those motivators to act in accordance with their egalitarian ideals. While this process begins during voir dire, defense counsel should consider other opportunities throughout trial to continue this process, including the use of experts, storytelling/narrative, and jury instructions.

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148. Mickenberg, *supra* note 126, at 10.

iii. *Educating Jurors During Trial*

Although we have begun to educate jurors about IRB during voir dire, efforts must be made to continue to remind jurors of the tendency for subtle pressures to influence how they view the association between race and crime. Expert testimony, use of narrative, and jury instructions provide three vehicles through which to do so.

a. *Use of Expert Testimony*

Perhaps the most obvious way to educate jurors about scientific principles that are not commonly known to the layperson is through the use of expert witnesses. Social scientists have increasingly been used in courtrooms to explain what studies tell us about human behavior when that behavior is both relevant to an issue in the case and not commonly understood by the layperson.<sup>149</sup> The expert can convey important information about how people behave under certain circumstances that jurors might otherwise not appreciate. This is particularly true in the case of IRB, to which many jurors may be resistant. Expert testimony can help jurors understand the relationship between explicit and implicit bias and reinforce an understanding that implicit biases “do not necessarily align with individuals’ openly-held beliefs or even reflect stances one would explicitly endorse.”<sup>150</sup>

An expert can also better educate the jury about the power that motivation can play in controlling our subconscious biases.<sup>151</sup> Thereby jurors can better understand that by consciously working to make decisions consistent with their egalitarian ideals, they can help overcome the influence of IRB.

Another important principle for jurors is the effect that “time pressures” and “cognitive busyness” can play in driving our subconscious biases.<sup>152</sup> During deliberations jurors may become anxious, feeling pressure to come to an agreement as the deliberative process becomes lengthy. Attention spans can become short and jurors may get distracted. Loss of focus and pressure to speed up the process may facilitate stereotypic thinking. Expert testimony can help remind jurors to be patient and focused when evaluating the evidence in the case, particularly the type of ambiguous evidence that is subject to being evaluated through a biased lens.

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149. See John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 *LAW & HUM. BEHAV.* 72 (2011).

150. *STAATS*, *supra* note 49, at 14.

151. *Id.* at 17.

152. *Id.* at 18–19.

Because this is a relatively new area of psychology that involves behavior of which, by definition, people are unaware, expert testimony can help jurors understand the role of IRB in decision-making and guard against its distorting effects. While judges maintain considerable discretion over the admission of expert testimony given the gatekeeping function they serve under *Daubert*,<sup>153</sup> “[e]xpert opinion regarding how implicit bias can operate as a motivating factor that could result in a discriminatory decision appears to readily pass muster.”<sup>154</sup> Certainly some judges will initially refuse to allow such testimony, as judges can be resistant to new practices. However, an important side benefit is that through the process of litigating the issue, defense counsel will help to educate the judge about IRB.

*b. Storytelling/Crafting Narratives*

Another mechanism through which the lawyer can blunt the impact of IRB is through the narratives we tell during opening and closing statements. In an article that examines how capital defense lawyers can make use of narrative during the sentencing phase of trial to mitigate the impact of IRB, Professor Pamela A. Wilkins discusses several ways that jurors’ application of racial stereotypes may be inhibited through narrative.<sup>155</sup> Three, in particular, are relevant to our discussion.

Wilkins discusses how we tend to harbor subconscious schemas, or stereotypes, that shape how we view others,<sup>156</sup> and considers strategies for blunting the impact of the racial schema jurors hold about black men and crime.<sup>157</sup>

One of the strategies she discusses involves understanding that “more than one schema applies to most persons.”<sup>158</sup> As an example, she uses a female, Asian, mechanic and points out that there are different schemas for females, Asians, and mechanics.<sup>159</sup> Research suggests that by getting jurors to focus on one schema (say, the mechanic), we can “inhibit the activation of stereotypes associated with another cate-

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153. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589, 597 (2003).

154. David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1431 (2008).

155. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012).

156. *Id.* at 320.

157. *Id.* at 330–33.

158. *Id.* at 331.

