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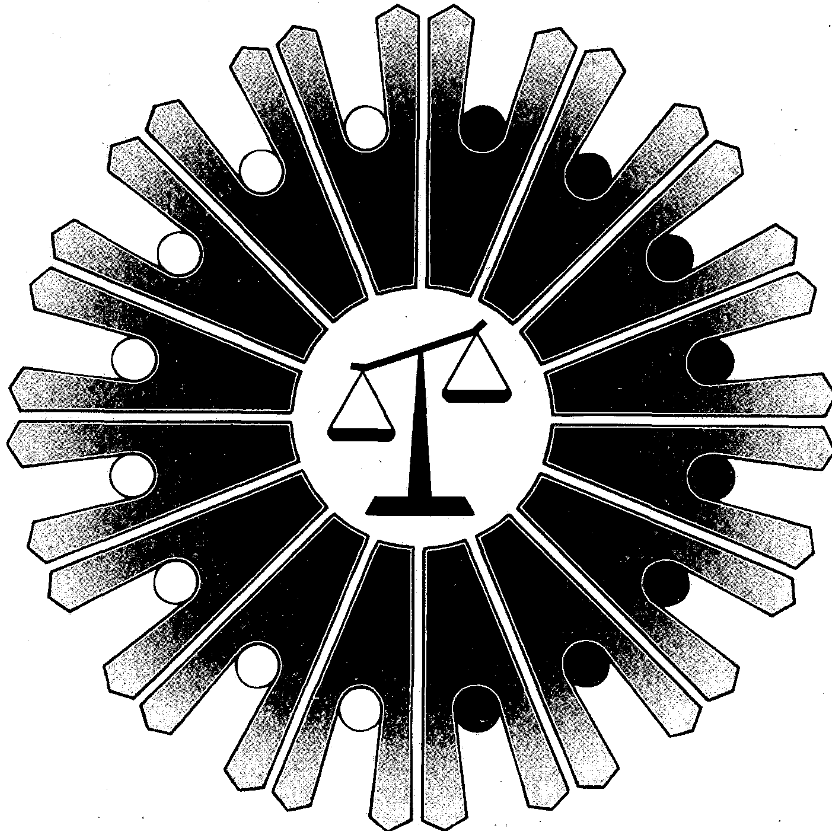
MODEL GUIDE 2

Access to Justice for Persons of Color:
Selected Guides and Programs for Improving Court Performance

Bias in the Court!

Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions



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Access to Justice for Persons of Color:
Selected Guides and Programs for Improving Court Performance

Bias in the Court!

Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions

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About the Cover

The project logo, "Equal Justice," was designed by Seattle graphic artist Sekio Matsumoto. The original design on the cover of *Model Guide 1* depicts people of all races and ethnic backgrounds encircling "the scales of justice," with their arms raised in celebration. The shading and gradation of the colors represents a fusion of these diverse peoples into an indivisible whole, while still maintaining their individual identity. The balanced scales encircled by the people characterize one of the most fundamental principles of our society—*equal justice under law.*

There is a subtle, but significant difference between the logo on the cover of *Model Guide 1* and *Model Guide 2*—the scales of justice on this *Guide* are unbalanced. The unbalanced scales symbolize the effects of racial and ethnic bias, which often result in unequal justice for racial and ethnic minorities. Unfortunately, many case outcomes are influenced by more than evidence or persuasive arguments. Biased attitudes, behaviors, and messages—whether they are subtle or overt, conscious or unconscious, naive or deliberate—conveyed by judges, lawyers, and court staff have a profound, negative impact on fairness and equality in our nation's courts.

Not only has Mr. Matsumoto's design become a recognized symbol of efforts to promote equality and fairness in the justice system, it has received worldwide acceptance as an expression of diversity and inclusiveness. The design was originally conceived by Mr. Matsumoto in 1977 when he was asked by the American Baptist Churches, USA to demonstrate inclusiveness of a diverse racial, ethnic, and linguistic population in the national church. The Washington State Minority Justice Commission in 1994 asked Mr. Matsumoto if he could adapt his concept from a celebration of religion to a celebration of justice. The result was the "Equal Justice" version of the logo, which was virtually identical to its depiction on the cover of *Model Guide 1.* This adaptation was originally used for the *1994 Annual Report of the Washington State Minority and Justice Commission* and was later adapted again in 1995 by the *First National Conference on Eliminating Racial and Ethnic Bias in the Courts.* Most recently, the logo was adopted by the *National Consortium Monitor*, the newsletter of the *National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts.*

The copyright for the logo is held by the artist, who has given the National Center for State Courts permission for its use. The layout and design of the cover was done by graphic artist Hisako Sayers.

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*Preface**

Racial and ethnic bias have no place in the courts or anywhere in the justice system. Eliminating such bias and ensuring its absence is the keystone of equal justice. Eliminating bias involves not just dispensing with systems or procedures or letting go of individuals with a bad attitude, but including some affirmative steps and commitment of resources as well.

Eliminating bias from the courts and other aspects of the justice system is critical. This country and the rights and obligations of all who live here are defined by law—the Constitution and laws passed by Congress, states, and localities. If bias exists in the operation of this system for the enforcement and protection of rights, then a corruption exists that goes to the foundation of the nation. Therefore, this elimination of bias is not an exercise in political correctness; it is of fundamental and structural importance to the viability of our system of government.

Courts should undertake the exercise of self-examination to identify actual prejudice, discrimination, and those practices that appear discriminatory. This exercise is also salutary in and of itself. Effective outreach and a willingness to listen and self-examine bring people into the system and create a confidence in the interest, concern, and goodwill of the system. We must be ready to work together to redesign those aspects that have operated in a discriminatory, exclusionary, or otherwise unfair way. Equally important are the affirmative commitments of resources ranging from funds to time and energy, not just to eliminate the outcroppings of bias, but also to make justice equally available, fair, and impartial.

With so much of our effort to achieve a fair and just society, there is no ultimate right answer to the appropriateness of various initiatives under the Constitution or any philosophic or moral code. They are value choices for Americans to make. We, and those we represent in our local, state, and federal justice systems, must be energetic in devising ways to ensure that the individuals who comprise this pluralistic whole can effectively take advantage of the rights to which they are entitled. Those of us who in effect constitute our justice system, simply must have the judicial system, the most critical component of our democracy, respond to, and embrace the diversity of our country.

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* This preface consists of excerpts from a luncheon address by Assistant Attorney General Eleanor D. Acheson entitled "The Importance of Eliminating Bias from Institutions of the Justice System in an Era of Challenges to Remedies for Inequality." Her address is published in the proceedings of *The First National Conference on Racial and Ethnic Bias in the Courts*, which are entitled *A New Paradigm for Fairness: The First National Conference on Eliminating Racial and Ethnic Bias in the Courts*. The proceedings were written by H. Clifton Grandy and were published in 1995 by the National Center for State Courts.

Foreword

"Equal access" to justice is, in theory, a fundamental characteristic of the courts; however, in practice, "equal access" remains an aspiration for all court systems. The principle of equal access is much broader than the rights of litigants and defendants. Equal access includes access to employment opportunities as part of the court's staff or as a contract service provider to the court. Our nation's workforce is rapidly becoming more heterogeneous by race, ethnicity, gender, age, physical ability, religion, language, and educational background. State court judges and managers need to understand how this increasing diversity will present both opportunities and challenges to those who utilize the courts and those who are part of the judicial workforce.

While minorities are overrepresented in the justice system as defendants in criminal cases and as inmates in jails and prisons, they are underrepresented as judges, judicial appointees, and employees. This underrepresentation has been well documented by the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts and individual state commissions tasked with identifying and documenting racial and ethnic bias in the judicial branch. The commissions of Arizona, the District of Columbia, Florida, Massachusetts, Minnesota, New York, New Jersey, Oregon, and Washington State have addressed the underrepresentation of minorities in the work force. For example, the New York commission found that minority underrepresentation in the courts fueled the perceptions of minority communities that the judicial branch is biased.

In March 1994, the American Bar Association in cooperation with the National Bar Association, the Native American Bar Association, the National Asian Pacific American Bar Association, and the Hispanic National Bar Association convened a meeting to explore racial and ethnic bias in the American justice system, the *Summit on Racial and Ethnic Bias in the Justice System.* Thus, the need for the State Justice Institute-funded *First National Conference on Eliminating Racial and Ethnic Bias in the Courts ("Conference"),* which was held in March of 1995 in Albuquerque, New Mexico. For the first time in the history of the state courts, more than 425 justices, judges, court administrators, judicial educators, attorneys, and court users gathered to focus on strategies to eliminate racial and ethnic bias in the courts.

Finally, the *Conference* provided an opportunity for participants to network and exchange invaluable information to assist them in addressing racial and ethnic bias in their state's court system. Several major themes that can be addressed through diversity training emerged from the *Conference.* These themes included staying vigilant against bias through continuous self-examination of court operations, as well as reassessment of mechanisms for addressing the perception of and the existence of biased behaviors on the part of judicial and nonjudicial staff; managing court interpretation problems, which equates to fairness and equal access to justice for non-English speakers; protecting the rights of American Indians as sovereign nations and culturally distinct peoples who are guaranteed unique parental rights under the Indian Child Welfare Act; and mentoring persons of color to judicial service on the bench.

As the series title indicates, "Access to Justice for Persons of Color: *Selected Guides and Programs for Improving Court Performance*," the *Model Guides* are designed to address the above issues through the various programs contained under the following titles:

MODEL GUIDE 1

A Total Approach to Diversity: ***An Assessment and Curriculum Guide for State Courts***

MODEL GUIDE 2

Bias in the Court! ***Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions***

MODEL GUIDE 3

Managing Language Problems: ***A Court Interpreting Education Program for Judges, Lawyers, and Court Managers***

MODEL GUIDE 4

The Indian Child Welfare Act: ***A Cultural and Legal Education Program***

MODEL GUIDE 5

Judicial Mentoring: ***Starting, Organizing, and Sustaining a Program for Mentoring Persons of Color to the Bench***

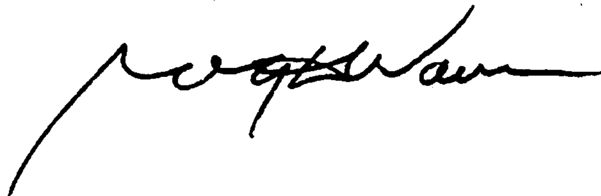
NANCY E. GIST
Director
Bureau of Justice Assistance

The Need for Focusing on the Behavior of Judges, Lawyers, and Court Staff

Public trust and confidence in our legal system are grounded in the perception of fairness and equality in our courts and in the offices that support our courthouses. Fairness and equality in our courts are primarily products of the judges, lawyers, and court staff who work there, how they conduct themselves when interacting with the public, and how they conduct themselves when interacting with each other in public (e.g., a derogatory remark by a judge to an attorney, a court manager to a clerk, or a bailiff to a defendant damages the perception of fairness and equality in the court). The phrase "court interactions" in the title refers to the words, actions, and behaviors that judges, lawyers, and court staff display toward the public; the beliefs, attitudes, and messages their actions convey to the public; the effect these behaviors and messages have on case outcomes; and ultimately, the effect all of these have on public trust and confidence in our legal system.

Several behaviors are common to discussions of racial and ethnic bias in court interactions: 1) conduct that communicates hostile biases or naive stereotyping; 2) habits of judges and lawyers that reflect conscious or unconscious bias (e.g., addressing majority lawyers by formal title such as "counsel," but minority lawyers by informal reference such as their first name); 3) mistaken conclusions drawn by judges, lawyers, court staff, or even juries about the behavior of litigants or witnesses, due to ignorance of variation in behavioral norms among cultural groups; and 4) case strategies that exploit racial stereotypes and biases when such references are not relevant to the case.

This *Model Guide* is aimed at reducing the effects of racial and ethnic bias in court interactions by raising the awareness of judges, lawyers, and court staff to their unwarranted conscious or unconscious words, actions, and behaviors that often result in unfavorable outcomes for minorities involved in our legal system. Several problem areas and recommended strategies to address these concerns are included in this program: 1) concentrating on the quality of the treatment minorities receive in our justice system, regardless of their roles (e.g., witnesses, litigants, or defendants) in the courtroom and around the courthouse; 2) ensuring that the words, actions, and behaviors of judges, lawyers, and court staff are consistent with the principles of fairness and equality; 3) taking appropriate steps to persuade minorities that racially or ethnically based negative attitudes and beliefs will neither govern court proceedings nor dictate the outcomes of their cases; and 4) assuring the public that equal access to fair and dignified treatment in our courts awaits all who enter therein.



ROGER K. WARREN
President
The National Center for State Courts

Bias in the Court!

Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions

Bias in the Court! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions

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Bias in the Court! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions

Instructor Preparation

Program at a Glance

Bias in the Court! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions aims to reduce the effects of racial and ethnic bias in court interactions by educating participants about biased behavior and by offering solutions. The program concentrates on unwarranted conscious or unconscious words, actions, and behaviors on the part of judges, lawyers, and court staff that often result in unfavorable outcomes for minorities involved in our legal system.

Bias in the Court! consists of six stand-alone modules. You may combine the modules in any order to meet the needs of your audience and the time you have available. **Note: You should always present Module 1 along with any other modules you choose. Module 1 provides essential background information and is a prerequisite for the other modules.**

The program timing is flexible. If you present all six modules, the program could take four or more hours. The amount of time for each module depends on the depth of your discussions. Review the modules you intend to present and determine how much time you can devote to discussion.

Objectives of the Program

Several problem areas and recommended strategies are addressed in this program. Specifically, this program will enable participants to:

1. Manage the quality of the treatment minorities receive, regardless of their roles (e.g., witnesses, litigants, defendants, or attorneys) from judges, lawyers, and court staff, both in the courtroom and around the courthouse;

2. Ensure that the words, actions, and behaviors of judges, lawyers, and court staff are consistent with the principles of fairness and equality; and

3. Take appropriate steps to assure minorities that racially based negative attitudes and beliefs will neither govern court proceedings nor dictate the outcomes of their cases.

Preparation Activities

Things to Do

- ☐ Determine which modules you are going to present.

- ☐ Review the appropriate sections of this Faculty Guide.

The Faculty Guide leads you step-by-step through each module of the *Bias in the Court!* workshop. You may follow the script in the right column, or use the call-out notes in the left column. The script provides word-for-word guidance. The call-out notes provide cues.

Notes to the instructor appear in **bold** font. These notes give you information about the text and provide instructions about actions you should take (e.g., posting responses on the flip chart).

☐ Refer to the opening section of each module you are going to present for additional preparation activities.

Module 1

Overview

Module 1. Overview

Module at a Glance

- Introduction
- Icebreaker
- Effects of Biased Behavior in State Courts
- Behaviors that May Indicate Bias
- Roles and Responsibilities
- Module Conclusion

Objectives

At the end of Module 1, participants will be able to:

1. Describe the effects of biased behavior in courts.
2. Identify behaviors that may signify racial and ethnic biases in court interactions.
3. Explain their role and responsibility in eliminating racial and ethnic bias.

Preparation

Things You Need

Equipment

- ☐ Flip chart (FC), markers, and masking tape
- ☐ Overhead projector
- ☐ Screen

Instructor material

- ☐ Faculty Guide, pp. 1-1 through 1-12
- ☐ Overheads (OH) 1-1 through 1-2, located in Appendix A

Participant material

- ☐ Handout (HO) 1-1: *State Court Findings and Remedies*, located in Appendix B
- ☐ HO1-2: *Model Suggestions for Bias-Free Behavior in Courts*, located in Appendix C
- ☐ HO1-3: *Model Court Conduct Handbook*, located in Appendix D

Things to Do

- ☐ Review pp. 1-1 through 1-12 of this Faculty Guide.
- ☐ Prepare FC1-1: Objectives (refer to pp. 1-3 and 1-4).
- ☐ Post warm-up questions on FC pages for the icebreaker (refer to page 1-4).
- ☐ Make copies of HO1-1: *State Court Findings and Remedies*. This handout is located in Appendix B of this Faculty Guide.
- ☐ Make copies of HO1-2: *Model Suggestions for Bias-Free Behavior in Courts*. This handout is located in Appendix C of this Faculty Guide.
- ☐ Make copies of HO1-3: *Model Court Conduct Handbook*. This handout is located in Appendix D of this Faculty Guide.

Introduction

Note to instructor: **Begin the workshop by welcoming the participants. Introduce yourself by providing information about your background and experience.**

State program purpose

The purpose of this program is to increase our awareness about biased behavior so that we may reduce the effects of racial and ethnic bias in court interactions.

State that they will learn about the effects of biased behavior

In this module, you will learn about the effects of biased behavior. In other words, how unwarranted conscious or unconscious words, actions, and behaviors on the part of judges, lawyers, and court staff often result in unfavorable outcomes for minorities involved in our legal system.

State that they will learn to identify and address biased behavior

You will learn how to identify these words, actions, and behaviors and how to replace them with words, actions, and behaviors that are bias-free.

Note to instructor: **Prepare FC1-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that during the program you can refer to it and point out when you have met each objective.**

Show FC1-1: Objectives
State objectives

Specifically, at the end of this module, you will be able to:

1. Describe the effects of biased behavior in courts.

2. Identify behaviors that may signify racial and ethnic biases in court interactions.

3. Explain your role and responsibility in eliminating racial and ethnic bias.

Introduce warm-up questions

Let's begin by talking briefly about your experiences with bias in the court.

Icebreaker

Note to instructor:

Step-by-step instructions for conducting the icebreaker are listed below. Post the questions on separate pieces of flip chart paper before the program.

Do not discuss the participants' answers. Just make a list of the issues they identify.

For each question, probe for responses from a representative sample of your audience (e.g., judges, attorneys, court managers, operational personnel).

Ask Question 1

What behaviors, words, or actions have you witnessed in court that someone may interpret as indicating a bias?

Note to instructor:

Pause to allow participants to consider the question and respond. Record responses.

Ask Question 2

What is your role in reducing biased behavior in the court? What can you do?

Note to instructor:

Pause to allow participants to consider the question and respond. Record responses.

Thank participants for input

Thank you all for your input. You have made some very good points and raised some important issues in response to these questions.

Conclude icebreaker

Throughout the workshop today, we're going to come back to these questions and examine some of the points you've raised. I am going to post these flip chart pages on the wall so we can easily refer to them throughout the day.

Note to instructor:

Tape the pages to the wall so that you may connect and comment on the responses during the presentation. You may wish to mention some of the specific responses that you will be discussing in the workshop.

The Effects of Biased Behavior in State Courts

State the importance of fairness in the court

Public trust and confidence in our legal system is grounded in the perception of fairness and equality in our courts and in the offices that lend support to our courthouses.

Describe how all court staff affect fairness in the court

The presence of fairness and equality in our courts is primarily a product of the people who work there and how they conduct themselves when interacting with the public.

Show OH1-1: Court Interactions
Explain "court interactions"

The phrase "court interactions" refers to the communication among individuals throughout the courthouse, particularly:

- The words, actions, and behaviors that court officers and employees display toward the public;
- The attitudes and beliefs these words, actions, and behaviors convey to the public; and
- The effects of these words, actions, and behaviors on public trust and confidence in our legal system.

State the effect of biased behavior

Words, actions, and behaviors that indicate bias diminish public trust and confidence in two fundamental principles of our justice system:

1. Our courts are free of perceived and actual bias; and
2. Equal access to fair and dignified treatment in our courts awaits all who enter therein.

Summarize the importance of individuals' behavior

When the public perceives biased behavior by court officers or employees, it diminishes their confidence in the quality and fairness of the entire justice system. In other words, your words, actions, and behaviors matter. You have an effect on how the public perceives our justice system.

State that biased behavior does exist in the courts

Some of you may be thinking that your court officers and employees do not exhibit biased behavior. Biased behavior is sometimes so ingrained that we do not even recognize it. Later in this module, we will identify some specific behaviors that are perceived as biased by people with whom we interact.

Refer to HO1-1: ***State Court Findings and Remedies***

Now I am going to distribute a handout that describes research by state task forces and commissions on the extent of bias in their courts and recommended strategies for overcoming it. You will see from this handout that the problem of biased behavior is not uncommon.

Note to instructor:

Distribute HO1-1: ***State Court Findings and Remedies*****. (The handout is located in Appendix B of this Faculty Guide. Make enough copies for all participants before the program begins.)**

Allow about five minutes for participants to look over the handout.

Debrief HO1-1

What did you think about the article?

- Was there anything that surprised you?
- What was new to you?
- What did you think about the recommended strategies that are described in the article?

Behaviors that May Indicate Bias

Define the scope of biased behavior in the court

When people talk about racial and ethnic biases in court interactions, they may be referring to several different types of behaviors. Racial and ethnic biases are exhibited in at least four ways in court interactions.

Show OH1-2: Biased Behaviors

Note to instructor:

Cover the points on the overhead with a piece of plain paper. Reveal each point as you discuss it.

Discuss #1 on OH1-2

One type of biased behavior is:

1. Conduct that overtly communicates hostile biases or naive stereotyping.

Ask participants for examples

Can someone give us an example of this type of behavior? What might someone <u>do</u> that overtly communicates hostile biases or naive stereotyping?

Note to instructor:

Pause to allow participants to think and respond. You may wish to mention the following possible examples:

- **Make a joke that plays on gender or ethnic stereotypes.**
- **Assume that a person of Hispanic, Asian, or African descent is not a judge, attorney, or officer of the court.**
- **Speaking more slowly to a person of foreign descent who was actually born and reared in this country.**

Discuss #2 on OH1-2

Another way in which biases are exhibited is:

2. Mistaken conclusions drawn by judges, attorneys, or juries about the behavior of litigants or witnesses, due to ignorance of variation in behavioral norms among cultural groups.

Ask participants for examples

Can someone give us an example of this type of behavior?

Note to instructor:

Pause to allow participants to think and respond. You may wish to mention the following examples:

- **Assuming that a nod or a "yes" indicates thorough understanding.**
- **Assuming that someone is lying if he or she does not make eye contact. In many cultures, making eye contact with someone in a position of authority is considered disrespectful.**

Discuss #3 on OH1-2

A third way in which biased behavior is exhibited is:

3. Habits of judges and lawyers that reflect conscious or unconscious bias.

Ask participants for examples

Can someone provide an example of this type of behavior?

Note to instructor: **Pause to allow participants to think and respond. You may wish to mention the following examples:**

- **Addressing majority lawyers by formal title such as counsel, but minority lawyers by informal reference such as their first name.**
- **Referring to women by terms such as "honey," "sweetie," or "dear."**

Discuss #4 on OH1-2 The fourth way in which biases are commonly exhibited is:

4. Case strategies that exploit stereotypes and biases when such references are not relevant to the case.

Ask participants for examples Can someone give us an example of this type of behavior?

Note to instructor: **Pause to allow participants to think and respond. You may wish to mention the following examples:**

- **Making an argument that it is customary in a particular ethnic or racial culture for men to hit their wives and that women encourage and expect it.**
- **Implying that a rape victim's dress or speech caused the attack.**

Summarize the discussion These four types of behaviors that we've just discussed are ways in which bias is evident in court interactions.

Ask for questions Are there any questions about these behaviors or how to identify them?

Note to instructor: **Listen and respond to questions.**

Roles and Responsibilities

Introduce topic At the beginning of the module, you answered a question about your role in reducing bias in court interactions. We're going to revisit that question and look at how one state task force and one state commission have defined roles and responsibilities.

Note to instructor: **Review the responses that participants gave to the icebreaker question.**

Refer to HO1-2: ***Model Suggestions for Bias-free Behavior in the Courts***

Let's look at some guidelines for creating a bias-free environment from the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts.

Note to instructor: **Distribute HO1-2:** ***Model Suggestions for Bias-Free Behavior in the Courts*****. (The handout is located in Appendix C of this Faculty Guide. Make enough copies for all participants before the program begins.)**

Allow no more than five minutes for participants to read the suggestions.

Refer to HO1-3: ***Model Court Conduct Handbook***

Now let's look at an excerpt from the *Model Court Conduct Handbook* written by the Women and Minorities in the Profession Committee of the State Bar of Georgia.

Note to instructor: **Distribute HO1-3: *Model Court Conduct Handbook*. (The handout is located in Appendix D of this Faculty Guide. Make enough copies for all participants before the program begins.)**

Allow five to ten minutes for participants to read the handbook.

Discuss the articles What did you think about these articles?

- What was new to you? Were there any surprises?
- What did you find most interesting?
- What was similar between Georgia's Commission and Michigan's Task Force?
- Are some of these suggestions behaviors that you take for granted or assume will occur? Would it surprise you if some of these behaviors were not exhibited? What is helpful about having them in writing?

Module Conclusion

Show OH1-2: Why remedy bias? Biases in court interactions diminish public trust and confidence in our justice system.

Give reasons why the problem of bias needs remedy It is imperative that we address biases in court interactions because:

1. They create the perception or actual existence of unequal treatment for racial and ethnic minorities.
2. They result in unfavorable case outcomes for racial and ethnic minorities.

3. Judges, attorneys, and court staff are responsible for preserving and protecting the dignity and integrity of the court.

Summarize learning

In this module we have discussed:

- The effect of biased behavior in courts,
- Behaviors that may signify racial and ethnic biases in court interactions, and
- Our roles and responsibilities in eliminating racial and ethnic bias.

Ask for questions

Are there any questions about what we have discussed?

Note to instructor:

Listen and respond to questions.

Conclusion

The information presented during this module will help you identify and reduce bias in court interactions. Think about how you can apply what you have learned here in your court.

Note to instructor:

If you are presenting additional modules, briefly state what the next module will address.

Module 2

Bias in the Courtroom

Module 2. Bias in the Courtroom

Module at a Glance

- Introduction
- Discussion and Video: *Bias in the Courtroom*
- Module Conclusion

Objectives

Module 2 is based on the video *Bias in the Courtroom.* The video contains seven vignettes that provide a medium for participants to:

1. Discuss the impact of perceptions of bias on the justice system.
2. Identify nonverbal behaviors that may signify bias in court interactions.
3. Identify language that may signify bias in court interactions.
4. Examine the behavior of court personnel.
5. Develop strategies for recognizing and correcting biased behavior in court interactions.

Preparation

Things You Need

Equipment

- ☐ Flip chart (FC), markers, and masking tape
- ☐ VCR and monitor
- ☐ Video: *Bias in the Courtroom*

Instructor material

- ☐ Faculty Guide, pp. 2-1 through 2-11

Participant material

- ☐ Handout (HO) 2-1: Video Discussion Guide
- ☐ HO2-2: Effects of Bias in the Courtroom

Things to Do

- ☐ Review pp. 2-1 through 2-11 of this Faculty Guide.
- ☐ Review the video *Bias in the Courtroom.*
- ☐ Prepare FC2-1: Objectives (refer to pp. 2-4 and 2-5).
- ☐ Make copies of HO2-1: Video Discussion Guide. This handout is located in Appendix E of this Faculty Guide.
- ☐ Make copies of HO2-2: Effects of Bias in the Courtroom. This handout is located in Appendix E of this Faculty Guide.

Instructor Notes

This module is based on the video *Bias in the Courtroom.* The video was produced by the American Bar Association Commission on Minorities in the Profession, the American Bar Association Judicial Administration Division, the Virginia Women's Attorneys Association, the Virginia Commission on Women and Minorities, and Arthur Young.

A Video Discussion Guide (HO2-1, located in Appendix E) provides structure for the discussions about the video by focusing participants on the important points. Review the video and the discussion guide before the program. After you review the video and discussion guide, you may find that you have points that you would like to add to the discussion during the program. Modify the discussion to meet the needs of your audience.

This Faculty Guide provides step-by-step instructions for leading discussions about the video. You may discuss the questions as a full group, or you may divide the participants into smaller groups to discuss the questions in more depth. If you decide to divide the participants into smaller groups, allow time for each group to report on their discussion to the entire class.

Introduction

State purpose of the module

In this module, we are going to further explore the issues we raised in Module 1. We will watch a video that illustrates the biased behaviors we discussed, and we will develop strategies for recognizing and correcting biased interactions in our courts.

Provide an overview of the video

The video features a series of seven vignettes. These vignettes address the following topic areas:

- The perception of bias;
- Nonverbal behavior, or body language;
- Names and titles; and
- The behavior of court personnel.

Interspersed throughout the video are excerpts from interviews with judges who discuss their roles in reducing bias in their courts, the power and influence of their own behavior, and their responsibility to monitor and control their own real or perceived biases.

Note to instructor:

Prepare FC2-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that you can refer to it and point out when you have met each objective.

Show FC2-1: Objectives
State objectives

Specifically, during this module, we will:

1. Discuss the impact of perceptions of bias on the justice system.

2. Identify nonverbal behaviors that may signify bias in court interactions.

3. Identify language that may signify bias in court interactions.

4. Examine the behavior of court personnel.

5. Develop strategies for recognizing and correcting biased behavior in court interactions.

Refer to HO2-1: Video Discussion Guide

I am going to distribute a handout that will help guide our discussion about the video. As you watch the video, make notes about the questions on the handout. We will stop the video periodically for discussion.

Note to instructor:

Distribute HO2-1: Video Discussion Guide. (The handout is located in Appendix E of this Faculty Guide. Make enough copies for all participants before the program begins.)

If you are going to divide the participants into smaller groups, do this now. Explain to them that they will share responses to the questions in the Discussion Guide with the whole group.

Video: *Bias in the Courtroom*

Announce the video

I am going to start the video. It is titled *Bias in the Courtroom.*

Note to instructor:

Start the video. Stop the video after Vignette #1: The Perception of Bias. Use the discussion questions below to encourage comments and feedback.

You may wish to record the responses to Question #3 on the flip chart. Question #3 encourages participants to think about strategies for overcoming bias. As you record their responses, tell them that these are strategies they can further develop and apply in their court.

If you have divided participants into smaller groups, ask each group to record their responses to Question #3 on a piece of flip chart paper.

Discuss Vignette #1: The Perception of Bias

This vignette dealt with the perception of bias in the courtroom.

1. How important are perceptions? Are perceptions an accurate measure of reality?
2. What impact do perceptions of bias have on the quality of our justice system? On public trust and confidence in our justice system?
3. How can we address perceptions of bias in court interactions?

Note to instructor:

Restart the video. Stop the video after Vignette #2: Body Language. Use the discussion questions below to encourage comments and feedback.

Discuss Vignette #2: Body Language

Nonverbal behavior sends powerful messages. As the judge stated in the interview, we often don't recognize the messages we send with our body language.

1. What types of nonverbal behavior have you witnessed in court that could indicate bias? In what ways do judges exhibit bias toward witnesses? Toward attorneys?

2. What effect do biased behaviors have on jurors? Do judges understand the effect of judicial actions on jurors? On witnesses? On the public?

3. Are there circumstances when bias is justified? For example, bias in favor of justice?

4. How do we distinguish between justified bias, if any, and unjustified bias?

Note to instructor: **Restart the video. Keep the video going through Vignettes 3 and 4: Names and Titles. Stop the video after Vignette #4. Use the discussion questions below to encourage comments and feedback.**

You may wish to record the responses to Question #3 and Question #5 on the flip chart. Questions #3 and #5 encourage participants to think about strategies for overcoming bias. As you record their responses, tell them that these are strategies they can further develop and apply in their court.

If you have divided participants into smaller groups, ask each group to record their responses to Questions #3 and #5 on a piece of flip chart paper.

Discussion Vignettes 3 and 4: Names and Titles

These vignettes addressed the issue of language and how the words we use may indicate bias.

1. How do you think the actions of the judge and the attorney in these vignettes may have influenced the jurors? What might the jurors think about the credibility of the witnesses?

2. How can we avoid overcompensating for biased feelings? Examples of overcompensation are showing exaggerated courtesy or condescension.

3. How can judges discourage attorneys from exhibiting biased behavior?

4. Should judges address biased behavior at the time of the offense or later?

5. How can judges and attorneys help each other recognize and overcome bias?

Note to instructor: **Restart the video. Keep the video going to the end. The remaining vignettes (Vignettes 5, 6, and 7) address the behavior of court personnel. Use the discussion questions below to encourage comments and feedback.**

You may wish to record the responses to Questions #2 and #3 on the flip chart. Questions #2 and #3 encourage participants to think about strategies for overcoming bias. As you record their responses, tell them that these are strategies they can further develop and apply in their court.

If you have divided participants into smaller groups, ask each group to record their responses to Questions #2 and #3 on a piece of flip chart paper.

Discuss Vignettes 5, 6, and 7: Court Personnel

These vignettes showed how court personnel and judges show bias in their interactions.

1. What degree of biased conduct is grounds for dismissal of court personnel, including judges?

2. What can and should judges do to help court personnel recognize and correct biases?

3. How can judges work among themselves to address bias in courtrooms and court-houses?

Transition to summary discussion

This video showed us some specific examples of how bias may be exhibited in court interactions. We had some good discussion and began to develop strategies for overcoming bias in our courts. We're going to wrap-up this module by reviewing the negative effects of bias.

Module Conclusion

Ask for definition of bias

Reflect for a moment on what we have discussed in this program. Based on what we have covered, how would you define bias?

Note to instructor:

Pause to allow participants to think and respond.

Provide dictionary definition

Thanks for your input. A simple, dictionary definition of bias is:

- A preference or inclination that inhibits impartial judgment;
- A prejudice.

Explain that everyone is affected by bias

We all hold biases about ourselves and each other. We have all been in situations where we've felt prejudged based on factors other than our unique personalities.

Everyone is negatively affected by bias in court interactions.

Refer to HO2-2: Effects of Bias

I am going to distribute a handout that summarizes how bias affects court principals and diminishes the integrity of our legal system. You may use this handout in your court in your efforts to increase awareness about bias in court interactions.

Note to instructor:

Distribute HO2-2: Effects of Bias in the Courtroom. (The handout is located in Appendix E of this Faculty Guide. Make enough copies for all participants before the program begins.)

Allow about three minutes for participants to look over the handout.

Ask for questions about handout

Are there any questions about the handout?

Note to instructor:

Listen and respond to questions.

Summarize learning

In this module we have examined:

1. The impact of bias and the perception of bias on the justice system.

2. Nonverbal behaviors that may signify bias in court interactions.

3. Language that may signify bias in court interactions.

4. The behavior of court personnel.

5. Strategies for recognizing and addressing biased behavior in court interactions.

Ask for questions

Are there any questions about what we have discussed?

Note to instructor:

Listen and respond to questions.

Conclusion

Thank you all for your participation. Our discussions during this program have benefited from sharing the unique perspectives and experiences we each have. Think about how you can apply what we have discussed here in your court.

Note to instructor:

If you are presenting additional modules, briefly state what the next module will address.

Module 3

Statute for Your Thoughts?

Module 3. Statute for Your Thoughts?

Module at a Glance

- Introduction
- Discussion of *Statute for Your Thoughts?*
- Module Conclusion

Objectives

Module 3 consists of a discussion based on the article *Statute for Your Thoughts?* Through the discussion, participants will:

1. Define racial imagery.
2. Identify the effects of racial imagery.
3. Discuss the court's responsibility concerning the use of racial imagery.
4. Develop strategies for reducing the effects of racial imagery in court proceedings.

Preparation

Things You Need

Equipment — ☐ Flip chart (FC), markers, and masking tape

Instructor material — ☐ Faculty Guide, pp. 3-1 through 3-12

Participant material — ☐ Handout (HO)3-1: *Statute for Your Thoughts?*

Things to Do

- ☐ Review pp. 3-1 through 3-12 of this Faculty Guide.
- ☐ Read HO3-1: *Statute for Your Thoughts?*
- ☐ Prepare FC3-1: Objectives (refer to pp. 3-4 and 3-5).
- ☐ Make copies of HO3-1: *Statute for Your Thoughts?* This handout is located in Appendix F of this Faculty Guide.
- ☐ Send copies of HO3-1 to participants before the program.

Instructor Notes

This module is based on the article *Racial Imagery in Criminal Cases*, by Professor Sheri Lynn Johnson of Cornell Law School, published in the Tulane Law Review, June 1993. The title *Statute for Your Thoughts?* was added to Professor Johnson's article to frame the exercise and discussion.

Because the article is too long to read in class, send a copy of HO3-1 to each participant ahead of the program. HO3-1 contains the article and a discussion guide to help participants focus their thoughts about the article. Send a letter with the handout instructing participants to read the article and think about the discussion questions before the day of the program. The article is located in HO3-1 in Appendix F of this Faculty Guide.

Module Conclusion

Discuss qualities

As a final comment on this topic, let's discuss some overall qualities that are important in cross-cultural communication.

Empathy and genuineness

Empathy and genuineness are the main qualities.

Taking a moment to consider "How would I feel in this person's situation?" will help you to slow down and think about what your client needs from you. Imagine if you were to appear in the court of a foreign country. What kinds of support do you think you would need?

When you meet clients from a culture other than your own, spend some time getting to know them. Ask them how they grew up, and what it was like in their country of origin.

Court officers, judges, and lawyers may need to respond both to what the individual is saying explicitly and to what is implied or hinted.

Use playback to understand both explicit and implicit messages, and to reaffirm what has been said.

Be honest about your own knowledge. If your knowledge about a country or culture is limited, ask the person with whom you are communicating to enlighten you. By learning more about his or her background, you will increase your ability to deal effectively with their situation.

Ask for questions or comments

Are there any questions or comments about what we have covered?

Provide additional points

In addition to what we've already mentioned, here are some additional points to keep in mind:

- "Yes" may mean "I'm listening," "I agree with you," or "I heard you," depending on the culture. Silence may indicate respect, disagreement, or personal emotional exhaustion. You must always be conscious of the fact that all communication is passing through a cultural barrier.

- Consider the nonverbal cues of different cultures also. Do not draw conclusions about a person's temperament from hand gestures or loud speech alone.

- Limit your hand gestures to things like numbers and sizes that can be communicated in this fashion.

- Remember that many people understand English better than they speak it. They probably understand what you are saying to others in the room, so guard confidential information and remain otherwise professional in all your conversations.

- To people who do not know the U.S. system of justice, you may need to explain the concept of bail, presumed innocence, or the jury system. They may require your patience in explaining what is happening to them.

- **Emphasize the main point you want to communicate. State one idea at a time to keep things simple.**

- **Use simple language. Ask "Where do you live?" rather than "What is your place of residence?" If your client does not understand what you are saying, rephrase it and try again.**

- **Speak slowly and clearly. Do not exaggerate your speech or speak loudly if you are not understood. This may intimidate your client, and does nothing to improve the communication. Be aware that your client may be frustrated in communicating, as well, and may also speak loudly. This does not mean that the client is angry.**

- **Avoid slang and mixed languages. These only confuse matters further.**

- **Do not use sentences with double negatives like "Did you not see the car?"**

- **Be consistent in your use of terminology. Call "the father" "the father" every time you talk about the same person. Referring to him as "the husband" or "the brother" can also be confusing.**

- **You may need to ask a question several times to be sure you have the right response. The first response may be given simply to please you.**

Explain techniques

There is no magic to it. For each cultural group you come into contact with, take the time to educate yourself about that culture.

Review what you know about the culture and the person, about how that person identifies with their culture of origin.

Then, be aware of differences between their culture and yours. Before important conversations, plan how you will accommodate those cultural differences.

Discuss specific techniques for non-English speakers

Suppose you have an interview with an individual from a different cultural group than yours, and you know that the individual's English language skills are not strong. What might you do?

Note to instructor:

Pause and wait for participants to respond. Mention the following points if participants do not.

- **Allow extra time for the interview. If you are using an interpreter, the interview may take twice as long.**
- **Gather information about the individual and his or her culture. This will help you to communicate legal alternatives to the client.**
- **Use open-ended questions, which are less limiting and encourage a broader response. The opportunity to explain an issue may give you additional insight on the situation at hand. Open-ended questions may also put the interviewee more at ease.**

- **Despite broad cultural differences, no assumptions were made about specific behaviors.**
- **Court personnel showed empathy in sending an individual familiar with the culture to serve the no-abuse order.**

Ask what else they could have done What else could they have done?

Note to instructor: **Possible answers include:**

- **Display dual language signs in the building.**
- **In areas with large non-English-speaking populations, provide written instructions for common procedures in the most frequently spoken languages.**
- **Provide a certified interpreter.**

Ask for other comments Are there other comments about this example?

Summarize section Equal access to justice requires vigilance to prevent assumptions from obscuring facts.

Improving our knowledge about cultural norms helps to ensure that members of the multiple cultures that use our judicial system will receive equal access to justice.

Techniques to Improve Cross-Cultural Communication

Introduce discussion Given this diversity in communication styles and norms, how can court managers, lawyers, and judges build communication bridges among the cultural groups? How can this become a part of our daily thought processes and activities?

- **Allow extra time.**
- **Confirm Patricia's understanding with the proceedings.**
- **Demonstrate empathy.**
- **Playback explicit and implicit points of the conversation.**

Ask for comments Are there other comments about Ann and Patricia's interactions?

Transition to Tinh and Bien What were the differing customs and norms in the second story with Tinh and Bien?

Note to instructor: **Possible answers include:**

- **Gender roles**
- **Language**
- **Conception of authority**
- **Perception of kinship and family**

Ask about assumptions What assumptions were made?

Note to instructor: **Possible answer:**

Both an interpreter and someone familiar with the culture were necessary for the court to respond appropriately.

Ask what was done well What was done well in this situation?

Note to instructor: **Possible answers:**

- **All court personnel were generally supportive, even if they did not have the specialized skills to be supportive.**
- **Within available resources, interpreters were provided.**

Ask about Patricia's assumptions What assumptions did Patricia make?

Note to instructor: **Possible answers include:**

- **Patricia assumed that her extended family life was not relevant.**
- **Patricia assumed she had all the relevant information.**
- **Patricia assumed arbitrary government intervention.**
- **Patricia assumed the fitness hearing was not important.**
- **Patricia assumed that the social worker did not have the children's interest at heart.**

Ask what Ann could have done What could Ann have done differently to avoid misunderstandings?

Note to instructor: **Possible answers include:**

- **Get an interpreter.**
- **Ask Patricia about her culture.**
- **Research Patricia's culture, so that consideration could be given to varying cultural norms.**
- **Ann could have looked to herself to find the source of her discomfort. She could have been honest with herself about her lack of knowledge about the culture.**
- **Be patient. Spend more time in the interview process to determine why the children were alone, why Patricia left them, and other mitigating circumstances.**

Note to instructor: **Probe for the following responses:**

- **Patricia's language is high context, Ann's is low context.**
- **Ann is well dressed. Perhaps dress and appearance norms differ.**
- **Their perception of kinship and family differ. Patricia is private about her extended family.**
- **Patricia is fearful of authority.**
- **Ann's lack of physical gestures was misleading to Patricia.**
- **Patricia's gestures were frightening to Ann.**
- **Patricia's loud tone of voice was threatening to Ann.**

Ask about assumptions What assumptions did Ann make?

Note to instructor: **Possible answers include:**

- **Patricia's tone, gestures, and language choice meant she was violent, unstable, and angry.**
- **Patricia left the children without supervision.**
- **Patricia behaved irresponsibly in leaving her children.**
- **Patricia's English was good enough to explain her situation.**
- **Ann's Spanish was good enough to understand Patricia.**

Refer to HO6-2: *Comparing Cultural Norms and Values*

Thank you for all of your input. I am going to distribute a handout that summarizes some of what we have discussed about differences in cultural norms and values.

Note to instructor:

Distribute HO6-2: *Comparing Cultural Norms and Values*. This handout is located in Appendix I of this Faculty Guide. Make enough copies for all participants before the program.

Application Exercise

Introduction

Now, let's examine how cross-cultural norms and communication may operate in the court system.

Refer to HO6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*

I am going to distribute an article that shows two examples of the management of cultural differences in communication. This article was excerpted from *Ensuring Equal Justice*, a publication of the Massachusetts Bar Association.

Note to instructor:

Distribute HO6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*. This handout is located in Appendix I of this Faculty Guide. Make enough copies for all participants before the program.

Allow five to ten minutes for participants to read the article.

Debrief the article

Let's talk about the stories in the article. First, Patricia and Ann.

- What were the cultural norms that differed between Patricia and Ann, the social worker?

You may have the participants work in small groups to complete this activity. Instruct each group to record their answers on flip chart paper. Allow time at the end for each group to report their results.

Refer to HO6-1: Based on your own knowledge and the article *Language and Communication Skills for Effective Cross-Cultural Communication*, what are some examples of cultural norms?

Note to instructor: **Record responses in the left column of the flip chart. Probe for the following responses:**

- **Dress and appearance**
- **Gender roles**
- **Concept of authority**
- **Degree of context in language (high or low)**
- **Relationships, family, friends**
- **Values**
- **Beliefs and attitudes**
- **Work habits**
- **Nonverbal signals**

Complete the table Let's fill in the columns of our table for each type of cultural difference we've listed.

Note to instructor: **Encourage responses. Fill in American norms for each category and then examples of norms from other cultures.**

Transition to discussion of cultural customs and norms

Cultural customs and norms reflected in communication vary tremendously. Judges, court personnel, and lawyers face the challenge of communicating daily with people from diverse backgrounds with varied cultural customs and norms. These norms can interfere with effective communication, so let's take a look at ways that these norms and customs vary across different cultures.

Cultural Customs and Norms that Affect Cross-Cultural Communication

Introduce challenge

If we hope to provide equal justice to all, we must recognize that our individual values and cultural norms are not necessarily shared by everyone else with whom we interact.

We must also recognize that the values and behaviors of all cultural groups are neither right nor wrong, but simply different.

Our challenge is to recognize how they differ and to consider the role of customs and norms in what an individual of a particular group says to us, as well as how (as a member of a particular group) we respond to them.

Let's look at some of the ways communication can differ across cultures.

Note to instructor:

Use several pieces of flip chart paper for the next activity. Divide each piece into three columns with the following headings:

Cultural Norm	American	Other Cultures

Ask Question 1

We have all experienced cross-cultural miscommunication at one time or another. What are some of the cross-cultural communication challenges you have experienced? Did the article remind you of any?

Note to instructor:

Pause to allow participants to consider the question and respond. Record responses.

Ask Question 2

How did you address those challenges at the time? Or did you?

Note to instructor:

Pause to allow participants to consider the question and respond. Record responses.

Thank participants for input

Thank you all for your input. You have made some very good points and raised some important issues in response to these questions.

State importance for audience

Communicating well with a person from another culture, a different country, or whose native language is different from yours requires knowledge, skill, and sensitivity.