159. *Id.*

gory.”<sup>160</sup> This suggests that by developing a narrative that promotes the client as a devoted husband, a loving father, a committed son, or a dedicated employee, we can potentially help to suppress the more pernicious racial stereotype.

A second strategy is to “prime”<sup>161</sup> jurors with, or provoke their subconscious thinking about, “ideals of fairness and equality” in order to “suppress . . . racial and other stereotypes.”<sup>162</sup> This strategy is based on research that suggests “‘that it is possible to counter stereotypes at the same preconscious level at which they are activated.’”<sup>163</sup> Therefore, by reminding jurors during closing argument of our nation’s highest ideals, the role of the jury in promoting justice, and the important principles of law that protect each of us as individuals against a far more powerful government, we may be able to counteract some of the influence of IRB.<sup>164</sup>

A third strategy is to expose the jury to members of the group (in this case African-Americans) who clearly do not conform to the stereotype of the group.<sup>165</sup> Research suggests that this may inhibit activation or reduce implicit biases.<sup>166</sup> Therefore, opportunities to weave characters into the defense narrative who defy the stereotypes the de-

160. *Id.* (quoting Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1253 (2002)).

161. *Id.* at 332. “[P]riming is . . . the act of being exposed to a stimulus that influences how an individual later responds to a different stimulus. Often used in experimental settings, priming methods typically feature a subliminal initial prime that influences or increases the sensitivity of the respondent’s later judgments or behaviors.” STAATS, *supra* note 49, at 24.

162. Wilkins, *supra* note 154, at 332.

163. *Id.* (quoting Blasi, *supra* note 159, at 1254).

164. Based on my experience as a trial lawyer and public defender trainer, I recommend waiting for closing argument to begin discussing legal principles like presumption of innocence, burden of proof, and standard of proof (beyond a reasonable doubt) designed to ensure fairness and protect the individual against the state. While these are important principles to ensure the jury understands, as they give a significant advantage to the accused, discussing them during opening statements carries a grave risk. During opening statements the jury is presented with two competing narratives and will likely select one through which it will process the evidence in the case. The defense wants the jury to embrace its narrative. A discussion of the law can be heard by jurors as the defense saying, “my client may be guilty but they can’t prove it.” This is far less risky during closing when the jury has already heard the evidence and processed it through the framework constructed during opening. While the social science suggests that there can be a benefit to “priming” the jury with ideals of fairness and equality, if the lawyer decides to do so during opening statements, (s)he should make sure it is not unintentionally undermining his or her confidence in the defense theory. There are strategies at closing for weaving these important principals into the narrative the defense builds throughout trial without undermining counsel’s confidence in his or her position, but that is beyond the scope of this article.

165. Wilkins, *supra* note 154, at 332.

166. *Id.*

fense seeks to suppress, and playing those individuals up in the narrative may have a positive impact.

These strategies should help guide the creation of the narrative and stories we develop in crafting our opening and closing statements, as these can be powerful tools in the effort to de-bias the jury.

*c. Jury Instructions*

A final vehicle to educate the jury about, and raise awareness of, implicit racial bias is through the use of jury instructions. Defense counsel should consider proposing a set of instructions to the judge to address this phenomenon. Above, we discussed requesting that the judge begin jury selection with a discussion of IRB. Regardless of success in this endeavor, lawyers should also consider requesting an instruction at the beginning of trial and again when final instructions are read.

After discussing IRB during voir dire, federal Judge Mark W. Bennett, a leading scholar on implicit bias in the courtroom, asks jurors to take a pledge upon the completion of jury selection.<sup>167</sup> As part of the pledge, jurors must “pledge . . . not to decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.”<sup>168</sup>

Judge Bennett also gives the following instruction to the jury before opening statements:

Do not decide this case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making every important decision in this case, I strongly encourage you to evaluate the evidence carefully and resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of the evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>169</sup>

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167. Kang et al., *supra* note 107, at 1182.

168. *Id.*

169. *Id.* at 1182–83.