Like all skills, cross-cultural communication is a learned activity that can be improved through several means.

Part of professional competence

Effective cross-cultural communication is an essential part of professional competence. High quality communication is an essential element of the administration of justice, without which the best intentions and highest standards cannot be met.

As an administrator of justice, it is incumbent upon you to strive to continually enhance your cross-cultural communications in the interest of justice.

Introduction

Describe module content

In this module, we will examine how cross-cultural norms and customs affect communication, and have the opportunity to practice some techniques to improve cross-cultural communication. In addition, we will take a look at some qualities of communication and how they help to establish trust and promote openness.

Note to instructor:

Prepare FC6-1 before the workshop by posting the bullet points shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that during the program you can refer to it and point out when you have met each objective.

Show FC6-1: Objectives

State objectives

Specifically, at the end of this module, you will be able to:

1. Identify customs and norms that affect cross-cultural communication.
2. Use techniques to improve cross-cultural communication.
3. Encourage cross-cultural communication through the demonstration of qualities important to cross-cultural communication.

Introduce warm-up questions

Let's begin by hearing from you about your reactions to the article, *Language and Communication Skills for Effective Cross-Cultural Communication.*

Note to instructor:

Post the questions and record responses on the flip chart.

- ☐ Make copies of HO6-2: *Comparing Cultural Norms and Values*. This handout is located in Appendix I of this Faculty Guide. You will distribute this handout during the program.
- ☐ Make copies of HO6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*. This handout is located in Appendix I of this Faculty Guide. You will distribute this handout during the program.

Instructor Notes

This module is based on *Language and Communication Skills for Effective Cross-Cultural Communication*, by Dianne E. Mahony, excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*.

This Faculty Guide provides step-by-step instructions for leading a discussion about the article. Read the article and this Faculty Guide before the program. You may find that you have additional questions for the discussion.

Send a copy of HO6-1 to each participant ahead of the program. Send a letter with the handout instructing participants to read the material before the day of the program. HO6-1 is located in Appendix I of this Faculty Guide.

Preparation

Things You Need

Equipment

- ☐ Flip chart (FC), markers, and masking tape

Instructor material

- ☐ Faculty Guide, pp. 6-1 through 6-17

Participant material

- ☐ Handout (HO)6-1: *Language and Communication Skills for Effective Cross-Cultural Communication*
- ☐ HO6-2: *Comparing Cultural Norms and Values*
- ☐ HO6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*

Things to Do

- ☐ Review pp. 6-1 through 6-17 of this Faculty Guide.
- ☐ Read HO6-1: *Language and Communication Skills for Effective Cross-Cultural Communication*
- ☐ Review HO6-2: *Comparing Cultural Norms and Values*
- ☐ Read HO6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*
- ☐ Prepare FC1: Objectives (refer to page 6-4).
- ☐ Make copies of HO6-1: *Language and Communication Skills for Effective Cross-Cultural Communication*. This handout is located in Appendix I of this Faculty Guide.
- ☐ Send a copy of HO6-1 to each participant before the program.

Module 6. Language and Communication Skills for Effective Cross-Cultural Communication

Module at a Glance

- Introduction
- Cultural Customs and Norms That Affect Cross-Cultural Communication
- Techniques to Improve Cross-Cultural Communication
- Module Conclusion

Objectives

Module 6 is based on *Language and Communication Skills for Effective Cross-Cultural Communication*, by Dianne E. Mahony, excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*. At the end of Module 6, participants will be able to:

1. Identify customs and norms that affect cross-cultural communication.
2. Use techniques to improve cross-cultural communication.
3. Encourage cross-cultural communication through the demonstration of qualities important to cross-cultural communication.

Module 6

Language and Communication Skills for Effective Cross-Cultural Communication

Conclusion By attending this program, you have begun to increase your multicultural awareness. Think about how you can apply what you have learned here in your court.

Note to instructor: **If you are presenting additional modules, briefly state what the next module will address.**

- **Organize a cultural resource library containing information from newspaper articles, books, magazines, and other sources describing different ethnic, religious, racial, linguistic, and national groups and their cultures.**

- **You can also organize public outreach programs and invite speakers to address ethnic and cultural issues observed in their cultures**

Summarize responses

We have a lot of good ideas here. All efforts you make to show respect for individuals will contribute to furthering equal justice.

Module Conclusion

State importance of cultural awareness

Cultural awareness is a skill that must be learned. Like the development of communication skills, increased cultural awareness enhances our ability to communicate effectively with others. Because we are a nation of extraordinary ethnic and cultural diversity, it is incumbent on us to enhance our cultural awareness to ensure equal access to justice for all.

Summarize module objectives

In this module, we have:

1. Described how assumptions about cultural differences affect court interactions.

2. Identified ways to improve multicultural competence in the courts.

Can you modify the words you use, your physical gestures, your tone of voice, the level of context of your comments, or other aspects of the way you appear to others in order to minimize the stress?

Ask for input What are some other things you can do?

Note to instructor: **Post responses on the flip chart. Mention the following points if participants do not:**

- **Ask how to pronounce a person's name, if you are unsure.**
- **Refrain from staring at physical attributes that seem unusual to you.**
- **Focus on the issue at hand, not individual characteristics.**
- **Repeat or reword your communication if you are not sure you have been understood. Do not talk louder to be understood.**
- **Ask if your point has been understood.**
- **Contact organizations that represent the interests of different ethnic, racial, linguistic, religious, and other groups. These organizations may recommend speakers who would be willing to address a lunch gathering of your organization's members or may suggest training materials designed to increase understanding of their community.**

Improving Multicultural Competence in the Courts

Introduce discussion

It is idealistic to think that we will be able to understand everyone from a different cultural group with whom we come in contact. We can, however, focus on a few groups with whom we have considerable contact, and can educate ourselves to be more aware of the values, practices, and beliefs of those groups.

Note to instructor:

Post the questions, below, on the flip chart.

Ask participants to think about multicultural challenges

Improving multicultural competence in the courts begins with giving serious thought to questions such as these:

- Which cultural group other than your own do you think you understand best?
- How did you gain your understanding?
- What differences do you notice in members of other cultural groups that make you uncomfortable? Can you identify the reasons for your reactions?
- What do you think are the influences of your own culture, race, or religion on you?
- Can you identify some of the stereotypes that others associate with your background? Do those stereotypes describe you?

Note to instructor:

Encourage discussion.

Apply to court proceedings

Individuals working their way through judicial proceedings are in a stressful situation. Any way that you can help to alleviate that stress will help that individual to participate more effectively in the process.

Summarize

Generally, we do not mention identifying characteristics that seem most common to us. If we are members of the dominant race or culture, or speak the dominant language, we do not list those things. For example, did anyone whose first language is English include "speak English" as an attribute on your first list?

State that this helps us recognize the relationship between attributes and assumptions

We usually notice first those characteristics in other people that seem most dissimilar to what we believe is the norm. And somehow, we equate the norm as good and other-than-the-norm as less good.

When we notice first the characteristics that differentiate another from us rather than the characteristics that another person shares with us, we will tend to emphasize the differences between us rather than the similarities. Emphasizing differences can make communication harder.

We will be better able to recognize when we are making assumptions when we remember that our norms are simply that: our norms. We will then be better equipped to stop ourselves from making assumptions about individuals based merely on their membership in a group that has different norms than our own.

Conclude discussion about attributes and assumptions

Remaining open to and accepting of differences is not easy, but if we pay attention to our own reactions, we can learn to challenge ourselves. Recognizing the influence of our own and others' background on our communication gives us the power to improve the quality and effectiveness of our interactions.

Participants describe others

Finally, think about someone you know who is different from you in some way such as ethnic background, first language, religion, race, or sexual preference. Describe that person using a list of ten things.

Note to instructor:

Wait for participants to complete the third list. When they have finished, walk them through the following analysis of their lists. After you ask each question in the analysis, pause to allow participants to think. If people volunteer responses, facilitate a discussion about their lists. Some groups will feel comfortable sharing aloud, others will not.

Debrief exercise

Look at your first list.

- How do you describe yourself? Do you emphasize gender, race, religion, ethnic background, marital status, family role, professional status, economic status, or hobbies?
- How did you order the attributes you used to describe yourself? What was the first attribute on your list?

Now look at your other two lists.

- Did you describe the other two people with the same attributes as you described yourself?
- Were the attributes in the same order as the attributes you used to describe yourself?

- **Physical or other characteristics**

Review the list of assumptions

As you were talking, I listed some of the assumptions you mentioned. Look how many types of assumptions we make about others. How many of us are really aware about the number and type of assumptions we make in our interactions?

Importance of recognizing when we make assumptions

The important lesson here is to train ourselves to recognize when we are making assumptions that may interfere with our ability to understand and deal effectively with another person.

Once we have learned to recognize when we are making assumptions, we can learn to check whether or not our assumptions are valid, and improve the quality of our communication.

How to recognize assumptions

So, how can we begin to recognize when we are making assumptions? Let's practice by doing an exercise that is briefly described in the article you read.

Description-Attribution Activity

Describe activity

This is an individual activity. I won't be asking you to share your answers. Just write down your responses on a sheet of paper.

Participants describe selves

First, describe yourself using a list of ten things.

Note to instructor:

Wait until people have completed their list to continue.

Participants describe others

Now, think about someone you have recently met. Describe that person using a list of ten things.

Note to instructor:

Wait until people have completed the second list.

Assumptions about groups are damaging to individuals

Moreover, if we assume that members of a certain group are more likely to act in certain ways, we are more likely to notice when members of the group do act that way. We notice the behavior we expect to see. Our assumptions become a self-fulfilling prophesy.

Link to court interactions

In the same way that teachers program success or failure in students by reinforcing their own expectations, court officers, lawyers, and judges can also program success or failure into the experience of people who interact with the courts.

Ask for experience with assumptions in the court setting

In your experience in the court, what type of assumptions about people have actually proved helpful? What assumptions have proved more damaging to court interactions? What have you seen that works or doesn't work?

Note to instructor:

Encourage discussion. As you listen, summarize the bases for assumptions that participants mention on a piece of flip chart paper. Some attributes or characteristics that will probably come up include:

- **Skin color**
- **Accent**
- **Disability**
- **Socioeconomic class**
- **Ethnic background**
- **Religion**
- **Different style of dressing, styling hair, or wearing jewelry**

Recognizing Assumptions

Provide background facts about diversity in the U.S.

In the 1990 U.S. Census, U.S. residents reported that they belonged to 300 races, 600 Indian tribes, 70 Hispanic groups, and 75 combinations of these groups. The essence of diversity is complexity. It is no wonder that in the midst of all these differences, people find communication difficult, and understanding elusive.

Refer to HO5-1: *A Self-Training Guide to Cultural Awareness*

In the handout you read, entitled *A Self-Training Guide to Cultural Awareness,* the authors state that in an effort to predict how someone will react to us, we often make assumptions based on physical or other characteristics.

Explain why we make assumptions

If we can accurately predict how people will react to us based on our assumptions, we can be more successful in our interactions.

Explain when assumptions are helpful

These assumptions sometimes do prove helpful. For example, they may provide us with background information that makes us more sensitive and understanding toward others. This sensitivity and understanding will make our interactions more successful.

State the problem with assumptions

At other times, however, assumptions impair our ability to work with people effectively. The problem with assumptions is that it is extremely difficult to accurately predict how people will react based on their physical characteristics.

As the article points out, "we cannot always stay sufficiently informed about everyone who is different from us to be certain that our assumptions are correct."

Introduction

Establish link to Module 1: In Module 1 we identified how biased words, actions, and behaviors can affect the public's trust and confidence in our justice system. We also discussed several types of behaviors that demonstrate biases.

State purpose of this module In this module, we will examine how our own experiences and group identification influence our assumptions about others and how those assumptions can lead to the types of biased behavior we discussed in Module 1.

Describe workshop content We will explore how to recognize assumptions, how assumptions influence behavior, the values placed on cultural differences, and how our background influences our attitudes toward others. Then, we will talk about specific things you can do to improve multicultural competence in your professional community.

Note to instructor: **Prepare FC5-1 before the workshop by posting the bullet points shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that during the program you can refer to it and point out when you have met each objective.**

Show FC1: Objectives
State objectives Specifically, at the end of this session, you will be able to:

1. Describe how assumptions about cultural differences affect court interactions.

2. Identify ways to improve multicultural competence in the courts.

Things to Do

- ☐ Review pp. 5-1 through 5-11 of this Faculty Guide.
- ☐ Read HO5-1: *A Self-Training Guide to Cultural Awareness.*
- ☐ Prepare FC5-1: Objectives (refer to page 5-3).
- ☐ Make copies of HO5-1: *A Self-Training Guide to Cultural Awareness.* This handout is located in Appendix H of this Faculty Guide.
- ☐ Send copies of HO5-1 to participants before the program.

Instructor Notes

This module is based on *A Self-Training Guide to Cultural Awareness*, by Gladys E. Maged and Dianne E. Mahony, excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice.*

This Faculty Guide provides step-by-step instructions for leading a discussion about the article. Read the article and this Faculty Guide before the program. You may find that you have additional questions for the discussion.

Send a copy of HO5-1 to each participant ahead of the program. Send a letter with the handout instructing participants to read the material before the day of the program. HO5-1 is located in Appendix H of this Faculty Guide.

Module 5. Cultural Awareness

Module at a Glance

- Introduction
- Recognizing Assumptions
- Improving Multicultural Competence in the Courts
- Module Conclusion

Objectives

Module 5 is based on *A Self-Training Guide to Cultural Awareness*, by Gladys E. Maged and Dianne E. Mahony, excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*. At the end of Module 5, participants will be able to:

1. Describe how assumptions about cultural differences affect court interactions.
2. Identify ways to improve multicultural competence in the courts.

Preparation

Things You Need

Equipment — ☐ Flip chart (FC), markers, and masking tape

Instructor material — ☐ Faculty Guide, pp. 5-1 through 5-11

Participant material — ☐ Handout (HO) 5-1: *A Self-Training Guide to Cultural Awareness*

Module 5

Cultural Awareness

Summarize learning

In this module we have:

- Examined the effects of nonverbal behavior.
- Identified nonverbal behaviors that may influence jurors.
- Discussed the court's responsibility concerning the influence of nonverbal behavior.

Conclusion

By attending this program, you have increased your awareness about the effects of nonverbal behavior on court interactions. Think about how you can apply what you have learned here in your court.

Note to instructor:

If you are presenting additional modules, briefly state what the next module will address.

Note to instructor: **Encourage discussion. Post responses on the flip chart.**

Module Conclusion

State that correction begins with personal awareness

One way that we can begin to reduce the influence of nonverbal behavior is to become more aware of our own behavior and the signals that we send.

Ask about personal awareness of nonverbal signals

How aware are you of the nonverbal signals you send? What about facial expressions? Are you aware of what your face is telling people? Do you think of yourself as a "poker face"?

Note to instructor: **The question above is mostly a rhetorical question. Pause a few seconds for people to reflect. If people do volunteer responses, allow a few seconds for discussion.**

Refer to HO4-3: *The "Clever Hans" Phenomenon*

I am going to distribute a story for you to read. As you read it, think about the nonverbal signals you may be unconsciously sending.

Note to instructor: **Distribute HO4-3: *The "Clever Hans" Phenomenon*. (The handout is located in Appendix G of this Faculty Guide. Make enough copies for all participants before the program begins.)**

Ask for questions or comments

Does anyone have any comments about this story or about what we have discussed in this module?

Note to instructor: **Listen and respond to questions or comments.**

Note to instructor: **Post the bullet points, below, on the flip chart.**

State appellate court actions

Appellate courts have been more proactive in attempting to develop ways to curb the influence of nonverbal behavior. Clay describes a four-factor sliding scale that examines:

- The materiality or relevance of the behavior or comment;
- The emphatic or overbearing nature of the behavior or comment;
- The efficacy of any curative instruction used to correct the error; and
- The prejudicial effect of the behavior or comment in light of the trial as a whole.

Discuss difficulties with appellate court measures

What do you think of this "sliding scale"? What difficulties do you see in using it? What difficulties does Clay mention?

Note to instructor: **Encourage discussion. Probe for the following difficulties mentioned by Clay:**

- **In many instances, the alleged prejudicial conduct cannot be preserved in the record for appeal.**
- **Defense counsel must make a contemporaneous objection to preserve the alleged misconduct in the record.**
- **It is difficult to assess the prejudicial impact of a judge's behavior on jurors.**

Discuss strategies for reducing effects of nonverbal signals

Given all of this, what can we do in our courts to reduce the influence of nonverbal behavior?

Note to instructor: **Distribute HO4-2. *Examples of Nonverbal Behavior in the Court.* (The handout is located in Appendix G of this Faculty Guide. Make enough copies for all participants before the program begins.)**

Allow two to three minutes for participants to review the handout.

Debrief the handout What do you think of the decisions by the appellate courts?

- How would you characterize the behaviors described in these scenarios?
- What effect do you think these behaviors had on the outcomes of the trials?

Mention Clay's point about adopting preventive measures Based on examples such as these, Clay raises the point that "one might think that the courts would acknowledge the influence of nonverbal behavior and adopt prophylactic measures to ensure that such factors do not receive excessive consideration by the jury."

Ask what courts have actually done about nonverbal signals What have trial courts done to address the issue of nonverbal signals?

Note to instructor: **Encourage responses from participants. Bring up the following discussion point:**

- **According to Clay, some courts have actually done the opposite. "Florida judges are permitted to instruct the jury that it may weigh nonverbal cues in making their decision. A similar jury instruction is available in California."**

Ask for examples

What are some specific examples of these types of nonverbal signals? How have you seen these displayed in court? What has been the effect?

Note to instructor:

Encourage discussion of participants' experience with nonverbal communication in court. Probe for the effect of the nonverbal communication on witnesses, defendants, and jurors.

Thank participants for input

Thanks for your input. These are all good examples of the types of nonverbal behavior that occurs in court and the effects of that behavior.

Link to possible racial/ethnic bias

Nonverbal behaviors and how they are interpreted can vary according to race and ethnicity, social and economic status, group, and individuals.

If a correlation can be established between certain nonverbal signals and a person's status or background, such persons will have a diminished chance of persuading a jury. Clay makes this point specifically with regard to powerless and hypercorrect speech, but we can see the implications for other types of nonverbal signals as well.

Discuss courts' reactions to nonverbal signals

Clay details some ways in which courts have responded to the effects of nonverbal signals.

Refer to HO4-2: *Examples of Nonverbal Behavior in the Court*

I am going to distribute a handout that summarizes some of Clay's research. In these examples, appellate courts found that nonverbal communication significantly influenced the outcome of the trial.

The vocal portion of a message includes the intonation, tone, stress, and length and frequency of pauses.

- Fifty-five percent of the meaning comes from facial expression!

This fact gives us some understanding of the importance of having a "poker face."

Link to courtroom interactions

Most of you were probably already aware of the significance of nonverbal messages. Our challenge is to examine the impact of these behaviors in the courtroom.

Quote from Clay

As Clay points out, "innumerable techniques are available to the attorney to make a message less believable. But more troubling than these recognized techniques are the latent mannerisms that transmit messages which, unknown to the attorney, convey meanings different than those actually intended."

Ask for examples of nonverbal communication

What are some examples of "latent mannerisms"? What sort of body language did I use in the demonstration? What nonverbal signals do you recognize and respond to?

Note to instructor:

Probe for the following examples:

- **Eye contact**
- **Facial expression**
- **Gestures**
- **Body posture**
- **Trunk movement**
- **Distance**
- **Speech patterns**

Discussion of *Race and Perception in the Courtroom*

Note to instructor: **Post the following statistical facts on the flip chart:**

Percentage of meaning we derive from a spoken message:

- **7% = actual words**
- **38% = vocal content (intonation, tone)**
- **55% = speaker's facial expression**

State importance of nonverbal signals to meaning

Nonverbal signals convey a large part of the meaning behind spoken messages.

Refer to HO4-1: *Race and Perception in the Courtroom*

You read the article *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System* before this program.

Note to instructor: **Refer to the flip chart with the statistical facts.**

Report percentage of meaning received from verbal signals

The author, D. A. Clay, reports the following facts from psychologist Albert Mehrabian:

- The verbal component of a spoken message accounts for only 7 percent of its total content.

Verbal component refers to the words we actually speak. So, people only derive 7 percent of the meaning of a message from the actual words we say!

- Of the remaining 93 percent of the meaning, 38 percent comes from the vocal portion of the message.

Make the point that nonverbal behavior affects perceptions

As we can see from this demonstration, nonverbal behavior does affect our perceptions about other people.

State the effect of nonverbal behavior in court interactions

Nonverbal signals from authority figures such as judges or lawyers can affect the testimony of witnesses as well as the jurors' perceptions of that testimony.

Introduction

Introduce module content

In this module, we are going to examine how nonverbal behavior influences jury verdicts and discuss how we can monitor nonverbal behavior in our courts.

Note to instructor:

Prepare FC4-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that you can refer to it and point out when you have met each objective.

Show FC4-1: Objectives
State objectives

Specifically, in this module we will:

- Examine the effects of nonverbal behavior.
- Identify nonverbal behaviors that may influence jurors.
- Discuss the court's responsibility concerning the influence of nonverbal behavior.

Transition to identification of nonverbal behaviors

We've already touched on some of the effects of nonverbal behavior. Let's examine <u>why</u> these effects are so powerful and identify specific nonverbal signals that we may see in court interactions.

- **Feel like you were interested in and believed the story?**

8. **Ask Participant #2 how your behavior affected him or her. Did he or she feel:**

   - **Confused by your behavior?**
   - **Anxious?**
   - **Frustrated?**
   - **Angry?**
   - **Like you weren't listening or did not believe the story?**

9. **Ask how that type of behavior by a judge or lawyer might affect a witness.**

10. **Ask the remaining participants how they were affected by your behavior. Did they think that:**

    - **Participant #2 was uncomfortable? Did they perceive that Participant #2 was more uncomfortable than Participant #1?**
    - **Participant #2's story was less interesting or less believable?**
    - **You were acting rudely?**

11. **Ask how that type of behavior by a judge or lawyer might affect jurors. If Participant #2 was acting uncomfortable, ask how that type of behavior by a witness might affect a juror.**

- **What did you do last night? Tell me about your activities.**

- **Where did you go on your last vacation? When was it? What did you do?**

3. **As this participant answers, display the following positive nonverbal behaviors:**

   - **Maintain eye contact.**

   - **Smile and nod your head.**

   - **Walk toward the participant.**

4. **Ask another participant the same question. Address the participant by name at the start of the question. When you ask the question, use a contemptuous, sarcastic, or accusatory tone of voice. Note: Use some discretion with this technique; convey a bit of humor with your nonverbal behavior so that you do not seriously offend the participant.**

5. **As this participant answers, display the following negative nonverbal behaviors:**

   - **Roll your eyes toward the ceiling.**

   - **Shake your head.**

   - **Cross your arms.**

6. **Announce that your behavior was a demonstration. Be sure to thank the participants for cooperating. Give a special thanks to Participant #2.**

7. **Ask Participant #1 how your behavior affected him or her. Did he or she:**

   - **Want to continue talking to you?**

Demonstration of the Effects of Nonverbal Behavior

Note to instructor: You will begin this module with a demonstration. The demonstration shows how nonverbal behavior influences interactions between people.