Considering some of the social science discussed in this article, Judge Bennett's instruction is potentially effective for a number of reasons. It continues the process of awareness-raising that he started during the voir dire process. It appeals to the jurors' sense of fairness, which could serve to inhibit IRB. It motivates jurors to live up to their egalitarian ideals. And it urges thoughtful, unhurried deliberation, which can help jurors avoid the "cognitive busyness" that fosters stereotyping. A similar instruction should be requested at the end of the case.

*iv. Sentencing Advocacy*

Thus far we have considered how to educate judges and jurors about IRB through motions practice, jury selection, and trial. However, the vast majority of people who end up convicted and sentenced in our criminal justice system will never have a trial.<sup>170</sup> In these cases, counsel will not have the opportunity to educate the judge about the influence IRB may have on him or her, an important consideration in light of evidence of racially disparate sentencing practices. And even in those cases where there is a trial, and defense counsel is able to employ one or more of the above strategies, it will be helpful to engage in awareness-raising in the judge specifically. For the judge may embrace the general concept of IRB, and agree that it influences police officers and jurors, but believe that (s)he is immune from its effects. Studies show that judges, who believe themselves to be objective, are in fact more susceptible to biases.<sup>171</sup> And, although counsel must be delicate in how (s)he does it, judges must be reminded that they are "human and fallible, notwithstanding their status, their education, and the robe."<sup>172</sup>

Sentencing advocacy provides an ideal opportunity for the lawyer to educate the judge about the impact IRB can have on him or her, as the lawyer will often have freer rein to discuss relevant social science, sentencing statistics, and the appropriate goals of sentencing, which include promoting important societal values including racial justice. Unlike the previous strategies discussed, where the lawyer hoped to educate the judge by introducing IRB in the context of how it applies to others in the system, at sentencing, defense counsel can point out how subconscious bias can affect how judges sentence.

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170. Today, more than ninety-five percent of all cases are resolved through guilty pleas. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011).

171. Kang et al., *supra* note 107, at 1173.

172. *Id.*

It should come as no surprise that judges are highly susceptible to succumbing to subtle pressures to stereotype. They spend their days in a criminal justice system that is overburdened and under-resourced, and they see it as their responsibility to ensure that a high volume of cases are processed efficiently through broken systems. The time pressures and “cognitive busyness,” discussed above, that drive subconscious stereotyping are a regular feature of a trial judge’s routine. If our criminal justice system is defined by a culture that dehumanizes those accused of crimes,<sup>173</sup> judges live in this culture. This culture is part of what journalist Amy Bach describes as the “Ordinary Injustice” that has come to define our criminal justice system. It is a system in which professionals, including judges, “become[ ] so accustomed to a pattern of lapses that they can no longer see their role in them.”<sup>174</sup>

Given their immersion in a criminal justice system so influenced by race, it is understandable that even judges who view themselves as egalitarian are influenced by IRB.<sup>175</sup> But, just as judges are susceptible to IRB, so too can they suppress its influence when they are made aware of it and become motivated to do so.<sup>176</sup> Sentencing advocacy provides an excellent opportunity to do this.

As a first step, through both written and oral advocacy, lawyers should consider how to effectively educate judges about IRB and its demonstrated impact on even egalitarian-minded judges. This can be done through sentencing memoranda that discuss the social science and its impact on trial judges.<sup>177</sup>

A second step might be to lay out the statistics that demonstrate the extent to which race accounts for sentencing disparity in our criminal justice system.<sup>178</sup> Ideally, counsel would be able to compile statistics about sentencing patterns of the particular judge, or the relevant jurisdiction.

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173. See Rapping, *supra* note 90, at 561 (2012) (discussing how the criminal justice system drives prosecutors to dehumanize those accused of crimes).

174. AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 2* (2009); see also Rapping, *supra* note 99, at 339 (discussing a criminal justice culture in which injustice is accepted by everyone, including judges).

175. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1221 (2009) (summarizing a study that used IAT scores of participating judges to conclude that judges do in fact harbor implicit bias about race).

176. *Id.*

177. See *id.* at 1225–26 (suggesting control of implicit bias in the courtroom requires taking action and raising awareness of IRB for judges who lack time to address it on their own).

178. See Kang, et al., *supra* note 107, at 1148–52.

Finally, using some of the narrative strategies addressed above, defense counsel might discuss the client in the context of a schema distinct from race (father, son, dedicated employee, coach, deacon, volunteer, good neighbor, etc.) and appeal to the judge's role in promoting fairness in our criminal justice system. In particular, as racial justice is an important American ideal, one goal of sentencing should be to send a message to the community that our court system is color-blind. Therefore, countering systemic sentencing disparity on a case-by-case basis is an appropriate sentencing goal.<sup>179</sup>

#### *D. A Lone Light in the Darkness*

After laying out a host of strategies that defense counsel might use to blunt the force of IRB, thereby addressing a leading contributor to racial disparity in the criminal justice system, I hope it is not defeating to say that the likelihood of short-term improvement is slim. Unfortunately, many judges will not embrace IRB as a widespread phenomenon that warrants their intervention. Others may appreciate the power of IRB, but are nevertheless resistant to altering the way they have always done things. Even for the lawyer who has success with these strategies, racism in the criminal justice system is so entrenched that any progress will be incremental. Educating people in the system about their implicit biases and hoping they will be motivated to address them is a long term strategy, and only one part of a badly needed, comprehensive solution. Once one becomes conscious of the racial injustice in the system, continuing to toil in a patently unfair system can cause the most committed lawyer to question whether he or she is making a difference. Some may even come to believe that by participating in such a corrupt system they are effectively enabling racism.

Michelle Alexander convincingly argues that “mass incarceration in the United States . . . [is] a stunningly comprehensive and well-designed system of racialized social control that functions in a manner

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179. In fact, counsel should always be sensitive to the potential for a judge to be defensive about the perceived accusation that they may be less than fair, even if subconsciously. Counsel should know the judge and craft the argument accordingly. For some judges, an argument about systemic shortcomings, that take the focus off the individual judge, will be much better received. In this instance the lawyer might consider packaging the message as follows: “While we are not suggesting that this court would allow prejudice or stereotyping to affect its sentence in this case, promoting the color blind administration of justice and correcting for systemic racial disparity is an appropriate sentencing consideration. For that reason we ask the court to consider the social science and statistics provided.”

strikingly similar to Jim Crow.”<sup>180</sup> If so, should conscientious defense counsel play any role other than trying to dismantle it? Politically conscious lawyers have always debated whether there is a role for them to play within a patently unjust system.<sup>181</sup>

In her article examining the role of conscientious lawyers in unjust systems, Professor Alexandra Lahav suggests five possible responses: 1) organized boycott, 2) individual refusal, 3) working to transform the system from within, 4) making a record for a higher tribunal, and 5) appealing to public opinion.<sup>182</sup> She then provides thoughtful critiques of each strategy. The degree to which an individual lawyer embraces each will probably depend on the extent to which they see themselves as a “cause lawyer,” committed to pursuing a larger political agenda, or a “client-centered lawyer,” committed to helping individual clients achieve their goals on a case-by-case basis. Defense lawyers can fall on a wide range of points along the “cause lawyer” to “client-centered lawyer” spectrum. As argued above, I believe the public defender is duty-bound to reside at one end of the spectrum, suppressing the desire to pursue all personal causes that are inconsistent with the lawful goals of the individual client.

For the client-centered lawyer, the organized boycott approach is obviously problematic as it requires the lawyer to abandon the individual clients to whom (s)he is responsible, leaving them to fend for themselves and almost certainly experiencing worse outcomes individually.<sup>183</sup> As Professor Lahav points out, it is also impractical in that it requires widespread participation by members of the Bar, a group with heterogeneous political views.<sup>184</sup>

Individual refusal is a practical solution for the lawyer who is unwilling to participate in a racially unjust system, but it will not lead to systemic reform as there will be other lawyers to handle the cases.

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180. ALEXANDER, *supra* note 12, at 4.

181. See e.g., Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375 (2005) (considering whether lawyers should participate in unjust military tribunals); Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725 (2012) (considering the appropriate reaction of lawyers to unjust tribunals).