Summary of demonstration

In the demonstration, you will exhibit positive and negative nonverbal behavior to two different participants. Do not announce to any of the participants that you are conducting a demonstration. You will ask the same question to the two participants. After you ask the first participant the question, display positive nonverbal behavior. After you ask the second participant the question, display negative nonverbal behavior. Debrief the demonstration by asking each participant how your behavior affected them. Then, ask the rest of the class how they reacted to the participants based on your behavior.

Conducting the demonstration

Use the step-by-step instructions, below, to conduct the demonstration.

1. Do not announce that you are conducting a demonstration or inform the participants you are going to involve in the demonstration ahead of time.

2. Begin the demonstration by asking one of the program participants a question. Address the participant by name at the start of the question. When you ask the question, use an interested, inquisitive tone of voice, as you would with a friend. Possible questions include:

   - What did you eat for dinner last night? Please describe it.

Instructor Notes

This module is based on the article *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System* by D. A. Clay, published in the *Tulane Law Review*, June 1993.

Because the article is too long to read in class, send a copy of HO4-1 to each participant ahead of the program. Send a letter with the handout instructing participants to read the article before the day of the program. The article is located in HO4-1 in Appendix G of this Faculty Guide.

The Faculty Guide provides step-by-step instructions for leading a discussion about the article. You should read the article in-depth so that you are very familiar with it. Use the discussion questions in this Guide as a starting point for dialogue about nonverbal behavior and its effect on court interactions. After you read the article, you may find that you have questions that you would like to add to the discussion.

Participant material

- ☐ Handout (HO)4-1: *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System*
- ☐ HO4-2: *Examples of Nonverbal Behavior in the Court*
- ☐ HO4-3: *The "Clever Hans" Phenomenon*

Things to Do

- ☐ Review pp. 4-1 through 4-14 of this Faculty Guide.
- ☐ Read HO4-1: *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System*
- ☐ Prepare FC4-1: Objectives (refer to page 4-7).
- ☐ Make copies of HO4-1: *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System.* This handout is located in Appendix G of this Faculty Guide.
- ☐ Send copies of HO4-1 to participants before the program.
- ☐ Make copies of HO4-2: *Examples of Nonverbal Behavior in the Court.* This handout is located in Appendix G of this Faculty Guide.
- ☐ Make copies of HO4-3: *The "Clever Hans" Phenomenon.* This handout is located in Appendix G of this Faculty Guide. You will distribute this handout during the program.

Module 4. Nonverbal Behavior In Court Settings

Module at a Glance

- Demonstration of the Effects of Nonverbal Behavior
- Introduction
- Discussion of *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System*
- Module Conclusion

Objectives

In this module participants will:

1. Examine the effects of nonverbal behavior.
2. Identify nonverbal behaviors that may influence jurors.
3. Discuss the court's responsibility concerning the influence of nonverbal behavior.

Preparation

Things You Need

Equipment ☐ Flip chart (FC), markers, and masking tape

Instructor material ☐ Faculty Guide, pp. 4-1 through 4-14

Module 4

Nonverbal Behavior in Court Settings

Conclusion By attending this program, you have increased your awareness about racial imagery and how it affects our justice system. Think about how you can apply what you have learned here in your court.

Note to instructor: **If you are presenting additional modules, briefly state what the next module will address.**

3. Make it difficult to believe that extralegal factors are not operating to cause lower rates of pretrial release for minorities, higher levels of convictions, and the application of generally harsher sanctions upon conviction. The combined weight of statistical evidence and biased behavior in court interactions seriously weakens the credibility of claims that court decision makers "overcome" biased attitudes and beliefs at crucial moments.

Link racial imagery to these reasons

The discussion in this module about racial imagery shows that biased interactions really do have these effects on our justice system. Professor Johnson's article provides concrete examples of how racial imagery causes these effects.

Summarize learning

By reading and discussing this article, we have increased our understanding and awareness of:

- The effects of racial imagery.
- The prevalence of racial imagery.

Through our discussion, we have:

- Identified the range of the court's responsibility concerning the use of racial imagery.
- Developed strategies for reducing the effects of racial imagery in court proceedings.

Ask for further comments or questions

Are there any further comments or questions about what we have discussed?

Note to instructor:

Listen and respond to comments and questions.

Ask for other comments

Are there any other comments about racial imagery or about Professor Johnson's proposed "Racial Imagery Shield"?

Note to instructor: **Listen and respond appropriately.**

Module Conclusion

Emphasize the reality of racial imagery in criminal cases

Professor Johnson provides evidence that racial imagery does occur in the conduct of criminal cases. Furthermore, the evidence shows that racial imagery affects case outcomes and, according to Professor Johnson, "enhances the likelihood of convictions for defendants of color."

Review Module 1 reasons for why we must reduce bias

In Module 1 we stated that it is imperative that we remedy the problem of biased interactions in court because they:

1. Provide evidence of the existence of biased attitudes and beliefs among judges, lawyers, and court staff.

2. Subject minorities to indignity and injury. Biased interactions cause minorities to fear that they will receive biased advocacy by counsel and biased decisions and judgments by the court.

Ask about the court's responsibility

What responsibility does the court have concerning the use of racial imagery in our justice system? What more should the court do?

Note to instructor:

Facilitate discussion by keeping it on track and by controlling the flow of responses. Ensure that a representative sample of your audience provides input. Use the flip chart to record responses when appropriate.

Ask about Professor Johnson's "Racial Imagery Shield"

Professor Johnson proposes the adoption of a "Racial Imagery Shield." What struck you about Professor Johnson's proposed "Racial Imagery Shield"?

- How practical is Professor Johnson's "Racial Imagery Shield"?
- What would be the difficulties of a "Racial Imagery Shield"? Would it be enforceable?
- What about the cost of implementing a "Racial Imagery Shield"? Is the cost too much to ask of our judicial system?

Note to instructor:

Facilitate discussion by keeping it on track and by controlling the flow of responses. Ensure that a representative sample of your audience provides input. Use the flip chart to record responses when appropriate.

Ask what judges can do now to reduce effects

What can judges do now to reduce the effects of racial imagery in court proceedings?

Note to instructor:

Facilitate discussion by keeping it on track and by controlling the flow of responses. Ensure that a representative sample of your audience provides input. Use the flip chart to record responses when appropriate.

Note to instructor: **Facilitate discussion by keeping it on track and by controlling the flow of responses. Ensure that a representative sample of your audience provides input. Use the flip chart to record responses when appropriate.**

Note to instructor: **You may wish to use the flip chart to post some of the legal remedies listed below.**

Review Prof. Johnson's analysis of current regulations

Professor Johnson describes the current legal remedies that are available to address racial imagery. These include:

- Change of venue.
- Voir dire.
- Rule 403 of the Federal Rules of Evidence (adopted by many states in substantially the same language), which states that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Professor Johnson provides the example of when a racial motive is hypothesized as the cause of a crime, evidence of that motive is relevant, but it still might be inadmissible as more prejudicial than probative.
- Restrictions on summation provided by the Due Process Clause.
- Professional ethics constraints.
- Controls on jury deliberations.

Ask for assessments about the effectiveness of remedies

What was Professor Johnson's assessment of these current remedies? What do you think about these current efforts to constrain racial imagery?

- Members of nonmajority racial or ethnic groups?
- Members of the dominant ethnic group?

Note to instructor: **Facilitate discussion by keeping it on track and by controlling the flow of responses. Ensure that a representative sample of your audience provides input. Use the flip chart to record responses when appropriate.**

Review Prof. Johnson's reasons for the absence of laws

In the introduction of the article, Professor Johnson provides a variety of reasons for the silence of the law on racial imagery. Some of her reasons include:

- A general perception that the use of racial imagery is rare.
- A belief that racial imagery will seldom sway a jury as intended and may even backfire, benefiting the subject of the imagery.
- An assumption that any injustices that result from racial imagery will be corrected by the justice system.
- Selective indifference; there are fewer people of color to identify with racial derogation and thus actively combat it.
- Self-interested denial.

Ask for opinions about why the law is silent about racial imagery

Why do you think the law isn't more proactive in this area? What do you think about Professor Johnson's assessment?

- **A picture, story, example, description, metaphor, or term that creates a racial image or recalls an image to which a person was exposed at an earlier time.**
- **Descriptions of events that conjure up stereotypes about racial or ethnic groups.**
- **Interpretations of events that are based on stereotypes about racial or ethnic groups.**
- **Demeanor, manner of address (e.g., "you people") or nonverbal signals (e.g., pitch, intonation, facial expression) that create "us-them" imagery based on racial or ethnic stereotypes.**
- **Using stereotypes to inflame racial hostility or to subtly reinforce racial divisions.**

Ask for questions or comments

Thanks for your input on describing racial imagery. As you can see from our discussion, racial imagery encompasses a variety of behaviors. Does anyone have any further questions or comments about what racial imagery is?

Note to instructor: **Listen and respond to questions.**

Ask about the effects of racial imagery

In general, what are some of the effects of racial imagery? What are the effects on:

- Jurors?
- Judges?
- Lawyers?
- Other court personnel?
- Defendants, victims, and witnesses?

- Discuss the court's responsibility concerning the use of racial imagery.
- Develop strategies for reducing the effects of racial imagery in court proceedings.

Refer to HO3-1: Statute for Your Thoughts

Let's begin our discussion of Professor Johnson's article.

Discussion: *Statute for Your Thoughts?*

Define racial imagery

Based on the article, let's define racial imagery in our own words. How would you describe racial imagery?

Note to instructor:

Record responses on the flip chart. Probe for the following points:

- **Suggesting in any way, explicitly or by implication, that a person's race or ethnicity affects:**
  - **That person's status as a capable and decent human being;**
  - **His or her credibility;**
  - **His or her propensity to choose a course of action, whether criminal or noncriminal;**
  - **The appropriate sanctions for a crime committed by or against him or her; or**
  - **Alliances with people, whether of the same race or ethnicity or of a different race or ethnicity.**

Introduction

Review the four ways bias is exhibited from Module 1

In Module 1, we discussed four ways in which people exhibit bias in court interactions. These were:

1. Conduct that overtly communicates hostile biases or naive stereotyping;
2. Mistaken conclusions due to ignorance of the variation in behavioral norms among cultural groups;
3. Habits that reflect bias; and
4. Case strategies that exploit racial stereotypes and biases.

Link this module to Module 1

In this module, we are going to examine a behavior that manifests itself in all four of these areas. That behavior is the use, either consciously or unconsciously, of racial imagery.

Note to instructor:

Prepare FC3-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that you can refer to it and point out when you have met each objective.

Show FC3-1: Objectives
State objectives

This module is based on the article *Racial Imagery in Criminal Cases*, by Sheri Lynn Johnson of Cornell Law School. Specifically, in this module we will use the article as a starting point to:

- Define racial imagery.
- Identify the effects of racial imagery.

This Faculty Guide provides step-by-step instructions for leading a discussion about the article. Use the discussion questions as a starting point for dialogue about the issue of racial imagery. After you read the article, you may find that you have questions that you would like to add to the discussion.

You may lead a full group discussion, or you may divide the participants into smaller groups to discuss the questions in more depth. If you decide to divide the participants into smaller groups, allow time for each group to report on their discussion to the entire class.

Note to instructor: **Listen and respond to questions and comments.**

Thank participants

Thank you all for participating in this program. I hope that what you have learned today will help you in your efforts to reduce the effects of biased interactions in the court.

Appendix A

Module 1 Overheads

Appendix A.
Module 1 Overheads

Contents

This appendix contains the camera-ready overheads for Module 1 of *Bias in the Court!* Photocopy these camera-ready, hard-copy overheads onto transparency paper before the program.

Court Interactions

- **Words, actions, and behaviors that court officers and employees display toward the public.**
- **Attitudes and beliefs these words, actions, and behaviors convey to the public.**
- **Effects of these words, actions, and behaviors on public trust and confidence in our legal system.**

Biased Behaviors

1. Conduct that overtly communicates hostile biases or naive stereotyping.
2. Mistaken conclusions drawn due to ignorance of variation in behavioral norms among cultural groups.
3. Habits that reflect conscious or unconscious bias.
4. Case strategies that exploit stereotypes and biases when such references are not relevant to the case.

Appendix B

Handout 1-1: State Court Findings and Remedies

Appendix B. Handout 1-1: State Court Findings and Remedies

Contents

This appendix contains Handout 1-1: *State Court Findings and Remedies.* You will distribute this handout during the program. Make enough copies for all participants before the start of the program.

Handout 1-1: State Court Findings and Remedies

Research by state task forces and commissions to determine the extent of bias in their courts consistently reports unwarranted, improper behavior exhibited by judges, lawyers, and court staff toward people of color. One state court found that 41 percent of its metropolitan judges under 50 years of age acknowledged that other judges sometimes display culturally insensitive behavior, and 21 percent of this group reported that judges sometimes make demeaning remarks or jokes about people of color in court or in chambers. In this same study, 40 percent of the court's public defenders reported the use of derogatory language toward minority defendants by court staff, while 46 percent of victim assistance providers surveyed stated that court staff always, often, or sometimes made remarks or jokes demeaning to people of color in court or in chambers. (Minnesota Final Report, 1993).

Other behaviors of court personnel identified by findings of state task forces include:

- Judges sometimes do not take minority defendants and nondefendants seriously or treat them with respect.
- Prosecutors sometimes make disparaging remarks about people of color in the presence of defendants.
- Public defenders, whose client loads are top-heavy with the poor and indigent (most of whom are people of color), are sometimes seen by their clients as insensitive and uncaring.

Oregon's task force identified several problems regarding biased behavior in court interactions and recommended specific strategies for remedying the problems to its implementation committee, the body charged with facilitating task force recommendations (Progress Report of the Oregon Supreme Court Implementation Committee, 1996). For example, the task force found that professional and ethical codes of conduct did not explicitly address racially biased behaviors; thus, citing the need "to be keenly aware of racial stereotypes lurking beneath references to race, and to refer to race only when necessary to the disposition of a case," the task force recommended changes to appropriate codes that govern the conduct of judges and court staff:

Recommendation 3-10: Judges should be aware of hidden racial stereotypes and refer to race only when necessary to the disposition of the case.

Recommendation 3-11: Canon 2 of the Code of Judicial Conduct should be amended to provide: A judge should not engage in conduct, on or off the bench, that reflects or implements bias on the basis of race, sex, religion, ethnic or national origin, or sexual orientation (including sexual harassment).

> Recommendation 4-8: The Oregon Supreme Court, the Chief Justice and the State Court Administrator should adopt a canon for judges and administrative rules for staff that explicitly prohibit the manifestation of racial bias.

In response to Recommendation 4-8, the Oregon Judicial Department has developed and provided diversity educational training for all court personnel.

As to 3-10 and 3-11, the Oregon Judicial Conference proposed an addition to its Proposed Revised Oregon Judicial Code of Conduct under Judicial Rule 2: Impartial and Diligent Performance of Judicial Duties (JR 2-110), prohibiting "actions of judges, and those under a judge's control, that may be reasonably perceived as biased;" however, the rule would not "preclude consideration or advocacy of any issue relevant to the proceeding." On November 22, 1995, the chief justice signed an order adopting the revised code.

Overt acts of discrimination are apparent and are more easily addressed than subtle biases; however, Oregon's task force and its implementation committee were resolute in also addressing subtle biases in court interactions. The task force found evidence of substantial "communication problems" between minorities and nonminorities within the court's work force, as well as between minority and nonminority citizens conducting business in courts. Although the court had existing, formal mechanisms to investigate and address discriminatory acts by judges, lawyers, and court staff, the task force recommended the appointment of 38 ombudspersons, one for each of the state's 36 courts, one to the Office of the State Court Administrator (OSCA), and one to investigate complaints against judges and administrators.

> Recommendation 3-7: Each court and the OSCA should appoint an ombudsperson to investigate complaints against staff relative to allegations of racial bias.
>
> Recommendation 3-8: The Chief Justice should appoint an ombudsperson to investigate complaints against judges and administrators relative to allegations of racial bias.

In response to task force Recommendation 3-8, the implementation committee proposed the appointment of a single ombudsperson from among OSCA staff. The committee found most racial bias complaints involved "subtle and unintended miscommunications, problems which rarely support formal complaints," concluding that enhancing communication within the work force and with the public, and bridging the gap between unintended miscommunications and formal complaints of racial discrimination are goals worthy of the appointment of the ombudsperson. The role of the ombudsperson is to address, for all trial courts and the OSCA, bias-related allegations that do not warrant formal complaint mechanisms, and resolve them swiftly through means of informal resolution (e.g., mediating open discussions or meetings) or, if later determined to appropriate, forward the allegations to formal complaint mechanisms.

Other task force findings, recommendations, and strategies for reducing the effects of bias in court interactions can be found in the following reports: Michigan's report (1989) addresses the subject explicitly in a chapter entitled "Courtroom Treatment of Minority Litigants, Witnesses, Jurors and Attorneys." Washington's task force report (1990) includes brief sections dealing with court

interactions as subheadings of various chapters or sections of the report. The reports from Minnesota (1993) and Oregon (1994) treat the subject in sections related to "Trials." Florida (1990) includes a section entitled "The Court's Demeanor: Ensuring Respect and Accountability. New Jersey (1984 and 1992) frames the discussion in the context of "Insensitivity and Indifference."

Another strategy for addressing bias experienced by minorities in court is expanding the diversity in the work force of the courts. This approach is emphasized, for example, in the 1990 Florida report, which stresses mechanisms for diversifying the racial and ethnic composition of the bench and court administrative personnel. In its 1991 report, Florida's study committee emphasizes the need for public institutions and agencies and the private bar to diversify and expand opportunities for minority attorneys.

Appendix C

Handout 1-2: Model Suggestions for Bias-Free Behavior in Courts

Appendix C.
Handout 1-2: Model Suggestions for Bias-Free Behavior in Courts

Contents

This appendix contains Handout 1-2: *Model Suggestions for Bias-Free Behavior in Courts*. These suggestions were developed by the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts.

You will distribute this handout during the *Bias in the Court!* program. Make enough copies for all participants before the program.

Handout 1-2: Model Suggestions for Bias-Free Behavior in Courts*

Do:

- Treat all individuals with courtesy.
- Address women and men with gender neutral terms.
- Recognize racial, ethnic, and gender stereotypes and remove these biases from the workplace.
- Address all individuals by last name and appropriate titles in the public setting.
- Make sure that all communications, both written and verbal, are gender neutral.
- Discuss biased behavior with individuals who may be unaware of its impact, and ensure that such behavior will not be tolerated in the court.
- Provide all individuals equal treatment regardless of race, ethnicity, gender, background, age, physical limitations, sexual orientation, social class, or ability to speak English.
- Recognize that all matters heard by the court are important.

Don't:

- Assume that a person's status or level of authority is related to their race, ethnicity, or gender.
- Use terms of endearment in public settings.
- Make assumptions about individuals or their role in the court based on stereotypes or without knowledge.
- Subject victims of crime to unjust scrutiny because of the nature of the act(s) perpetrated against them, their race, their ethnicity, their gender, or their social class.
- Subject individuals to comments gestures, touching, or other actions that can offend them or make them feel uncomfortable.

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* Permission granted by the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts. Adapted from "And Justice for All . . . A Guide to Bias Free Behavior in the Courts," an informational brochure created that responds to findings and recommendations made by the task force. The guide symbolizes the court's commitment to equality and serves as a guide for creating a bias-free environment in which all participants can function without fear or intimidation.

Rights** and Responsibilities

As a Judge, you have the Right to:

- Be treated with respect and courtesy.
- Expect that court proceedings will begin on time and proceed in an orderly manner.
- Expect that attorneys and parties to an action will be prepared to proceed at the time of a hearing.
- Expect that the court's orders will be followed by all affected parties.
- Expect nonbiased treatment from court employees, litigants, and attorneys.
- Object to gender- or race-biased statements or remarks made by litigants, attorneys, or court employees.

As a Judge, you have the Responsibility to:

- Display leadership in setting a nonbiased tone and demeanor for your courtroom and judicial operations.
- Take necessary steps to correct discriminatory attitudes or comments to ensure a bias-free court environment.
- Treat litigants, attorneys, and court employees with fairness and courtesy.
- Avoid racial and gender bias in your own decision making and court interactions.

As a Court Employee, you have the Right to:

- Be treated with respect and courtesy.
- Be provided with written personnel policies that prohibit discriminatory treatment and promote fairness.
- Be provided with a written job description.
- Expect nonbiased treatment from judges, litigants, and attorneys.

** The word "right" as used in the brochure refers to ethical or moral correctness and should not be construed to mean a legal right, which has been established by Constitution, legislative action, or a court of law.

As a Court Employee, you have a Responsibility to:

- Treat judges, litigants, attorneys, and other court users with fairness, respect, and courtesy.
- Monitor your behavior and attitudes to avoid discrimination due to a person's race, ethnicity, religious affiliation, or gender.

As a Citizen using the Court, you have a Right to:

- Be treated with fairness, respect, and courtesy.
- Expect court proceedings to begin on time and proceed in an orderly manner.
- Expect nonbiased treatment from the judges, court employees, and attorneys.
- Object to gender- or race-biased statements or remarks made by judges, court employees, or attorneys
- Expect that the judge and the attorneys in a case are prepared to hear/try your case.
- Consult with an attorney regarding a legal proceeding.
- Ask questions of your attorney before or after your scheduled court appearance. If you are representing yourself, you may ask the court for clarification on an action or procedure.
- Request that the court provide an interpreter if you are unable to communicate in English or are hearing impaired.

As a Citizen using the Court, you have the Responsibility to:

- Treat the judge, court employees, and attorneys with fairness, respect, and courtesy.
- Monitor your own behavior, attitudes, and comments to ensure that you do not display bias due to race, ethnicity, religious affiliation, or gender.

As an Attorney representing a Litigant in the Court System, you have a Right to:

- Be treated with fairness, courtesy, and respect by judges, court personnel, litigants, and other attorneys.
- Expect that court proceedings will begin on time and proceed in an orderly manner.
- Expect that the judge will hold hearings and issue opinions in a timely manner.
- Expect nonbiased treatment from judges and litigants.

- Object to gender-or race-biased statements or remarks made by judges, litigants, or court employees.

As an Attorney representing a Litigant in the Court System, you have a Responsibility to:

- Treat the judge, court employees, litigants, and other attorneys with fairness, respect, and courtesy.
- Be prepared to try a case when it is scheduled and to represent your client to the best of your abilities.
- Monitor your own behavior, comments, and attitudes to ensure that you do not display bias due to race, ethnicity, religious affiliation, or gender.

Appendix D

Handout 1-3: Model Court Conduct Handbook

Appendix D. Handout 1-3: Model Court Conduct Handbook

Contents

This appendix contains Handout 1-3: *Model Court Conduct Handbook.* The handout was excerpted from the *Court Conduct Handbook* written by the Women and Minorities in the Profession Committee of the State Bar of Georgia, in conjunction with the Chief Justice's Commission on Professionalism.

You will distribute this handout during the *Bias in the Court!* program. Make sure that you have enough copies for all participants before the program begins.

Handout 1-3: Model Court Conduct Handbook*

Judges Shall Perform the Duties of Judicial Office Impartially and Diligently

Adjudicative Responsibilities:

Judges shall perform judicial duties without bias or prejudice. Judges shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's discretion and control to do so.

Commentary:

Judges must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to their direction and control. Judges must perform judicial duties impartially and fairly. Judges who manifest bias on any basis in a proceeding impair the fairness of the proceeding and bring the judiciary into disrepute. Facial expression, body language, and oral communication can give to parties or lawyers in the proceeding, jurors, the media, and others an appearance of judicial bias. Judges must be alert to avoid behavior that may be perceived as prejudicial.

Judges should require lawyers to refrain from manifesting, by words and conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

Your Role in Eliminating Gender, Racial, and Ethnic Bias

As Judges:

As the visible leadership of the courts, you play a key role in eliminating bias from the judicial system. The code of Judicial Conduct calls on you to establish, maintain, enforce, and observe high standards of conduct to preserve the integrity of the judiciary. Your treatment of people in the court, the decisions you make, and your intervention in the conduct of those around you are of utmost importance.

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* Provided for adaptation courtesy of the Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System. Excerpted from the *Court Conduct Handbook* written by the Women and Minorities in the Profession Committee of the State Bar of Georgia in conjunction with the Chief Justice's Commission on Professionalism, January 1, 1994.

As Court Employees:

Members of the public often have their first and sometimes their only experience with the court system through a court employee. By conveying respect and providing assistance to all, you play an important role in eliminating bias in the administration of justice.

As Attorneys:

As officers of the court, attorneys have an important role in maintaining the dignity and integrity of the court. Through your conduct, through your treatment of litigants and employees, and through bar association efforts, you have a significant impact on the judicial system.

Stereotypes Have No Place in the Treatment of People in the Handling of Cases in the Court

Litigants:

The claims of women and racial minority litigants are as legitimate as any other claims heard in court and must be treated accordingly. Do not label female litigants as more emotional because of the nature of the cases typically brought by women, such as child support enforcement, or regard cases brought by litigants with limited ability to speak English as less important or more troublesome than any other type of case. Similarly, jury instructions should promote bias-free decisions.

Victims:

The court must take special care to treat all victims of crime with respect and sensibility to the trauma they have experienced. Victims of domestic violence and sexual assault should not be subject to unjust scrutiny or be stereotyped because the alleged crime is sexual in nature or occurred in a domestic context. Likewise, victims are no less credible because they are of a minority race or have different cultural backgrounds or limited ability to speak English. Testimony of female and minority victims must be given equal weight with testimony of others and must be judged by the substance of the testimony.

Court Employees:

Court employees provide valuable service to everyone using the court and should be afforded appropriate authority, respect, and courtesy. It is incorrect to assume that an employee's authority or ability to assist you is related to that employee's gender, race, or language ability.

Lawyers:

Good attorneys are zealous advocates. Do not expect women and minority attorneys to be more passive in their advocacy or more tolerant of interruptions or reprimands.

Recognize and respond to women and minority lawyers to the same extent and in the same manner that you recognize and respond to other members of the bar. For example, it is inappropriate to address a female lawyer as "young lady" or to identify a minority lawyer as "that black lawyer" or "that Hispanic lawyer."

Witnesses:

Credibility of witnesses should be judged by consistent standards and not on the basis of race, gender or language ability. For example, do not assume that the opinions or statements of women are unimportant, irrational, or unduly emotional.

Judges, lawyers, and court personnel should make every effort to correctly and respectfully pronounce the name of the party involved. If a lawyer has a client or a witness with a name that is difficult to pronounce, the lawyer should assist the court by informing the court at or before the calendar call of the correct pronunciation. The lawyer may even wish to write out the name phonetically for the court ahead of time. That way, the client or the witness will not be embarrassed and the court will certainly appreciate the lawyer's assistance.

Expert Witnesses:

Expert witnesses must be judged on the basis of their qualifications and the substance of their testimony and not their gender, race, or language ability. When dealing with female and minority expert witnesses, be sure that the test for competence imposed is the same as the test applied to their male or white counterparts.

People from Diverse Communities:

Everyone entering the court must be given equal treatment regardless of gender, racial or ethnic background, disability, sexual preference, age, or ability to speak English. Be careful not to make assumptions about people's roles in the courts based on these factors.

As our population becomes more diverse, do not assume that someone who is a visual minority is not a native. "You speak such good English" may not be complementary to someone of foreign descent, but who was born and brought up in this country. When you see someone who has difficulty speaking or understanding English, try to be sensitive to his or her frustration because of the inability to communicate. Do not assume a nod or a "yes" indicates thorough understanding. Also, you should be conscious of the possibility that the person whom you are addressing is assigning your message a literal, rather than idiomatic meaning. For example, the phrase "I hear you" may not convey the meaning of "I understand you" or "I agree with you."

**Behavior in the Courthouse Must Be Free from Bias in Any Form.
Fair and Equal Treatment Must Be Accorded All Courtroom Participants.**

1. Address Adults by Last Names and Appropriate Titles.

Judge or Your Honor
Counselor or Attorney
Mr., Ms., (Unless Miss or Mrs. are requested)
Dr., Officer, Representative, or Senator

The court's Gender Bias Report found that women are sometimes addressed informally while their male counterparts are addressed in a formal or professional manner. To avoid differential treatment or even the appearance of differential treatment, address all people in the same formal or professional manner. In private conversations or social settings, first names and other informal address may convey a friendly or casual attitude. In public settings where courthouse business takes place, such forms of address suggest a lack of respect.

2. Address Groups with Gender Neutral or Gender Inclusive Terms.

Colleagues
Members of the Jury
Members of the Bar
Counselors
Ladies and Gentlemen

Referring to a mixed group as "brothers" or "gentlemen" indicates that women are not legitimate members of the community who must be taken seriously. Conversation that creates an exclusively masculine atmosphere must be avoided so that everyone is included in the justice system. When a group is primarily male and only one or two women are present, language used should be inclusive of everyone present. Even when a group is of one gender, it may be a good habit to use gender neutral terms.

3. Terms of Endearment and Diminutive Terms Do Not Belong in Courthouse Interactions.

Honey, Sweetie, Dear
Little Lady, Pretty Girl, Young Lady (in reference to Adult Women)

Terms of endearment and diminutive terms imply that women have lower status or less power. These terms can demean or offend women even if the speaker does not intend to do so.

4. Avoid Comments on Physical Appearance.

Body Parts
Dress Style
Skin Color
Hair Style
Pregnancy
Age

Comments on physical appearance can be demeaning and may disadvantage individuals by drawing attention away from the actual reason for their presence in the court. Comments appropriate in a social setting often are inappropriate in a professional setting. For example, complimenting a female attorney on appearance or drawing attention to her pregnancy while she is conducting business may undermine the way others perceive her.

As communities become more diverse, some of the traditional notions about what is acceptable court attire may be outdated. For example, court personnel may wish to inquire whether certain headwear has religious and/or cultural significance (when someone is dressed in nonwestern traditional clothing), rather than directing that person to remove such headwear in open court.

5. Jokes and Remarks with Sexual or Ethnic Content, or Jokes and Remarks that Play on Gender or Ethnic Stereotypes Are out of Place in the Courthouse Setting.

Everyone in the courthouse must protect the dignity and integrity of the court and show respect for every other person. Sexual, racial, or ethnic jokes and remarks, and mimicking someone's accent or speech have no place in the courthouse or in the administration of justice.

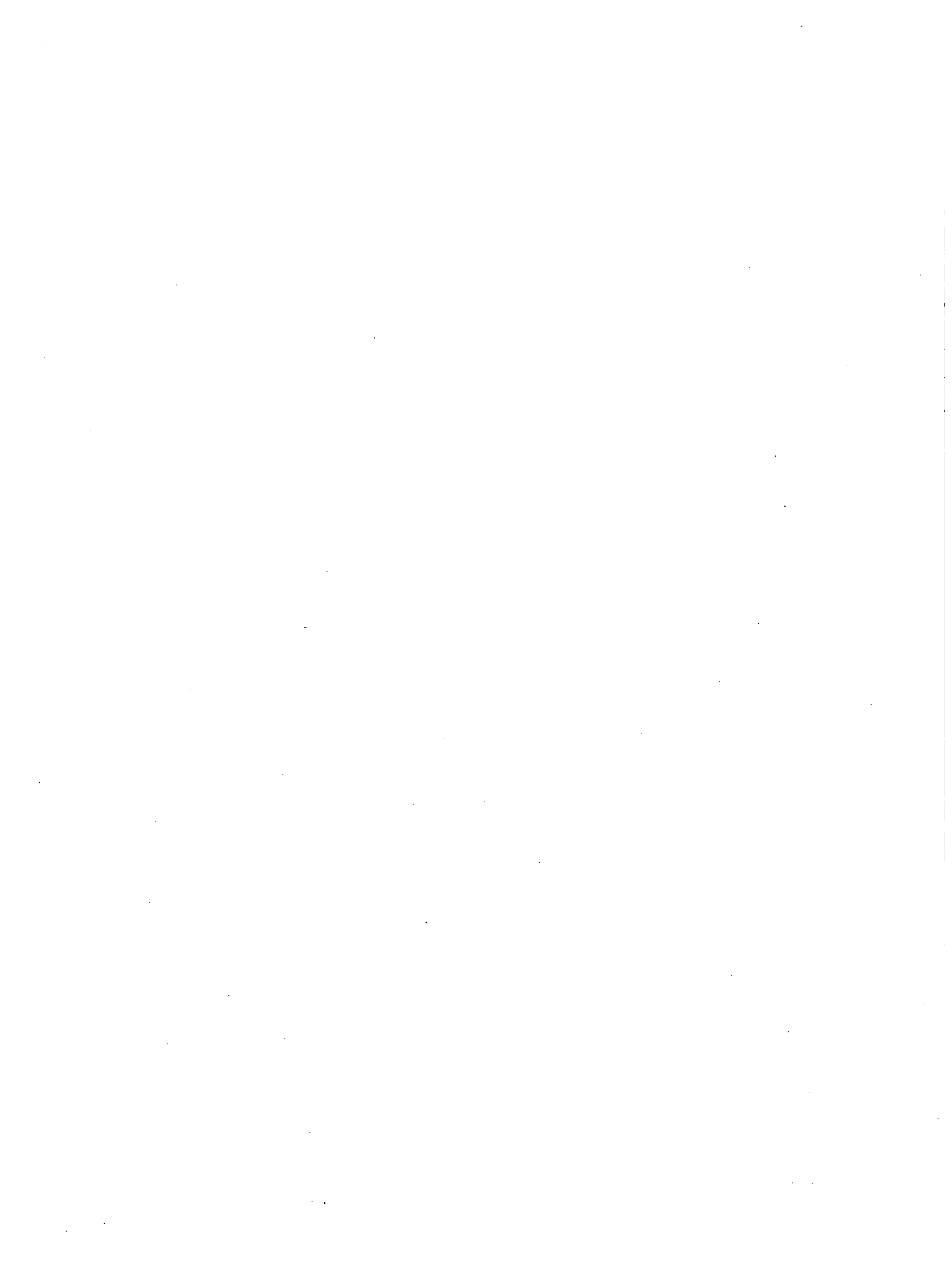
6. Comments, Gestures, and Touching that Can Offend or Make Individuals Uncomfortable Have No Place in the Courthouse.

Touching people (other than shaking hands) should be avoided because it may offend them. They may not feel free to interrupt or complain, especially when the individual doing the touching is in a position of authority (e.g., a supervisor touching an employee or a court employee touching a litigant, witness, juror, or attorney).

Sexually suggestive comments, gestures, and touching, as well as sexual advances, humiliate and intimidate people and undermine the dignity of the court. Such acts can also constitute sexual harassment which is illegal.

7. Treat All Lawyers with Equal Dignity.

The court's Gender Bias Report found that women lawyers are frequently asked if they are attorneys. Likewise, minority attorneys are more frequently asked this question. Do not inquire of a women or minority about his or her professional status when you would not ask the same question of a white male. Do not assume that a women or a member of a minority group is a client or defendant rather than an attorney or a judge. To avoid this, use a question that applies to everyone such as, "Will all attorneys please identify themselves to the court?" When addressing a man or a woman, always use consistent forms of address such as "Attorney X" or "Attorney Y." Do not call the man "Attorney X" and the woman "Ms. Y." Again, avoid identifying a lawyer by race or ethnic background. For example, do not direct the bailiff to ask "that Black lawyer," or "that Hispanic lawyer," or "that Asian lawyer"to come into the courtroom.



Appendix E

Module 2 Handouts

Appendix E.
Module 2 Handouts

Contents

This appendix contains the handouts for Module 2 of *Bias in the Court!* The handouts are:

- HO2-1: Video Discussion Guide. This handout begins on page E2.
- HO2-2: Effects of Bias in the Courtroom. This handout begins on page E5.

Make enough copies of these handouts for all participants before the program. You will distribute these handouts during the program to facilitate discussion about the video entitled *Bias in the Courtroom.*

Handout 2-1: Video Discussion Guide

As you watch the video entitled *Bias in the Courtroom,*[1] make notes about the questions on this discussion guide. The facilitator will stop the video periodically for discussion.

Vignette #1: The Perception of Bias

1. How important are perceptions? Are perceptions an accurate measure of reality?

2. What impact do perceptions of bias have on the quality of our justice system? On public trust and confidence in our justice system?

3. How can we address perceptions of bias in court interactions?

Vignette #2: Body Language

1. What types of nonverbal behavior have you witnessed in court that could indicate bias? In what ways do judges exhibit bias toward witnesses? Toward attorneys?

[1] Video produced by the American Bar Association Commission on Minorities in the Profession, the American Bar Association Judicial Administration Division, the Virginia Women's Attorneys Association, the Virginia Commission on Women and Minorities, and Arthur Young.

2. What effect do biased behaviors have on jurors? Do judges understand the effect of judicial actions on jurors? On witnesses? On the public?

3. Are there circumstances when bias is justified? For example, bias in favor of justice?

4. How do we distinguish between justified bias, if any, and unjustified bias?

Vignettes #3 and #4: Names and Titles

1. How do you think the actions of the judge and the attorney in these vignettes may have influenced the jurors? What might the jurors think about the credibility of the witnesses?

2. How can we avoid overcompensating for biased feelings? Examples of overcompensation are showing exaggerated courtesy or condescension.

3. How can judges discourage attorneys from exhibiting biased behavior?

4. Should judges address biased behavior at the time of the offense or later?

5. How can judges and attorneys help each other recognize and overcome bias?

Vignettes #5, #6, and #7: Court Personnel

1. What degree of biased conduct is grounds for dismissal of court personnel, including judges?

2. What can and should judges do to help court personnel recognize and correct biases?

3. How can judges work among themselves to address bias in courtrooms and courthouses?

Handout 2-2: Effects of Bias in the Courtroom

Definition of Bias.

A simple, dictionary definition of bias is:

A preference or inclination that inhibits impartial judgment; a prejudice.

In practical application, bias means making decisions, evaluating actions or circumstances, or rendering judgments based on considerations other than fact, merit, or credibility. Bias is manifested in the way we behave toward other people. Avoiding perceived or actual bias is essential to the fair administration of justice.

Who Feels the Effects of Bias?

Everyone, but the negative effects are greatest for persons of color, particularly women of color. We have all been in situations in which we have felt prejudged based on considerations other than who we are. We all also hold biases about ourselves and each other.

Effects of Bias on Persons of Color:

- Cause disparate treatment and case outcomes
- Devalue their rights, lives, property, etc.
- Perpetuate myths and misconceptions about their social and economic realities.

Effects of Bias on Women and Women of Color:

- Cause disparate treatment and case outcomes
- Restrict access to historically male dominated roles and opportunities
- Devalue women, their contributions, and their work
- Perpetuate myths and misconceptions about their social and economic realities

How Does Bias Influence Behavior and Perception in the Courtroom?

Active Bias:

- Influences judicial actions
- Influences judicial decision making
- Racial epithets, name calling, and negative remarks about cases, witnesses, parties, attorneys, or groups of people

Passive Bias:

- Though unconscious, influences judicial decision making
- Shifts attention away from factual issues to biased ones (this type of bias is subtle, but nonetheless critical to a fair and impartial process)

Overall Bias:

- Hinders the effective functioning of court proceedings, our system of justice, and perpetuates social problems

Examples of How Biases May Negatively Affect Court Principals.

Judges:

- Threatens their ability to uphold principles of equal justice under the law
- Raises doubts about impartiality and objectivity
- Reduces professional satisfaction

Attorneys:

- Damages their professionalism
- Devalues their work and legal arguments
- Encourages disregard of facts and reliance on stereotypes and assumptions

Witnesses:

- Lessens the value of their testimony
- Disrespects their contribution

Defendants and Litigants:

- Leads to unfair judgments
- Undermines confidence in legal process

Jurors:

- Prejudices their judgments
- Clouds their insights, perceptions, etc.
- Blocks verdicts based solely on evidence
- Undermines fairness in the legal process

Courtroom Personnel:

- Misguides their treatment of individuals in the courtroom
- Causes them to devalue and disrespect some, while currying favor with others
- Hinders impartial treatment of administrative matters

All Court Principals and Public:

- Disregards provisions of the law
- Encourages disrespect of some and favors others
- Weakens the effectiveness of the law
- Weakens principles under which we live

Appendix F

Handout 3-1: Statute for Your Thoughts?

Appendix F. Handout 3-1: *Statute for Your Thoughts?*

Contents

This appendix is the handout for Module 3 of *Bias in the Court!* The handout is:

- Handout 3-1: *Statute for Your Thoughts?*

The handout contains the article *Racial Imagery in Criminal Cases*, by Professor Sheri Lynn Johnson of Cornell Law School. The handout also contains a discussion guide to help participants focus their thoughts about the article.

Because the handout is too long to read in class, send a copy to each participant before the program. Send a letter with the handout instructing participants to read the article and think about the discussion questions before the day of the program.

Handout 3-1: *Statute for Your Thoughts?*

Discussion Questions: *Statute for Your Thoughts?*

These discussion questions will help you focus your thoughts about the article entitled *Racial Imagery in Criminal Cases*. The article was written by Professor Sheri Lynn Johnson of Cornell Law School and was published in the *Tulane Law Review*, June 1993. The article follows these discussion questions.

1. Define the term "racial imagery" in your own words.

2. What are the effects of racial imagery on:

   - Jurors?
   - Judges?
   - Lawyers?
   - Other court personnel?
   - Defendants, victims, and witnesses?
   - Members of nonmajority racial or ethnic groups?
   - Members of the dominant ethnic group?

3. Why do you think the law isn't more proactive about racial imagery? What do you think about Professor Johnson's reasons for the silence of the law in this area?

4. Professor Johnson describes the current legal remedies that are available to address racial imagery. What is her assessment of these current remedies? What do you think about the current efforts to constrain racial imagery?

5. What responsibility does the court have concerning the use of racial imagery in our justice system? What more should the court do?

6. Professor Johnson proposes the adoption of a "Racial Imagery Shield." What struck you about Professor Johnson's proposed "Racial Imagery Shield"? How practical is the idea? What would be the difficulties of enacting such a shield? Is it enforceable? What are the costs?

7. What can judges do now to reduce the effects of racial imagery in court proceedings?

Racial Imagery in Criminal Cases

By

Sheri Lynn Johnson**

During their testimony, Officer Powell and another defendant, Sgt. Stacey C. Koon, consistently described Mr. King in non-human terms. If it was part of a strategy to diminish Mr. King in the jurors' minds, it may have backfired.[1]

"It was Mr. King, a black man who was stopped for speeding, who chose to evade the police and to comply only slowly with their commands."[2]

"[H]e [King] deserved what he got."[3]

There are no "race shield laws." Nor are there other measures that adequately curb the use of racial[4] imagery in criminal cases. Moreover, in contrast to the political and scholarly climate that preceded the adoption of rape shield laws, there is no storm of protest on this front.[5] Perhaps the lack of attention to the use of racial imagery in criminal cases stems from a perception that resort to such

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** Professor of Law, Cornell Law School. B.A., 1975, University of Minnesota; J.D., 1979, Yale University. I am grateful to Joseph J. Kennedy, Editor in Chief of the *Cornell Law Review*, 1992-1993, for his insightful and sensitive comments. The Article is better for those comments and so am I.

[1] *Reporter's Notebook: Baton is 'Star' in Police-Beating Trial*, N.Y. TIMES, Apr. 6, 1992, at A14 [hereinafter *Notebook*]. This optimistic analysis was written before the defendants' acquittals.

[2] Seth Mydans, *Defense Lawyer at Beating Trial Asserts Driver Prompted Violence*, N.Y. TIMES, Apr. 22, 1992, at A16 (quoting closing argument by Officer Powell's attorney).

[3] Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y. L.J., May 26, 1992, at 3 (quoting juror in post-trial interview). Officers Powell, Koon, Briseno, and Wind were acquitted in the 1992 state court trial for the assault on Rodney King. In 1993, Officers Powell and Koon were convicted in federal court for violating King's civil rights. *See 2 Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1. This Article was written prior to the federal trial and all references to the Rodney King beating case concern the state court trial.

[4] I use the adjective "racial" rather than "racist" throughout this Article. Most of the remarks and images to which I refer I consider racist, but I think debate on that point is distracting. Racial images pose risks regardless of the motives that generate them.

[5] I found no comprehensive treatment of racial imagery in the criminal process and no articles or notes that discuss the use of racial imagery by defense counsel or witnesses. I found two student-written notes that focus on prosecutorial misconduct involving racially inflammatory remarks. The first note addresses only the use of overtly inflammatory remarks and most of its discussion concerns the appropriateness of a harmless error rule in such cases, rather than the definition or discernment of racially inflammatory remarks. *See* Steven D. DeBrota, Note, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartility and the Harmless Error Doctrine*, 64 *Ind. L.J.* 375 (1989). The more recent note contains an interesting survey of cases, and attempts to define two forms of prosecutorial racism: explicit references to race and indirect references that a reasonable person would discern contain racial undertones. *See* Elisabeth L. Earle, Note, 92 COLUM. L. REV. 1212 (1992). The note argues for the judicial identification of these two forms of racism regardless of the existence of a remedy, but specifically eschews discussion of remedies as beyond the scope of the note. *Id.* at 1214 n.12. The only other significant modern consideration of prosecutorial comments on race is a three-page section in a *Harvard Law Review* Developments note. *Developments in the Law—Race and the Criminal* Process, 101 HARV. L. REV. 1472, 1588-90 (1988). In most descriptions of prosecutorial misconduct, only a few lines of text are devoted to racial arguments. *See infra* notes 27-33 and accompanying text.

imagery is rare. Or perhaps disinterest may be traced to the belief implicit in the above-quoted contemporaneous evaluation of the likely effects of Koon's and Powell's animal imagery: such imagery will seldom sway the jury as intended and may even backfire, benefitting the subject of the imagery. A third noninvidious interpretation might be proffered: lawyers and laypeople are unaware that the law is largely silent here and assume that whatever the frequency of racial imagery in criminal cases, and whatever its effect might be on juries, injustices are corrected.

There is also selective indifference[6] to consider. Half of the population is female and many women could identify with the rape victim cross-examined on the details of her sexual life to facilitate summation arguments that she was a consenting whore. There are fewer people of color to identify with racial derogation on the witness stand and in summations. There were also many men with wives, girlfriends, sisters, daughters, and women friends who could worry about the treatment of rape victims; the absence of cross-cutting ties between most white people and people of color makes empathtic activism regarding racial imagery less likely.