182. Lahav, *supra* note 180, at 755–70.

183. In theory, the client-centered lawyer could engage in a boycott if, after being fully informed of the larger strategy including all of the costs and benefits to them personally, each client agreed to have his or her lawyer participate in the boycott. While theoretically possible, such an idea is impractical as many clients will be far more concerned with their fate in the case at hand than in sacrificing their own interests to attempt to combat systemic racial injustice.

184. Lahav, *supra* note 180, at 756.

While it is certainly understandable that some lawyers will decide not to participate in a racially unjust system, there will remain a large population of accused individuals whose fate will depend on the quality of their counsel. Given that there will always be lawyers available who have come to acquiesce to the existing system, and who will not push for racially just outcomes, the reform movement cannot afford to have all socially conscious lawyers refuse to participate. This result would be tantamount to an acceptance of the status quo.<sup>185</sup>

This leaves the final three responses, which are not mutually exclusive. Working within the system requires pushing for change on a case-by-case basis. At times, the lawyer will be able to obtain a successful result for an individual client at trial. At other times, through his or her trial advocacy, (s)he will build a record that might lead to an appellate victory that changes the legal landscape for future clients. And finally, through his or her participation in the system, the lawyer will find opportunities to educate the public about the gap between our ideals and the reality of our broken system of justice.

But, undoubtedly, progress for the lawyer who chooses to work within the system is incremental. It involves “taking advantage of the possibilities for justice wherever they can be found [and looking for] [s]mall victories in the courtroom [that] may open the door for more substantial changes.”<sup>186</sup>

Some argue that “unjust legal regimes can only be resisted extralegally.”<sup>187</sup> There is certainly an important role for lawyers to play from outside the system, such as pushing reform efforts to address racially disparate police practices, the over-criminalization phenomenon,<sup>188</sup> and mandatory minimum sentencing, which, drive racially disparate mass incarceration.

But while these worthwhile campaigns are underway, there will still be human beings processed through the system whose lives may well be destroyed. A conscientious lawyer who represents individuals in this system will not dismantle the system single-handedly. (S)he will not be able to wrestle justice from an unjust system for every client. And while the lawyer committed to representing individuals in an unjust system will enjoy success, the victories can be overshadowed by the sheer volume of injustice (s)he will witness daily. Most clients will fall victim to the unjust system. (S)he will often feel re-

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185. *See id.* at 762.

186. *Id.* at 764.

187. *Id.* at 765.

188. For an excellent discussion of the over-criminalization phenomenon, see Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

sponsible. Unfortunately, it is the lawyers who are most conscious of injustice who will internalize the defeats the most. Thus, ironically, the unjust system will most threaten to drive away the warriors who are most valuable to the struggle.

Perhaps the greatest obstacle to the lawyer's ability to remain in the system and push for change is the depressing view that any progress short of the elimination of all racial disparity is failure. To fight this defeatist attitude and survive in the system, the lawyer will need to redefine success and calibrate it to the reality of the existing criminal justice system, rather than focusing on an unattainable ideal.<sup>189</sup> In his seminal essay introducing the concept of "Racial Realism," Professor Derrick Bell cautions warriors for racial justice to abandon the notion that there will ever be true racial equality and instead to steel themselves to fight against an inherently unjust system.

While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trampled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.<sup>190</sup>

At Gideon's Promise, an organization I founded in 2007, we train and support public defenders to work in some the most dysfunctional criminal justice systems in the country. It is through our training that these lawyers learn what their clients deserve in an advocate and just how far they will come from being able to fulfill those obligations in light of resource and caseload pressures. Once aware of this gap between aspiration and reality, we teach these young warriors strategies for narrowing that gap; for incrementally moving towards the ideal. But at this point the work has just begun. We next provide these lawyers the support they will need as they confront the fact daily that they cannot live up to this ideal for most clients and that many are falling

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189. See Jonathan Rapping, *Redefining Success As a Public Defender: A Rallying Cry for Those Most Committed to Gideon's Promise*, THE CHAMPION, June 2012, at 30.

190. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992).

through the cracks on their watch. We encourage them to understand that there is value in moving the ball forward, even if only slightly. We remind them that there is victory in refusing to give into the status quo, where every pressure pushes the lawyer to abandon his and her passion and ideals. We inspire these lawyers to see victory in the fact that they may be the lone person reminding the system of its most important values. If victory is complete justice, they will never win. But if victory is always promoting justice where it is otherwise forgotten, they can begin to advance the cause.