Less charitable explanations press themselves upon us. One obvious candidate is self-interested denial. Acknowledging the continuing legacy of racism is painful and unpleasant, at least for white people;[7] it implies that many of us do not deserve all we have and that our good fortune is gained through the exploitation of others. Some people find it hard enough to acknowledge racism when that racism is expressed by aberrational racist skinheads[8] or construction workers.[9] It is even harder when we are confronted with the racism of—and the manipulation of racism by—"professionals." Perhaps we not only benefit from skin privilege; perhaps we tolerate it in our own ranks. Looking at a professional's use of racial imagery compounds this discomfort, for when we examine the speech patterns and images other professionals use, comparisons to our own everyday remarks will nag at the edges of our thought. Maybe we do more than tolerate skin privileging—maybe we practice it.[10]

Even more vile explanations are possible, but hinting at their existence may be enough. I will not speculate further; instead, I will start to fill the void. I proceed on a cautiously optimistic assumption: at least part of the inattention to racial imagery stems from noninvidious ignorance. This Article therefore attempts to redress some of that ignorance. Part I describes some of the many ways

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[6] *See* Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

[7] Professor Derrick Bell suggests that it may also be difficult for black people "who are not on the deprived end of the economic chasm between blacks and whites" to acknowledge the persistence of racism. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 13 (1992).

[8] In Dawson v. Delaware, 112 S. Ct. 1093 (1992), the Supreme Court held that membership in a white racist gang was not relevant to whether imposition of the death penalty was warranted and that the introduction of evidence of such membership at trial violated the defendant's First and Fourteenth Amendment rights. It is difficult for me to explain this decision as the result of either antindeath penalty sentiment or First Amendment vigilance given this Court's other contemporaneous decisions. *See also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (finding bias-motivated crime ordinance an impermissible content distinction).

[9] *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding insufficient evidence of discrimination in the construction industry to justify affirmative action plan despite the fact that the population of Richmond was half black and less than one percent of the city's prime construction contracts had been awarded to minority businesses during a five-year period).

[10] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987).

racial stereotypes are presented to the jury in criminal cases; Part II reviews the paltry legal remedies presently available; and Part III proposes and evaluates other measures that could be taken in an attempt to control the manipulation of racial stereotypes in criminal cases. Thus, for the bulk of this Article I proceed by assuming that information and logical argument may be persuasive. At the end, however, I return to the possibility of more invidious reasons for the void, and consider whether the self-righteousness and self-interest of white people preclude the redressing of ignorance in this area.

If this introduction rankles, I do not apologize. I do, however, wish to make clear that the subject of my scrutiny is not other, but same: my culture, my language, indeed, myself. I am white. As I began writing the immediately preceding paragraph, what came to my mind first was, "Other, darker, explanations are possible." That was, of course, both the right and the wrong image. (Why does "darker" capture such a vast range of negative possibilities?[11]) It is impossible for me to begin without at least this much candor: I have met the enemy, and she is us.

I. The Prevalence and Perniciousness of Racial Imagery in Criminal Cases

Racial imagery is a species of bias of which there are several subspecies (here, too, the taint of racial connotations). Racial imagery may be categorized in several ways because it varies in its source and setting, in the subtlety and indirection of its presentation, and in the aspect of racial stereotype or animus it evokes. Variation along each of these dimensions multiplies the opportunities for mutually reinforcing introductions of bias.

A. The Source and Setting of Racial Imagery

Racial imagery can be conveyed in pictures, stories, examples, and generalizations. These visual and auditory experiences may themselves generate a racial image, or they may recall for the observer racial imagery to which she was exposed at an earlier time. Because race is such a salient characteristic in our society,[12] a juror will notice the race of the defendant, the witnesses, the attorneys, the judge, and other jurors. What each juror will "see" when she observes an African-American judge, a white defendant, a Latino witness, or an Asian-American prosecutor will be affected by what happens in the courtroom, but what she "sees" happening in the courtroom will be affected by her prior exposure to racial imagery. The racial imagery that affects a particular juror's decision-making process is therefore impossible to catalog.

We can, however, acknowledge a vast and varied set of racial experiences and racial images with which jurors begin. Indeed, were there not such preexisting images, there would be little incentive for the parties to invoke racial images during the course of the trial. As we move to events surrounding a particular case, we will not consider how bias is *created*, but note the settings and sources within that case where preexisting racial images are repeated, recalled, and reshaped.

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[11] It may be that the origin of darkness-as-evil imagery is an instinctual fear of the dark. Whatever its origins, darkness imagery is now inextricably entwined with the omnipresent black-as-dark, Black-as-African (or African-American), black-as-evil imagery so that one cannot use a darkness-as-absence-of-sunlight image without racial connotations. It might, of course, be different in another culture; however, in this culture, declaring that one did not intend a racial meaning does not prevent a racial resonance.

[12] *See, e.g.*, Marilynn B. Brewer, *A Dual Process Model of Impression Formation, in* ADVANCES IN SOCIAL COGNITION 1, 6 (Thomas K. Srull & Robert S. Wyers, Jr. eds., 1988); Eliot R. Smith & Michael A. Zarate, *Person Categorization and Stereotyping*, 8 SOC. COGNITION 161 (1990).

1. Pretrial Publicity

Newspaper reports of crime generally include the race of the perpetrator only when he or she is a person of color; moreover, crimes against whites perpetrated by persons of color are likely to get more coverage than other interracial crimes or crimes where the perpetrators and victims are of the same race.[13] Sometimes the media frenzy, while ostensibly not racial, will indelibly imprint race as the primary image of the case. The Charles Stuart murder case in Boston and the Central Park jogger case are prime examples of this phenomenon. With regard to the Stuart case, after Stuart committed suicide it became obvious that he had played on racial fears when he concocted the story that he and his pregnant wife were shot by a black man. Media commentators also noted that race certainly had a role in the police decision not to investigate inconsistencies in Stuart's story, but instead to instigate a sweeping, unconstitutionally intrusive manhunt directed at African-American males.[14] When public pressure mounted, the police pressed Stuart to make an identification of the assailant and he picked a vulnerable black man out of a line-up. Could *anyone* argue that he would have gotten a color-blind trial?

The Stuart case exemplifies the risk that an innocent person may get caught up in overwhelmingly powerful racial pictures. But an injustice is also wrought—to the defendants and to the ethnic group to which they belong—if the guilty are judged guilty long before the trial begins. In the Central Park jogger case, journalists criticized the black lawyers who claimed that racial motives led authorities to frame their clients.[15] Without condemning or condoning the questions they asked various witnesses, it must be observed that the lawyers were not the ones who injected race into the trial. Could *anyone* in New York have walked into the jury box knowing of the crime without knowing the race of the alleged perpetrators?

Although the media is often blameworthy in such cases,[16] blameworthiness is not the point.[17] In the Rodney King beating case, most of the media was sympathetic to the prosecution, but this did not

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[13] Abbott & Calonico, *Black Man, White Woman—The Maintenance of a Myth: Rape and the Press in New Orleans*, in CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANCE 141, 147, 149 (M. Riedel & T. Thornberry eds., 1974) (noting that press reports overemphasize black-on-white rape and white respondents see reality as consistent with news reports); Kirk A. Johnson, *Objective News and Other Myths: The Poisoning of Young Black Minds*, 60 J. NEGRO EDUC. 328 (1991); Ellis Cose, *Rape in the News: Mainly About Whites*, N.Y. TIMES, May 7, 1989, §4, at 27 (stating that race is part of the determination of what is news and any suggestion of violence across racial lines is likely to push story onto front page); *see also* Jean-Marie B. Mayas, Perceived Criminality: The Attribution of Criminal Race from News-Reported Crime (1977) (unpublished Ph.D. dissertation, University of Michigan) (stating that white readers overwhelmingly ascribed violent crimes to black perpetrators even though the reports did not supply a basis for that attribution).

[14] *Stuart Dies in Jump off Tobin Bridge After Police Are Told He Killed His Wife; Image Proved Unjust*, BOSTON GLOBE, Jan. 5, 1990, at 1 [hereinafter *Stuart Dies*].

[15] *See* Anna Quindlen, *Public and Private: Dirt and Dignity*, N.Y. TIMES, July 22, 1990, §4, at 19; Sam Roberts, *The Region: For Some Blacks, Justice Is Not Blind to Color*, N.Y. TIMES, Sept. 9, 1990, §4, at 5; Ronald Sullivan, *Defense Calls Jogger Case a Racist Witch Hunt*, N.Y. TIMES, Nov. 29, 1990, at B3; Ronald Sullivan, *Judge Rejects Lawyer's Plea in Jogger Trial*, N.Y. TIMES, Oct. 27, 1990, §1, at 27.

[16] Why is the Central Park jogger case so much more compelling than the intraracial rape of a poor black woman (also fairly dramatic because her attackers forced her to jump from a twenty-one story building and she survived only because she caught a television cable) that occurred that same year? *See* Johnson, *supra* note 13, at 328 *passim*. Similarly, in Washington, D.C., why did the case of Daniel Kinard, a black man who was accused of murdering a white college graduate, so fascinate the media despite the fact that the city suffered four hundred and eighty-nine murders—most with black

mean that the white officers failed to benefit from the pretrial publicity. Because the state case was ultimately tried in Simi Valley, the facts that the media used to highlight the officers' racial motivations may actually have been detrimental to the prosecution's case. Whom did it help to repeat the "gorillas in the mist" line over and over again? Whom did it help to foreshadow the trial testimony that pictured King as an animal? Whom did it help to publish the interviews that stressed the size of King's thighs and his resemblance to a football linebacker?[18] The ultimate effects of this racial imagery did not depend on the media's intent; they depended on who sat on the jury.

2. Before the Evidence—Voir Dire and Opening Statements

Voir dire is designed to ferret out bias, but occasionally voir dire may reinforce it. Judges vary in the latitude they permit attorneys who wish to probe bias; sometimes "hypotheticals" that closely resemble the case may be permitted and the phrasing of these hypotheticals may provide a quick sketch of a racial picture. Sometimes attorneys, by their tone and demeanor, may suggest a racial affinity with some jurors and not others.[19]

The opportunity for deliberate manipulation of racial images increases as the trial progresses. Opening statements offer defense and prosecution the chance to outline the case they intend to proffer. Theoretically, quite a bit of imagery is possible here; the attorney is not constrained by evidence already proffered as she will be in closing arguments, but only by her good faith belief that such evidence will be produced. On the other hand, because declaration of a mistrial is relatively cheap so early in the trial, a lawyer may be constrained by the belief that the judge will tolerate less prejudice here than in closing arguments.

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victims—that year? Ellen J. Pollock & Stephen J. Adler, *Justice for All?*, WALL ST. J., May 8, 1992, at A1, A2. Why was the Carol Stuart murder seen as so much more compelling than the numerous other murders—mostly of black and Hispanic victims—during a contemporaneous wave of shootings in Boston? *See Stuart Dies*, *supra* note 14, at 1. Sometimes the media eventually tattles on itself about such disparate coverage, but such confessions do not make the front page day after day. If racial animosity is not part of the answer to these questions, surely racially selective indifference is. *See* Matthew S. Goldberg, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. ECON. 307 (1982) (arguing that racial nepotism rather than racial animosity explains most discrimination); *see also* BELL, *supra* note 7.

[17] When an Eyewitness News Daily News Poll asked New Yorkers which of nine individuals and institutions are making race relations worse in the city, the news media was mentioned by 69% of respondents. Burns W. Roper, *Racial Tensions Are Down*, N.Y. TIMES, July 26, 1990, at A19.

[18] *See, e.g.*, Richard A. Serrano, *3 in King Beating Say They Feared for Lives*, L.A. TIMES, May 21, 1991, at A1.

[19] In jurisdictions where the judge conducts voir dire, he or she may similarly suggest affinity with some jurors and not others. In one extreme example, a judge asked a venireman about inflation and then commented that he did not know why he was speaking to a Japanese juror about inflation because "what do fishheads and rice cost?" Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 382 (Cal. 1983), *appeal dismissed*, 464 U.S. 1033 (1984). In another criminal case, that same judge asked a black venirewoman who worked in a grocery store if she knew the price of watermelon. *See id.*

3. Testimony

During the presentation of the prosecution and defense cases in chief, racial imagery may be introduced by attorneys or witnesses. Often this is unavoidable. The witness's own race will be apparent to the jury and the witness may testify to facts that inevitably have some racial content. For example, she may be asked to describe the person she saw pointing a gun at the bank teller, and that description will usually include the person's race.[20]

This unavoidable racial content may be stressed either by repetition of a fact ("And then the black man . . ."), by the words chosen to describe that fact ("He looked Oriental, definitely foreign . . ."), or by inflection. The race of other persons can be mentioned when it is not necessary to the testimony ("Then me and the other white guys . . .").

Alternatively, the witness may employ racial imagery by the way she chooses to describe events in dispute or by her interpretation of those events. During the Rodney King police brutality trial, Officer Koon testified that Rodney King "gave out a bear-like yell" and "groaned like a wounded animal," choosing similes that do not explicitly allude to race, but that conjure up stereotypes of black people as subhuman.[21] Koon also testified that King was "very buffed out" and that he interpreted this to mean that King was an ex-con.[22] Koon further explained that he attributed King's unusual strength and insensitivity to pain to the use of the illegal drug PCP.[23] Again, there are no explicit references to race; this time the characterizations resonate with images of black people as criminal.

Finally, a witness may gratuitously offer facts, generalizations, or opinions having racial content that are not germane to the events in dispute. For example, a witness might volunteer the fact that the African-American defendant has a white spouse,[24] or she might make generalizations about the ethnic origins of persons involved in the drug trade.[25] Although the opposing attorney may object to such comments as irrelevant, the image will have been presented to the jury regardless of whether the judge sustains the objection.

Lawyers may also contribute racial imagery during the testimony of witnesses. They may have coached the terms of the description their witness employs or the interpretations she proffers. They may also ask questions that employ their own descriptions and interpretations, particularly on cross-examination. Their demeanor toward a witness or the terms by which they address her may have racial overtones. For example, the state prosecutor in one recent case said to a black witness: "Well you said [the defendant] said that he made a 'bitch' out of the man before he killed him. Does that have any

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[20] If the lighting conditions were poor, or the robber wore a mask, the description may not include race because it is unknown to the observer. Often the description will not appear to include race, but it may do so implicitly, as when a white person testifies about the appearance of another white person; because being white is seen as "normal," it need not be reported, just as the presence of two legs and two arms need not be reported.

[21] *Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Apr. 21, 1992, at A14.

[22] *Id.*

[23] *Id.* This image was particularly outrageous because drug testing showed no PCP in King's bloodstream.

[24] *See, e.g.*, People v. Nichols, 308 N.E.2d 848, 850 (Ill. App. Ct. 1974).

[25] *Cf.* United States v. Doe, 903 F.2d 16, 24 (D.C. Cir. 1990) (prosecutor elicited testimony that Jamaicans were taking over the local drug market).

meaning *to you people*?"[26] When an attorney impeaches a witness with her criminal record, information may be solicited that contributes to racial stereotyping whether or not this is the purpose of the inquiry. Finally, just as witnesses may volunteer information about irrelevant racial matters, attorneys may ask questions that allude to the same issues. Even though the judge will often prohibit an answer and instruct the jury to disregard the question, the insinuation has been made and the image flashed on the screen of the jurors' minds.

4. Closing Arguments and Jury Instructions

Closing arguments permit both defense counsel and the prosecuting attorney to summarize and argue from the evidence. Although neither side may argue facts outside the evidence and both must refrain from arguments that "inflame" the jury, passion, flamboyance, and rhetorical flourish are permitted. Within the bounds of a proper summation, laywers may repeat and stress racial imagery used by witnesses or they may introduce new imagery by their words, metaphors, or demeanor. Moreover, attorneys often stray beyond the bounds of a proper summation without the declaration of a mistrial.[27] Sometimes the opposing attorney hesitates to emphasize the offensive remark by her objection; however, even when she does object, the judge is likely merely to admonish the jury to disregard the offensive remarks. The use of racial imagery in summations is surprisingly common and ranges from overt attempts to inflame racial hostility to subtle reinforcement of racial divisions.[28]

After summations are complete, the judge instructs the jury. She generally will direct jurors to set aside all bias and prejudice; however, some judges may make other remarks that convey racial messages, particularly in jurisdictions where the judge may marshall the evidence.[29]

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[26] Applicant's Reply to State's Original Answer and Brief at 12, Russell v. Collins, 944 F.2d 202 (5th Cir.) (No. AC692), *cert. denied*, 112 S. Ct. 30 (1991); *see infra* note 73 and accompanying text.

[27] *See infra* notes 168-263 and accompanying text.

[28] Most of the reported cases containing some form of racial imagery involve prosecutors' summations. Defense summations may be even worse, but they are rarely the subject of an appeal because the Double Jeopardy Clause bars retrial after an acquittal. I therefore do not catalog here the kinds of racial imagery used in summations, but address them in the course of surveying the specific types of racial imagery that are employed in criminal trials.

[29] The reader who does not believe that a judge would ever employ racial imagery should consider some of the remarks that have been reported outside the context of jury instructions. One California judge was disciplined for explicitly racial comments made during sentencing and voir dire; these comments included asking a black woman who worked in a grocery store if she knew the price of watermelons. *See, supra* note 19. At least two New York judges have used ethnic slurs in the courtroom. *In re* Fabrizio, 480 N.E.2d 733 (N.Y. 1985); *In re* Agresta, 476 N.E.2d 285 (N.Y. 1985); *see In re* Cerbone, 460 N.E.2d 217 (N.Y. 1984) (judge threatened to use his judicial power against black patrons of a bar and embellished his remarks with racial epithets). A Michigan probate judge, discussing the Michigan law under which minors seeking abortions may request a waiver of the parental consent requirement, stated that he was reluctant to grant waivers, but might do so "in some cases, such as incest or when a white girl is raped by a black man." *Judge Cites Interracial Rape in Abortion Debate*, UPI, Apr. 26, 1991, *available in* LEXIS, Nexis Library, UPI File (cited in T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 COLO. L. REV. 325, 332 (1992)). Another judge was found to have repeatedly employed ethnic epithets and slurs in his chambers. *See In re* Stevens, 645 P.2d 99, 99 (Cal. 1982). A Florida judge commented publicly on welfare recipients, black law breakers ("We have been too good to them. They're the ones committing the crimes."), intermarriage, and his doubts about school integration. Larry Rohter, *Judge's Remarks Leave Town in Turmoil*, N.Y. TIMES, Jan. 10, 1992, at A12; *see In re* Petition for Removal of a Chief Judge, 592 So. 2d 671 (Fla. 1992). Additionally, a Massachusetts judge referred to Jewish lawyers with ethnic slurs and, on one occasion, on being informed that a Jewish lawyer was waiting to speak with him, said, "It's time to go warm up the ovens." *At the Bar*, N.Y. TIMES, Feb. 26, 1993, at 16. Judges who have such views are unlikely to conceal them completely from the jury because their demeanor, tone, and emphasis may convey racial messages.

5. Deliberations

Jurors may make explicit or implicit racial arguments in the course of deliberations. Because there is no record of deliberations, it is hard to estimate the frequency with which jurors introduce or reiterate racial imagery. Occasional reports by former jurors, usually persons of color, make it clear though that racial arguments are sometimes made by jurors as well as addressed to them.[30]

This overview makes it plain that a criminal trial provides several sources of, and myriad opportunities to use, racial imagery. The imagery that is in fact employed by these sources is quite varied. Several different schemes are possible for categorizing the content of these racial remarks. To the extent courts have attempted any categorization, they have focused on the intent of the speaker,[31] but I think that distinctions based on intent are unhelpful here.[32] Whether or not a slur was intended—and that is almost imposssible to ascertain[33]—motivation is of little or no importance in assessing the impact of racial imagery on the jury. Instead, in order to facilitate devising a remedy, I consider

[30] For example, in the trial of Keith Mondello for the racially motivated slaying of Yusef Hawkins, one juror said that two white jurors said they "wouldn't convict Mondello in no way form or fashion." *Racial Tension Fueling Attacks on Journalists*, N.Y. TIMES, May 21, 1990, at B2. The Latino juror in the Rodney King beating case made similar statements, noting that she had been mocked for her desire to review the videotape and that "it's like they wanted to see what they wanted to see. They already had their minds made up." Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y. L.J., May 26, 1992, at 4; *see* People v. Springs, 300 N.W.2d 315, 318 n.4 (Mich. Ct. App. 1980) (black juror asked to be dismissed midway through trial as other jurors had gotten "cold" and one juror said to her during deliberations "we want to get on this prostituting because Pat, you would know about that one, wouldn't you?").

[31] Several courts have followed this distinction. *See infra* notes 264-76 and accompanying text (discussing remedies for the use of racial imagery). Professor Elizabeth Earle illustrates two other categorization schemes in the cases. I think her "weight of the evidence" analysis is not a scheme courts use to categorize kinds of imagery, but reflects subsequent determinations about whether the error is harmless or not. What she calls "relevance based scrutiny" is indeed another approach, but one that has been applied as the sole test in only two cases in the last twenty years. *See* Earle, *supra* note 5, at 1212; *supra* note 5 and accompanying text.

[32] I have argued elsewhere, Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) [hereinafter Johnson, *Black Innocence*]; Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) [hereinafter Johnson, *Unconscious Racism*], as have many others, that distinctions based on intent are rarely useful with race discrimination issues. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

[33] Several commentators have argued that sophisticated discriminators will conceal their motives. *See, e.g.*, Eisenberg, *supra* note 32, at 47-48; Perry, *supra* note 32, at 551; Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. Ill. L.F. 961, 1031 (1977). Others have argued that unconscious racism renders it virtually impossible to adduce evidence of purpose when the actor herself is unaware that race influenced her choice. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA 156 (1989); Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 442 (1984); Paul Brest, *The Supreme Court—1975 Term—Forward: In Defense of the Anti-discrimination Principle*, 90 HARV. L. REV. 1, 6-8 (1976); Johnson, *Black Innocence, supra* note 32, at 1650; Johnson, *Unconscious Racism, supra* note 32, at 1031; Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1419 (1988); Lawrence *supra* note 10, at 318-26.

variation along two other dimensions: (1) the specific racial stereotype or fear that is called on and (2) the subtlety with which that stereotype or fear is evoked.

B. Specific Stereotypes and Fears

There are a variety of racial stereotypes for each disfavored ethnic group. I do not attempt to review all of the possible stereotypes that might be invoked because hypotheticals might be constructed for almost any stereotyped characteristic. Rather, I start by categorizing real cases—all of which are post-civil-rights-era cases and all of which have occurred within the last twenty years[34]—and then extrapolate from them to cases that are probably occurring but about which we do not have reliable information. Before starting, I should note that this section does not separately discuss cases in which people of color have used racial imagery. There are, of course, some such cases that the media documents assiduously.[35] I do not focus on them for three reasons: first, they are few in number; second, they already receive a disproportionate amount of attention; third, they are less likely to obstruct justice.[36]

Most starkly, black may be identified with evil and white with good. Perhaps because the imagery is so extreme, invocations of it tend to be somewhat indirect. It was a "black Sunday" when the black defendant set out after his white victims.[37] In another case involving an African-American defendant the prosecutor described the victim as a "nice white lady."[38]

Closely related is the image of African Americans as more violent and more criminal than whites. Thus, one prosecutor said that a defendant "had to play Superfly," alluding to a fictional black criminal.[39] Another prosecutor, seeking to impeach the veracity of a defendant's contention that, at the time of his arrest, he believed that the three arresting plain clothes officers were muggers, repeatedly argued that the African-American defendant could not have believed that white men were muggers.[40] In one case with a black defendant and black victim, the prosecutor discussed at some length the prevalence of black crime generally and of black-on-black crime in particular and argued that this

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[34] I do not examine earlier cases because I wish to avoid arguments about how much things have changed. I have not observed any dramatic changes during the 20-year span I do cover—neither in the kinds of imagery employed nor in judicial responses to that imagery.