Bell ends his article with a story that makes this point.

The year was 1964. It was a quiet, heat-hushed evening in Harmony, a small, black community near the Mississippi Delta. Some Harmony residents, in the face of increasing white hostility, were organizing to ensure implementation of a court order mandating desegregation of their schools the next September. Walking with Mrs. Biona MacDonald, one of the organizers, up a dusty, unpaved road toward her modest home, I asked where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window. "Derrick," she said slowly, seriously, "I am an old woman. I lives to harass white folks."<sup>191</sup>

He then explains how this anecdote explains racial realism and the role it can play in combatting injustice:

Mrs. MacDonald did not say she risked everything because she hoped or expected to win out over the whites who, as she well knew, held all the economic and political power, and the guns as well. Rather, she recognized that—powerless as she was—she had and intended to use courage and determination as weapons "to harass white folks." Her fight, in itself, gave her strength and empowerment in a society that relentlessly attempted to wear her down. Mrs. MacDonald did not even hint that her harassment would topple whites' well-entrenched power. Rather, her goal was defiance and its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

Mrs. MacDonald avoided discouragement and defeat because at the point that she determined to resist her oppression, she was trium-

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191. *Id.*

phant. Nothing the all-powerful whites could do to her would diminish her triumph.<sup>192</sup>

#### CONCLUSION

America is a country that has struggled mightily to overcome a troubling history of racism. Arguably, there is no institution in this country that provides a greater measure of our racial progress than our criminal justice system; for it is there that we decide matters of life and liberty. If we cannot make these critical decisions without regard to skin color, it is difficult to claim that we have conquered our racist legacy. Yet sadly, perhaps no feature of our criminal justice system defines it more than its racially disparate outcomes. That this can be true even as Americans come to accept more explicitly egalitarian views only speaks to the complexity of the problem and the power of the implicit racial biases we have been studying. For aspiring to promote color-blind outcomes is only the beginning. If we are to minimize racially disparate criminal justice outcomes, we must work to overcome the subconscious biases that drive them. While the defense lawyer owes allegiance to the individual client, and must not lose sight of this critical role, in the battle to eradicate racism in the system, defense lawyers can also play a pivotal role.

The first thing defense lawyers must do is become aware of their own implicit biases so that they may guard against them. As the personal anecdote at the beginning of the article reveals, systemic pres-

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192. *Id.* at 379. This story reminds me of one of my favorite parables that I use as part of a presentation I do for public defenders on their capacity to transform broken systems:

One of the Just Men came to Sodom, determined to save its inhabitants from sin and punishment. Night and day he walked the streets and markets protesting against greed and theft, falsehood and indifference. In the beginning, people listened and smiled ironically. Then they stopped listening; he no longer even amused them. The killers went on killing, the wise kept silent, as if there were no Just Man in their midst.

One day a child, moved by compassion for the unfortunate teacher, approached him with these words: "Poor stranger, you shout, you scream, don't you see that it is hopeless?"

"Yes, I see," answered the Just Man.

"Then why do you go on?"

"I'll tell you why. In the beginning, I thought I could change man. Today, I know I cannot. If I still shout today, if I still scream, it is to prevent man from ultimately changing me."

ELIE WIESEL, *ONE GENERATION AFTER*, 72 (Lily Edelman & Elie Wiesel trans., 1st prtg. 1970).

asures can drive any of us to accept negative assumptions about race if we are not consciously guarding against them. The conscientious defense lawyer can then use many tools in his or her advocacy toolkit to begin to educate judges, jurors, and prosecutors about this phenomenon, as self-awareness is a first step towards combatting implicit biases. But, perhaps most importantly, the defender must recognize the intractable nature of the problem and avoid becoming discouraged and accepting the status quo. Progress will be incremental and there is value in resistance, even when the results are not obvious. For arguably nothing ensures that racist outcomes will persist more than when those charged with representing the accused stop pushing back against the forces of injustice.