[35] The Central Park jogger case is one example. *See supra* note 15. The Marla Hanson case is another. *See* George James, *Man Given 5 to 15 Year Term in Model's Slashing*, N.Y. TIMES, May 12, 1987, at B4; *see also Defense Lawyer Says He Is "the Victim,"* Mar. 28, 1987, §1, at 31; E.R. Shipp, *Defense Lawyers' Tactics: Unfair or Just Aggressive*, N.Y. TIMES, Apr. 21, 1987, at B1. Perhaps the most ballyhooed case of racial manipulation by an African-American defendant is the drug prosecution of the former mayor of Washington, D.C., Marion Barry.

[36] The obvious exception may be Marion Barry's drug prosecution, but that case is extraordinary in many respects. Herman Schwartz, *Rough Justice: Verdict in the Marion S. Barry Case*, NATION, Sept. 10, 1990, at 1.

[37] State v. Wilson, 404 So. 2d 968, 969 (La. 1981).

[38] State v. Greene, 542 So. 2d 156, 157 (La. Ct. App. 1st Cir.), *writ denied*, 548 So. 2d 1229 (La. 1989).

[39] Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

[40] People v. Thomas, 514 N.Y.S.2d 91, 92-93 (App. Div. 1987); *see* People v. Traylor, 487 N.E.2d 1040, 1042 (Ill. App. Ct. 1985) (prosecutor argued that police officers' approach to stolen vehicle could be explained by fact that they were "white policemen in a black neighborhood").

Detroit pattern should not be permitted to reach Joliet.[41] In a similar case, the prosecutor said: "Ninety percent of all murders are committed by blacks on blacks" and, "Its [sic] time to say "We're not going to allow this kind of conduct to go on in our city anymore."[42] In yet another case, the prosecutor argued that the local drug market was being taken over by Jamaicans and introduced expert testimony to that effect; the only relevance of this assertion to the case was the Jamaican ancestry of the defendants.[43] In a peculiar twist on the propensity argument, a prosecutor argued that the defendant must have entered the robbed premises because the codefendant would never have let "him sit out there—I don't mean to be racial about this . . . do you think you're going to leave a black guy out there in a car, or a big car while a robbery is going on?"[44]

Some of the testimony and argument in the Rodney King beating case also conjured up the image of black people as criminal; Officer Koon described King as "very buffed out, very muscular" from which he said he concluded "that he was probably an ex-con."[45] Racial images related to criminality are not limited to African Americans. In a case involving recent Italian immigrants, both defense counsel and prosecutor argued about Al Capone and "The Godfather."[46] In a case involving Native-American defendants, the prosecutor argued that "when you see an Indian that drinks liquor, you see a man that can't handle it" and that such drinking leads to violence.[47] In another case the prosecutor asked the defendant, "Isn't it true in gypsy practice that it is okay to lie and cheat and steal if you can get away with it?"[48]

Equally abhorrent are portrayals of persons of color as animal-like or subhuman in some other way. The King beating case provides a small menagerie of such images. Officer Koon testified that King showed "Hulk-like strength," "gave out a bear-like yell," and "groaned like a wounded animal."[49] Powell recalled that Mr. King fell "like a rag doll" and repeatedly described King's movements as "unnatural."[50] Additionally, Powell was cross-examined about a computer message he typed shortly

[41] People v. Lurry, 395 N.E.2d 1234, 1237 (Ill. App. Ct. 1979).

[42] State v. Noel, 693 S.W.2d 317, 318 (Mo. Ct. App. 1985); *see* State v. Franklin, 526 S.W.2d 86, 90 (Mo. Ct. App. 1975) (in a robbery case with a black defendant, a prosecutor remarked in closing that 85% of crime victims in a particular city were people who have to live in black areas or who do live there).

[43] United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990); *see* Russell v. State, 518 A.2d 1081, 1085 (Md. Ct. Spec. App. 1987) (prosecutor refers to "Jamaican drug trafficking" in his opening statement, and a police officer made the same remark in his testimony about his subspecialty as a narcotics officer).

[44] State v. Snowden, 675 P.2d 289, 293 (Ariz. Ct. App. 1983).

[45] *Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Mar. 20, 1992, at A20.

[46] Commonwealth v. Graziano, 331 N.E.2d 808, 812 (Mass. 1975); *see* Haas v. State, 247 S.E.2d 507, 510 (Ga. Ct. App. 1978) (prosecutor repeatedly refered to an alias used in the indictment, to an Italian connection, and to the defendant as a "Sicilian,") *cert. denied*, 440 U.S. 922 (1979); *see also* State v. Filipov, 576 P.2d 507 (Ariz. Ct. App. 1977) (prosecutor refers to recent immigrant as "gypsy" and compares him to Sicilians).

[47] Soap v. Carter, 632 F.2d 872, 878 (10th Cir. 1980) (Seymour, J., dissenting), *cert. denied*, 451 U.S. 939 (1981); see United States v. Rodriguez Cortez, 949 F.2d 532, 540 (1st Cir. 1991) (trial court admitted evidence of defendant's Colombian identity as probative of his membership in a narcotics conspiracy with other Colombian members).

[48] Stanton v. State, 349 So. 2d 761, 764 n.1 (Fla. Dist. Ct. App. 1977).

[49] *See Notebook*, *supra* note 1, at A14.

[50] *Id.*

before the beating in which he described an earlier incident, involving black people, as "right out of 'Gorillas in the Mist.'"[51] "Powell denied that he saw Rodney King as non-human; however, when the prosecutor asked, "he wasn't an animal, was he?" Powell responded, "No, just acting like one.""[52]

Animal imagery is actually quite common in prosecutors' summations, perhaps because not all courts deem it impermissible. In a few recent cases, the racial import of these terms is clear;[53] in one case, the prosecutor characterized the defendant as "scum" who committed crimes in "our streets" and not in "some ghetto."[54] In most cases where the defendant complains of animal imagery, the court does not discuss the ethnicity of the defendant; occasionally, however, the defendant's name or other details of a particular case make it clear that courts are ignoring the interaction of such imagery with the defendant's race or ethnicity.[55] Sometimes the reference to subhumanity is more oblique, as when a prosecutor asked whether it was reasonable to believe the victim would consent to sex with "that?"[56] Other degrading, dehumanizing imagery includes the use of the word "n*****,"[57] other ethnic slurs,[58] and the practice of referring to a minority defendant by his or her first name.[59]

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[51] *Id.*

[52] *Id.*

[53] *See, e.g.*, State v. Wilson, 404 So. 2d 968, 969-70 (La. 1981) (district attorney's remarks "contained repeated references to 'whitey' and 'white honkies' in connection with defendant's supposed characterization of whites and to 'animals' as a description of the defendants").

[54] People v. Nightengale, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988), *appeal denied*, 520 N.E.2d 258 (Ill. 1988).

[55] *See, e.g.*, People v. Rivera, 426 N.Y.S.2d 785, 786 (App. Div. 1980) (referring to defendants as the "wolves of this society"). For an older such case, see Miller v. State, 163 S.E.2d 730, 734 (Ga. 1968); *see also* State v. Wilson, 404 So. 2d 968 (La. 1981) (court found no racial prejudice in black defendant case with three summation references to animals); Commonwealth v. Layton, 376 N.E.2d 150, 153 (Mass. App. Ct. 1978) (farfetched to think arguments about streets of commonwealth becoming a "jungle" were racially motivated in black defendant robbery case).

[56] Thomas v. State, 419 So. 2d 634, 635 (Fla. 1982); *see* Patterson v. Commonwealth, 555 S.W.2d 607 (Ky. Ct. App. 1977) (in black defendant-white victim case, in which prosecutor said, "[I]t's hard for me to tell people of the Negro race apart," he also said rape was not conduct befitting "a member of the human race").

[57] I am neither willing to use that word, nor able to see a need for its use. However, cases in which that epithet is used still occur, albeit less often than in the past. *See, e.g.*, Thornton v. Beto, 470 F.2d 657, 658-59 (5th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Kornegay v. State, 329 S.E.2d 601, 603 (Ga. 1985); People v. Walker, 411 N.Y.S.2d 377, 378-79 (App. Div. 1978); Sparks v. State, 563 S.W.2d 564, 567-78 (Tenn. Crim. App. 1978); *see also* McBride v. State, 338 So. 2d 567, 568 (Fla. Dist. Ct. App. 1976); In re Agreste, 476 N.E.2d 285 (N.Y. 1984) (*judge* used the phrase "n*****s in the woodpile" in open court in a trial involving two black defendants).

[58] In State v. Martinez, 658 P.2d 428, 430 (N.M. 1983), the prosecutor referred to the defendant as a "chola punk," a term which I might not repeat if I either knew what it meant or knew how to signal it. In People v. Wilson, 198 N.W.2d 424, 426-27 (Mich. Ct. App. 1972), both the prosecutor and the defense counsel referred to the defendant and his companion as "colored," and in State v. Parker, 509 P.2d 272, 273 (N.M. Ct. App. 1973), the prosecutor referred to black persons as "colored."

[59] In Hamilton v. Alabama, 376 U.S. 650 (1964) (facts reported in Bell v. Maryland, 378 U.S. 226, 248 n.4 (1964) (Douglas, J., concurring)), the Supreme Court reversed a contempt conviction against a black witness who refused to answer due to a solicitor's insistence on calling her by her first name. It would be a mistake to conclude that minority defendants and witnesses are not presently so degraded—such tactics do not lead to published reports in most circumstances. The King beating case provided one example of a witness using a black adult's first name. However, as the courtroom tapes reveal, the prosecutor corrected the witness. I suspect this is not unusual. One of my clients was referred to by the prosecutor in the course of an extremely inflammatory summation as "Pedro." *See* People v. Arroyo, 431 N.E.2d 271 (N.Y. 1982); *see also* State v. Torres, 554 P.2d 1069, 1071 (Wash. Ct. App. 1976) (prosecutor repeatedly referred to

In other cases, prosecutors play on the supposed sexual appetite of, or the supposed sexual threat posed by, black men. In the rape case variation, the prosecutor argues, sometimes in hysterical terms,[60] that the victim, a white woman, would never have consented to have sex with the defendant because he is a black man.[61] In cases not involving sexual assault, sexual threat imagery is exploited when the prosecutor directs the jury's attention to a fact irrelevant to the case: that the black defendant has had one or more sexual relationships with white women.[62] A particularly extreme example of this tactic is found in a 1987 Nevada case involving a death penalty hearing in which the prosecutor directed the jury's attention to the defendant's "preference for white women" and his "physical relationship" with a white woman.[63] Finally, in a case involving a white male victim, the prosecutor argued that the man had to be telling the truth, because his story included an account of intercourse with a black woman and "[i]f he is going to lie about anything else, he wouldn't admit having intercourse with a black woman."[64]

Black dishonesty is another racial image that has been exploited by prosecutors. At one time it was relatively common to find cases in which attorneys argued that African Americans are generally less trustworthy witnesses, and I have found three recent cases in which prosecutors made that argument quite directly. In one, the prosecutor said: "Not one white witness has been produced in this case that contradicts [the white prosecution witness's] position in this case."[65] In the second such case, the prosecutor characterized the testimony of a black defense witness as "shucking and jiving on the stand."[66] Finally, in the third case, referring to the black defendant and his black witnesses as "street

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defendants as Mexicans or Mexican Americans while referring to the complaining witness with a more formal "Ms." or "Mrs.").

[60] For repeated and extensive comments, see Reynolds v. State, 580 So. 2d. 254, 256 (Fla. Dist. Ct. App. 1991); *see also* Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978) ("[T]he average white woman abhors anything of [a sexual] nature that had to do with a black man.").

[61] *See, e.g., Miller*, 583 F.2d at 704; *Reynolds*, 580 So. 2d at 256; State v. Thomas, 777 P.2d 445 (Utah 1989); State v. Bautista, 514 P.2d 530, 532-33 (Utah 1973); *see also* Rhoden v. State, 274 So. 2d 630, 635 (Ala. Crim. App. 1973) (in an interracial rape case replete with references by both prosecutor and defense counsel to white lady and "white woman," prosecutor told jury that if they believed the complaining witness, they would have to believe that defendant "took it, he got him a white woman"); State v. Mayhue, 653 S.W.2d 227, 237 (Mo. Ct. App. 1983) ("[N]o person in their right mind would want to remember three black men getting on her naked body. . . .").

[62] *See, e.g.,* Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976); United States v. Grey, 422 F.2d 1043, 1045 (6th Cir.), *cert. denied*, 400 U.S. 967 (1970); Weddington v. State, 545 A.2d 607, 610 (Del. 1988); People v. Nichols, 308 N.E.2d 848 (Ill. App. Ct. 1974); People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980); State v. Parker, 509 P.2d 272, 272 (N.M. Ct. App. 1973); *see also* State v. Deas, 212 S.E.2d 693, 694 (N.C. Ct. App.) (prosecutor argued that if motel operator had seen a white woman in the car when the black defendant was registering as man and wife, he would have remembered it because "it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County"), *cert. denied*, 215 S.E.2d 626 (N.C. 1975).

[63] Dawson v. State, 734 P.2d 221, 223 (Nev. 1987); *see Nichols*, 308 N.E.2d at 852-53 (prosecutor's closing argument referred to the fact that the black defendant was married to a white woman).

[64] People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977)

[65] Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979).

[66] Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

people," the prosecutor said, "they lie every day."[67] One variation on the dishonesty image is that African Americans[68] are likely to lie when they testify for each other[69] and likely to tell the truth when they testify against each other.[70] An interesting interracial twist on this argument is presented by a case where the prosecutor argued that the testimony of the defendant's alibi witness, a white woman living with a black man, should be doubted because the witness had faced a lot of social disapproval and would therefore be more likely to lie for the defendant.[71]

Another specific brand of racial imagery common in prosecutor misconduct cases is what I call "us-them" imagery. In its most outrageous form, it portrays black-on-white violence as more horrible than other violence—implying that the jury must act to restrain future interracial crimes. Thus, in one case with a black victim and a black defendant, the prosecutor said that if the jury released the defendant, "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know."[72] In a very recent capital murder trial, the prosecutor rhetorically asked the jury: "Can you imagine the fear that [the victim] went through with three blacks?"[73] In another case the state's attorney characterized the defendant as "scum" who committed a crime in "our streets" and "not in some ghetto."[74] In a fourth case, the prosecutor argued that the defendant's homicidal act was caused by the racial tenets of the Black Muslim religion.[75] Likewise, in several cases prosecutor's have drawn on fears of racial revenge by arguing that black or Latino defendants with white victims were motivated by racial animosity, despite the lack of any evidence regarding the defendant's motives.[76] There are also a number of cases in which racial animosity is fueled by the attribution of an ethnic slur like "honkey"—often without basis in the record.[77]

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[67] *Richardson*, 363 N.E.2d at 926; *see* State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984) (prosecutor argued that defense witnesses were unreliable by reason of their foreign birth in the Mideast).

[68] Earlier cases involve arguments about other ethnic in-group lying. *See* 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE §516, at 722-25 (2d ed. 1978). I found only one recent example of an ethnic in-group lying argument, which involved the prosecutor's argument that defense witnesses, who were natives of Syria, were unduly biased because they were the defendant's "countrymen." *Kamel*, 466 N.E.2d at 866.

[69] *Richardson*, 363 N.E.2d at 926; People v. Kong, 517 N.Y.S.2d 71, 72 (App. Div. 1987).

[70] McFarland v. Smith, 611 F.2d 414, 416 (2d Cir. 1979); People v. Bramlett, 569 N.E.2d 1139, 1145 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 121 (Ill. 1991).

[71] State v. Terry, 582 S.W.2d 337, 339 (Mo. Ct. App. 1979).

[72] Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975).

[73] Petition for Writ of Certiorari at 18, Russell v. Collins, 944 F.2d 202 (5th Cir.) (No. AC692), *cert. denied*, 112 S. Ct. 30 (1991).

[74] People v. Nightengale, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988).

[75] Commonwealth v. Mahdi, 448 N.E.2d 704, 711-12 (Mass. 1983).

[76] *See, e.g.*, Carter v. Rafferty, 621 F. Supp. 533, 538 (D.N.J. 1985); People v. Sales, 502 N.E.2d 1221, 1225-26 (Ill. App. Ct. 1986); State v. Snedecor, 294 So. 2d 207, 209 (La. 1974); State v. Jones, 283 So. 2d 476, 477 (La. 1973); People v. Rivera, 523 N.Y.S.2d 834, 835 (App. Div.), *aff'd*, 540 N.Y.S.2d 233 (1988); *see also* People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979) (prosecutor argued that differences in nationality between defendants from Puerto Rico and victim from Mexico may have motivated the crime).

[77] *See, e.g.*, United States v. Haynes, 466 F.2d 1260, 1265 (5th Cir. 1972) (prosecutor said "burn, baby burn" to African-American defendant); Dixon v. State, 325 S.E.2d 893, 895 (Ga. Ct. App. 1985) (prosecutor elicited inadmissible hearsay including defendant's purported reference to victim as "this honkey"); People v. Turner, 367 N.E.2d 1365, 1366 (Ill. App.

The second form of "us-them" imagery focuses on how different "they" are. While this form of imagery might seem milder, some summations employing such imagery are breathtakingly long and digressive descents into stereotyping. In one case, the transcription of the prosecutor's racial remarks required two pages of the reporter and began with a discussion of whether the defendant would be considered a "n*****" in his own community.[78] In another case, the prosecutor discussed "colored" people as people who wear "exotic" hairstyles, straighten their hair, and wear unusual sideburns, and further argued about the early sexual maturity of black people and their inability to do or know things that are "commonplace for the ordinary person."[79] In yet another case, the defense attorney told the jury that he had told the defendants, " 'Y'all n*****s 40 or 50 years ago would be lynched for something like this, but you're not under the law guilty of rape because these people are as guilty as you are,' " and reinforced these statements with what the reviewing court described as "further demeaning references and stories regarding race."[80] In a fourth case, previously mentioned for the prosecutor's argument that Native Americans have a propensity for alcohol abuse and violence, the prosecutor also commented:

> You try to impress upon people that they can change—that they should change, and there is a decent way of going through life without violence, without committing crimes and still you can enjoy life and obtain things and goals in your life, but some people don't live that way, and they won't live that way. That's what you have in this case. You have a class of people and a situation that exists that you and I can't change irrespective of what we do . . . but I submit to you that the facts surrounding this are typical of the community in which this accident occurred . . . and there is nothing you and I can do to change that situation, other than you can suggest with your verdict in this case what you want to do, what kind of standard you want to ask or set in this country.[81]

There is also an interracial twist to "us-them" imagery. For example, a white defendant's association with black people and use of black witnesses has been the subject of prosecutorial comment.[82]

Ct. 1977) (prosecutor falsely stated that black witness had said he was going to have a good time watching two black girls "beat up whitey"); State v. Wilson, 404 So. 2d 968, 969 (La. 1981) ("whitey" and "white honkies"); *see also* United States v. Harvey, 756 F.2d 636, 649 (8th Cir.), *cert. denied*, 474 U.S. 831 (1985) ("honkey"); *cf.* McBride v. State, 338 So. 2d 567, 568 (Fla. Ct. App. 1976) ("n*****" accurately attributed to white defendant in a case with black jurors).

[78] People v. Walker, 411 N.Y.S.2d 377, 378-79 (App. Div. 1978).

[79] United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 154-55 (2d Cir. 1973); *see* People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979) (referring to a defendant's Puerto Rican origins and a victim's Mexican origins, prosecutor said he didn't know why people rob each other when they "are practically neighbors; they speak Spanish, all of them"); Sparks v. State, 563 S.W.2d 564, 567-68 (Tenn. Crim. App. 1978) (digression on what the use of ethnic slurs means between two black people, depending on whether or not white people are present).

[80] Kornegay v. State, 329 S.E.2d 601, 603 (Ga. Ct. App. 1985).

[81] Soap v. Carter, 632 F.2d 872, 878 (10th Cir. 1980); *see* Commonwealth v. Tirado, 375 A.2d 336, 337-38 (Pa. 1977) (prosecutor elicited "expert testimony" as to social values of Puerto Rican males, their honor system, and the importance of saving face in a confrontation).

[82] People v. Dukett, 308 N.E.2d 590, 596 (Ill.), *cert. denied*, 419 U.S. 965 (1974); *see* Herring v. State, 522 So. 2d 745, 746 (Miss. 1988) (prosecutor asked whether black members of the jury could vote for a fair verdict and noted some belief that a jury with eight black people would not vote for a life sentence for a black person raping a white person); Commonwealth v. Morgan, 401 A.2d 1182, 1190 (Pa. Super. Ct. 1979) (prosecutor asked whether it was likely that a white woman would have patronized a predominantly black bar, as the defendant had claimed).

Finally, there are a large number of cases in which no specific racial imagery is called on, but where the race of various parties is "mentioned" without any apparent reason for doing so. (Of course, racial images may be dredged up even when race is relevant, as it is in a description of the perpetrator of a crime or when the behavior of some person has a racial motive.[83]) Some of these references are clearly racial, but their meaning is unclear.[84] Others look quite innocuous. For example, in one case the prosecutor made reference in his opening statement to the victim, "a young black male."[85] More discomforting is the reference to the defendant as "a black kid from Detroit."[86]

Knowledge of the context (often not provided by appellate court opinions)[87] can render a single reference very disturbing. For example, in the Rodney King beating case the defendant's attorney's single injection of the adjective "black" when describing the man the police officers saw gains power from the racial imagery rampant in the defendant's testimony. Similarly, some powerful, albeit unspecified, racial content is carried by the sentence: "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?"[88] Even passing references to a defendant's Colombian nationality in a narcotics case is likely to be harmful.[89] Naturally, repeated references to the race of the victim or defendant are more provocative than a single reference.[90]

Because this set of image categories is largely derived from prosecutorial questioning and summation, it undoubtedly neglects some contexts in which these images are used. While I would expect a substantial degree of overlap, defense counsel and her witnesses may find somewhat different stereotypes useful. Because acquittals may not be appealed, the range of defense counsel's imagery is

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[83] *See, e.g.*, Commonwealth v. Washington, 549 N.E.2d 446, 447 (Mass. App. Ct.), *review denied*, 552 N.E. 2d 863 (Mass. 1990) (explaining victim's failure to report crime to persons with whom she had contact immediately after crime had occurred as due to those persons being black and the victim being afraid of black people).

[84] For example, in State v. Brown, 636 S.W.2d 929, 937 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983), the prosecutor argued that judges, reporters, prosecutors and police officers could all do their jobs " ,til we're black in the face." "Unless you do your job," their efforts would be useless. Given a black defendant and a white victim, it seems unlikely that the substitution of "black" for "blue" in the colloquial expression is nonracial, but the meaning of the substitution is uncertain. *See also* People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980) (prosecutor asked what the race of defendant's prior trial counsel was).

[85] State v. King, 573 So. 2d 604, 605 (La. Ct. App. 2d Cir. 1991).

[86] Sanders v. State, 428 N.E.2d 23, 28 (Ind. 1981).

[87] For an extreme example of lack of context, see People v. Dupree, 487 N.Y.S.2d 847, 848 (App. Div. 1985) (holding defendant not deprived of a fair trial by prosecutor's improper injection of race into the case without describing what the prosecutor had said).

[88] *See* Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990) (Harvey, J., dissenting), *cert. denied*, 112 S. Ct. 89 (1991).

[89] *See, e.g.*, United States v. Chase, 838 F.2d 743, 750 (5th Cir., *cert. denied*, 486 U.S. 1035 (1988); United States v. Cardenas, 778 F.2d 1127 (5th Cir. 1985); United States v. Yonn, 702 F.2d 1341, 1349 (11th Cir.) (prosecutor and defense attorney refer to defendant's Colombian nationality in narcotics prosecution), *cert. denied*, 464 U.S. 917 (1983).

[90] *See, e.g.*, Griffin v. Wainwright, 760 F.2d 1505, 1512 (11th Cir. 1985) (five references to victims of black defendant as "white male boy," "white boy," or "white males"), *cert. denied*, 476 U.S. 1123 (1986); Commonwealth v. Johnson, 361 N.E.2d 212, 219 (Mass. 1977) (repeated references to race of black defendant, white victim, and crime scene in a "project" with a heavy black population); State v. Granberry, 530 S.W.2d 714, 726-27 (Mo. Ct. App. 1975) (repeated reference to defendant's race).

not easily accessible. I would speculate that defense attorneys, whatever the race of their clients,[91] might use similar racial images to paint African-American and Latino victims as evil, subhuman (as in the King beating case), criminal, lying, or alien.[92] Defense attorneys may play the sexual threat-sexual appetite imagery differently; images of women of color as more likely to consent to sexual activity[93] might be observed along with images of their supposedly lesser sexual desirability.[94] I suspect that minority prosecution witnesses may be characterized by the defense as less intelligent or competent[95] and, therefore, less able to recall accurately what happened.

C. Blatant and Subtle Racial Imagery

The commentary on prosecutorial misconduct tends to dismiss blatant racial appeals as a relic of a racist past, rarely to be encountered in the present.[96] Whether or not that comfortable perspective is accurate depends, I suppose, on what one considers blatant and what one counts as rare. In my view, most of the reported cases concern blatant appeals to race, although reviewing courts have not always seen it that way.[97] As the examples discussed in the preceding section demonstrate, obvious appeals to racial prejudice can still be found with regular, if not overwhelming, frequency throughout the last

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91 In one study on rape prosecutions in Indianapolis, the researcher found that the racial identity of the alleged victim and perpetrator significantly affects the outcome in rape cases. Black men accused of raping white women are treated most harshly; white men accused of raping white women and black men accused of raping black women are treated more leniently. GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 129-47 (1989).

92 In cases where some of the jurors and the defendant are people of color, defense attorneys may also argue another variation of us-them imagery, claiming a racially motivated prosecution when no evidence supports such claims.

93 *See* LAFREE, *supra* note 91, at 219-20 (in Minneapolis rape prosecutions, jurors are less likely to believe black women who allege rape); *see also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE 179-80 (1981) (reporting that 63% of sample in one southern county believed that black women have lower morals than white women).

94 *Cf.* People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977) (prosecutor argued that white man must be telling the truth if he admitted to sex with a black woman).

95 I found only one case in which a prosecutor clearly invoked an image of black people as less intelligent. He said, "Sorry if I used such big words with [the black defendant] like 'spectator' and 'blacky tromp whitey.' Those are awfully big words, I know." People v. Turner, 367 N.E.2d 1365, 1366 (Ill. App. Ct. 1977). In another case, the prosecutor said that the African-American defendant was "stuck, by his own stupidity;" given the barrage of other racial remarks the prosecutor made, it is hard to believe that this remark was race neutral in either effect or intent. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987).

96 *See, e.g.*, DeBrota, *supra* note 5, at 375. *But see* Earle, *supra* note 5, at 1212; *see also* Haynes v. McKendrick, 481 F.2d 152, 153 (2d Cir. 1973) ("This case is surprising in this day and age."); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §10.2(d), at 10-14 (1985) ("Such blatant examples of bigotry rarely occur today, and when they do, the conviction invariably is reversed."); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 639-640 (1972); Lucinda J. Merrill, *The Limits of Prosecutorial Summation: An Overview of Permissible and Impermissible Final Arguments*, 24 S. TEX. L.J. 867, 872 (1983); *cf.* Dennis N. Blaske, *Prosecutorial Misconduct During Closing Argument: The Arts of Knowing When and How to Object and of Avoiding the "Invited Response" Doctrine*, 37 MERCER L. REV. 1033, 1044 (1986) ("Though now more rhetorically sophisticated and less used, racial appeals are not uncommon.").

97 *See infra* notes 264-76 and accomapnying text (describing how courts have treated prosecutors' racial appeals).

twenty years.[98] Some cases are amazing as well as appalling. In one particularly egregious case, the prosecutor's remarks included the following racially inflammatory comments:

> "Why is it a black Sunday? Because these two animals decided to shoot white honkies. . . . They were going to shoot white honkies. . . . They were going to go shoot white honkey. What did they mean? They meant business. . . . They left Oakwood Shopping Center, armed themselves and came back to shoot whitey, to kill whitey, and that's exactly what they did. . . . These gentlemen had the opportunity to leave at any time, at any time. Nobody forced them into that shopping center with guns to kill whitey. . . . Ladies and gentlemen, do you think these two black males or any kind of males, these two animals over here."[99]

Such a case can be deemed extreme, but cases that call on an image of black violence and criminality, albeit only once or twice, are not isolated even within the limited arena of prosecutorial comments. Cases in which prosecutors have overtly called on black sexual stereotypes or sexual threat imagery must be deemed fairly common. I count as "blatant" the use of animal imagery in a case involving African-American or Latino defendants. One would expect that prosecutors' comments are the tip of the iceberg because the media, witnesses, defense attorneys, and jurors have far fewer constraints on their behavior.

If reported prosecutorial misconduct cases are merely the visible tip of the iceberg of the use of blatant racial imagery, then subtle uses of racial imagery are the unexplored Antarctica. Few of the reported cases involve imagery that I would call subtle, but it would be a mistake to infer from the dearth of cases that subtle racial imagery is rarely employed in the courtroom. Rather, the predominance of blatant cases reflects the likely disposition of claims involving more subtle abuses. Unfortunately, courts do not always reverse even blatant cases and virtually never reverse more subtle abuses,[100] thus removing the incentive to litigate the less egregious cases. Indeed, even the number of appeals that do raise a racial imagery claim cannot be accurately ascertained because of the practice of affirming criminal defendants' appeals without an opinion.[101]

The trial of the officers who beat Rodney King provides an example of how both overt and subtle racial images can taint the decision-making process. The relatively blatant use of animal imagery by the officers should not overshadow the more subtle images conveyed by other actors: the demeaning reference to the victim as "Rodney" by a prosecution witness, the insertion of the word "black" in defense counsel's description of what the officers observed, the earlier media reports that

[98] *See, e.g., State v. Lurry*, 395 N.E.2d 1234, 1237-38 (Ill. App. Ct. 1979) (prosecutor argued that defendant wanted to make Joliet like Detroit, where young black males died most frequently by homicide and that an acquittal would encourage "these people" to commit more crimes of violence).

[99] *State v. Wilson*, 404 So. 2d 968, 969-70 (La. 1981).

[100] *See infra* notes 264-76 and accompanying text (discussing the remedies presently available for improper summations).

[101] This practice is extremely common, at least in New York, where I have seen it from the vantage point of the public defender's office. I suspect it also occurs in other states with heavy caseloads. Certainly it was common knowledge at the Criminal Appeals Bureau of the Legal Aid Society in New York City that difficult cases that the courts did not wish to write about were prime candidates for affirmances without opinions. The defense of this practice would be that the impropriety was harmless error in any event, or as public defenders used to say, the GAH ("guilty as hell") rule would apply.

Officer Koon thought King moved like a linebacker, or the minority juror's description of the racial tone of deliberations.[102]

Social science data on prejudice and communication supports the hypothesis that the unexplored continent of subtle racial imagery used in court is vast. Social science literature documenting the persistence of negative attitudes toward African Americans is overwhelming.[103] Although there is less data on other minority groups, no one could persuasively claim that stereotyping has disappeared for them either.[104] "Dominative" racists, persons who express bigotry and hostility openly and often employ physical force, are undoubtedly fewer in number in this country than they were fifty years ago.[105] However, the diminution in the ranks of the openly racist has been neither steady nor an unmitigated blessing. Not only have the last five years brought an upswing in bias-related violence and hate speech, but the long-term trend toward fewer open racists has also been paralleled by a trend toward more closeted, or "aversive" racists.[106] The phenomenon of the modern aversive racist portends frequent resort to subtle racial imagery.

Modern racists do not want to associate with persons of color largely because of the stereotypes they still hold.[107] A 1990 survey by the National Opinion Research Center of the University of Chicago found that more than half of all whites believe that black people are less intelligent, less hard-working, and less patriotic—and more to the point here—more prone to violence than whites.[108] Also relevant is that twenty-five percent of white Americans still approve of antimiscegenation laws.[109] These and similar surveys probably underestimate the prevalence of such stereotypes because such views are socially stigmatized and, therefore, embarrassing to report, even to a pollster.[110] In ordinary conversation, the aversive racist recognizes a formal antidiscrimination norm that forbids openly racist evaluations and conclusions.

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[102] *See supra* notes 49-52 and accompanying text.

[103] I refer the reader who still needs to be persuaded of the breadth of that literature to easily accessible summaries of the primary literature. *See, e.g.*, Aleinikoff, *supra* note 29, at 1618-51; Johnson, *Black Innocence*, *supra* note 32, at 1618-51; Howard Schuman, *Changing Racial Norms in America*, 30 MICH. Q. REV. 460 (1991); *see also* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1985).

[104] *See, e.g.*, HUBERT M. BLALOCK, RACE AND ETHNIC RELATIONS 21 (1982); Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983); Tom W. Smith & Glen R. Dempsey, *The Polls: Ethnic Social Distance and Prejudice*, 47 PUB. OPINION Q. 584, 593-94 (1983); Jose L. Solernou, Effects of Ethnic Group Membership an Attribution of Responsibility 58, 72 (1977) (unpublished dissertation, University of Kentucky).

[105] *See* Johnson, *Unconscious Racism, supra* note 32, at 1027-28 (surveying the relevant literature).

[106] *Id.*

[107] TEUN A. VAN DIJK, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 224-26 (1987).

[108] Aleinikoff, *supra* note 29, at 332.

[109] *Id.* at 332 n.21.

[110] *See* Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOL. 247, 254 (1971) (reporting results of experiment that revealed that more negative attitudes toward black people are reported when the subject thinks the experimenter has a physiological basis for determining whether the subject is being truthful); *see also* Deborah A. Byrnes, *Contemporary Measures of Attitudes Toward Blacks*, 48 EDUC. & PSYCHOL. MEASUREMENT 107 (1988) (attempting to devise scales for measuring racial attitudes masked by rationalization).

Recognition of the antidiscrimination norm does not, however, prevent the telling of racial stories or the conveying of racial imagery. In a fascinating linguistic study of white conversations about minorities in the United States and Holland, Teun A. Van Dijk observed a variety of recurring speech patterns.[111] Racial stories are generally not "I" stories, but "we" stories; group membership is signalled often by reference to group goals.[112] The stories are most successful when the self can be identified as a victim, both because it is more persuasive and because it allows the whole group to see itself as a victim entitled to the negative feelings it has about a racial outgroup.[113] The telling and hearing of these stories is thus functional for the majority and, despite the antidiscrimination norm, occurs quite frequently. The formal norm, particularly in settings where the racial views of the audience are unknown, makes direct attribution of negative personality characteristics to a race risky and, therefore, relatively rare; politeness and indirection function to preserve the positive presentation of self.[114]

Racist evaluations and conclusions are often toned down through various semantic moves. Negative acts are often described with the racist conclusion left implicit.[115] Thus, it is not surprising that in cases involving sexual threat imagery the argument that miscegenation is wrong is not made; it is enough, and safer, to merely tell the jury about the defendant's interracial sexual activity. Examples and generalizations are also common;[116] hence, the Willie Horton ads[117] and prosecutorial reminders of the prevalence of "black on black" crime. Again, overt arguments of racial propensity are not necessary.

Denial of racist motives is another common semantic tactic,[118] with racial remarks prefaced by "I am not a racist, but. . . ."[119] Here, one cannot help but think of the radio operator's denial during the Rodney King beating trial that the "gorillas in the mist" conversation related to race—and the jurors'

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[111] Van Dijk, *supra* note 107, at 48

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 90-91.

[117] In the 1988 presidential campaign, a campaign commercial supporting George Bush pictured Horton, a black man convicted of raping a white woman while on a prison furlough approved by Governor Dukakis, Vice President Bush's opponent. In the 1992 campaign, greater subtlety was possible; given the history of the Horton ad and the controversy it caused, the President invoked the image of Horton without even using his name by suggesting that "some guy let out of jail too early" could threaten the citizens of Governor Bill Clinton's Arkansas. *See Clinton Crime Policy Questioned*, UPI, Sept. 23, 1992, *available in* LEXIS, Nexis Library, UPI File.

[118] VAN DIJK, *supra* note 107, at 91-92.

[119] For a particularly arrogant variation on the denial move, see Roger Parloff, *Maybe the Jury Was Right*, Am. Law, June 9, 1992, §2, at 7. Regarding his view that the jury in the King case acted properly, he asks, "Am I out of my mind? A fascist? A racist? (I'm white.)." The rest of the article makes clear that this is not self-searching, but a purely rhetorical question; the answer is supposed to be obvious.

apparent acceptance of that denial.[120] Closely related to denial is apparent concession, where a positive remark is coupled with a negative one ("I like them a lot, but . . ." and "white people do that too, but . . .").[121] Mitigation, where the speaker understates her negative views, is also similar; the minimizing adjective undercuts the negative characterization ("I think its a *little* strange that they. . .").[122]

Negative impressions are also managed through the use of a hypothesized explanation or purported ignorance.[123] Thus, after describing a negative trait or incident, the speaker may ascribe it to cultural difference or note that she does not know why a person would behave in that way, thereby hoping to avoid the inference that she thinks such traits are genetically predetermined.

Prejudiced talk often includes contrasts between the majority group and the disliked minority. Contrast may, however, be stated in very vague terms with nonverbal cues such as pitch, intonation, and facial expression conveying the opinion of the speaker about the ethnic outgroup. Prejudiced talk often uses pronouns of distance. "They," "them," "those people," and similar euphemisms emphasize separation while protecting the speaker from the risk of social disapproval that accompanies overt racial pronouncements.[124] A paradigmatic example here would be Patrick Buchanan's statement about the post-King verdict rioters: "They violated our laws."[125] We all know who "they" are; we all know who "we" are. It seems unlikely that such a statement would be made about Charles Keating and his friends after the Lincoln Savings and Loan debacle. "They violated our laws" on its surface has no racial referents that are easily criticized, but the racial message is inescapable. Jurors who hear such messages may be tainted before the defendants they will judge have even been indicted.

II. The Regulation of Racial Bias in Criminal Cases

Although variation in the source, subtlety, and specific content of racial imagery provides opportunities to reinforce racial animus and stereotyping once it has been introduced into a criminal trial, sharp doctrinal lines often obscure the common roots and cumulative effects of these varied forms. Unfortunately, it is easy to parse the racial imagery in a case into categories and conclude that each piece fails to meet the mistrial (or reversal) standard for the relevant category.

To again use the Rodney King beating case as an example, variation in all three dimensions—source, subtlety, and specific content of the imagery—may be observed, but there exists no doctrinal

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[120] When they debated a computer message in which Officer Powell called a black family dispute "right out of Gorillas in the Mist," one juror argued that he could have been describing a closely knit family. Richard Prince, *King Jurors Should Read Police Memoirs*, GANNETT NEWS SERVICE, May 22, 1992, *available in* LEXIS, Nexis Library, GNS File.

[121] VAN DIJK, *supra* note 107, at 93-95.

[122] *Id.* at 95-97.

[123] *Id.* at 92-93, 97-98.

[124] *Id.* at 104.

[125] Buchanan toured Koreatown after the riots. *Primaries Take Backseat to Los Angeles Riots*, Proprietary to UPI, May 4, 1992, *available in* LEXIS, Nexis Library, UPI File. One of my students, who was there, reported this comment. Buchanan has said similar things that have been reported in the press. *See, e.g., Government Failed in Its First Duty in Los Angeles, Buchanan Says, Proprietary* to UPI, May 19, 1992, *available in* LEXIS, Nexis Library, UPI File ("As they took back the steets of Los Angeles, block by block, so we must take back our cities, and take back our culture, and take back our country.").

paradigm for assessing the cumulative effects of multiple racist manipulations of the jury. Bias is first divided by its source and setting. Thus, pretrial bias introduced by the media may be deemed "solved" by a change of venue. Consequently, there will be no consideration of how racial imagery plays a different (indeed, opposite) role in the new venue[126] and how *that* pretrial prejudice may be reinforced by the imagery invoked at the trial. Second, the more subtle invocations of racial imagery are unlikely to be interpreted in light of more blatant abuses; even if the blatant use of animal imagery by Officers Koon and Powell would have been condemned, Powell's attorney would probably not have been criticized for his unnecessary parenthetical "a black man"—a more subtle remark that gains its power from what came before. Finally, the subhuman imagery of Powell's and Koon's statements may never be connected with the black-as-evil imagery suggested by the juror's statement: "He deserved what he got."[127]

The only conceivable legal vehicle for measuring the cumulative impact of racial imagery is an argument that the trial as a whole deprived the defendant of due process. That I have not found a case in which such an argument was discussed[128] suggests something of its likely success.[129] Moreover, even this hypothetical argument would be possible only when the racial bias was anti-defendant, given that the Due Process Clause has not been interpreted to speak to deprivations suffered by victims, witnesses, or the general public.

Because there is no mechanism for assessing the cumulative effects of racial imagery that provide the remedy of mistrial or appellate reversal,[130] stringent regulation of each instance of the introdution of racial imagery becomes crucial. Unfortunately, there is no clear standard for determining when the introduction of racially tinged images is permissible. Instead, regulation of that imagery is dependent on the application of several generic standards, each aimed at regulating various kinds of bias in a particular setting. Thus, racial imagery may be evaluated against the various standards for pretrial prejudice, the admissibility of relevant evidence, the limits on proper summations, and so on, depending on who introduces the imagery and at what point in the proceedings it is introduced.

Before rape shield laws were enacted, introduction of prejudicial images of the "kind" of woman who consents, or the "kind" of woman who deserves to be raped, were governed only by the same general rules that presently constitute the only protection against the introduction of racially tinged language and imagery. The ineffectiveness of those general rules is by now well known in the context of rape prosecutions. A review of their application to the problem of racial imagery will show them to be equally inadequate here for similar reasons.

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[126] Nor will there be consideration of what effect the change of venue decision itself has. One might hypothesize that some potential jurors in Simi Valley might find the change of venue confirmation of their prior suspicions that people of color cannot be trusted to make judgments in a case of this kind.

[127] *See* Kelner & Kelner, *supra* note 3, at 3.

[128] *Cf.* State v. Parker, 509 P.2d 272, 274 (N.M. Ct. App. 1973) (defense failed to object to racial references; however, assuming arguendo the defendant's right to argue cumulative error, the challenged references to the defendant living with a white woman and the references to black people as "colored" were not objectionable as a matter of law).

[129] The closest contenders are very old cases. *See, e.g.,* Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of trial violates due process).

[130] Mistrial is the only conceivable remedy in a situation like the Rodney King beating case where the bias generated is pro-defendant because the Double Jeopardy Clause of the United States Constitution forbids retrial after an acquittal. U.S. CONST. amend. V, §2.

A. Legal Devices for Defusing Pretrial Racial Imagery

As discussed in Part I, the effect of racial imagery on deliberations may have pretrial origins, either in publicized media descriptions of the contested events or the jurors' individual experiences. A change of venue is supposed to remedy the former and voir dire the latter. Neither precaution is adequate.

When a "pattern of deep and bitter prejudice [is] shown to be present throughout the community," a change of venue is required.[131] Recent Supreme Court cases have established that this standard is quite difficult to meet,[132] but occasionally failure to grant a change of venue results in a reversal,[133] and occasionally a change of venue is granted by the trial judge. However, most changes of venue simply take the trial, for convenience reasons, to neighboring counties and jurors in the neighboring county are often also exposed to pretrial publicity concerning the case. Often the neighboring counties will have similar prejudices, albeit at slighly lower levels.[134] Thus, in the Joan Little case, where a black woman prisoner was prosecuted for killing a white jailer who allegedly raped her, the change of venue was to a neighboring county where "only" thirty-five percent of the population believed black women had lower morals than white women and that black people were more violent than white people.[135]

Sometimes, as in the King beating case, the neighboring county has a different reaction to the pretrial imagery—not necessarily a better one, however.[136] Jurors in neighboring Simi Valley had heard much of the pretrial publicity that presumably would have biased a Los Angeles jury, but filtered it through the lens of their quite different prior experience. In response to the Simi Valley verdict, legislators in California and New Jersey are drafting bills that would require any change of venue to be to a site demographically similar to the original location.[137] However, this is not a panacea or even a particularly good idea. In many situations, this requirement would simply reproduce the prejudice of an all-white original venue. In other situations, it may not be possible to duplicate the original location's venue in all racially relevant ways. In Florida, Judge W. Thomas Spencer first moved from Orlando to Tallahassee the upcoming retrial of a Latino police officer charged with fatally shooting a black motorcyclist. He cited the King verdict and the much greater black population of Tallahassee as

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[131] Irvin v. Dowd, 366 U.S. 717, 727 (1961).

[132] *See, e.g.*, Patton v. Yount, 467 U.S. 1025 (1984).

[133] *See, e.g.*, Lozano v. State, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991), *review denied*, 595 So. 2d 558 (Fla. 1992).

[134] Hines v. State, 384 So. 2d 1171, 1183-84 (Ala. Crim. App.), *cert. denied*, 384 So. 2d 1184 (Ala. 1980).

[135] In the county in which the killing occurred, 63% of the sample agreed that black women have lower morals than white women and that blacks are more violent than whites. Little was acquitted despite these attitudes. BENNETT & FELDMAN, *supra* note 93, at 179-80.

[136] After Powell's conviction on federal charges, the remaining state court charge of using excessive force under color of law, on which the first state jury had been hung, was dismissed. *Judge Dismisses Remaining King Beating Charges*, UPI, Apr. 28, 1993, *available in* LEXIS, Nexis Library, UPI File. However, prior to the dismissal of those charges, a judge had decided that any subsequent state trial would take place in Los Angeles. Lou Cannon, *No Venue Change in Officers' Retrial; Ruling Seen as Victory for Prosecution*, HOUS. CHRON., May 23, 1992, at A3.

[137] *See id.*

reasons for his decision. But as the defendant's attorney then pointed out, the Latino population in Tallahassee is less than 3 percent in contrast to a Latino population of almost 10 percent in Orlando. By protecting the victims from racial prejudice, the judge, in effect, was exposing the defendant to racial prejudice. The trial was moved five times before it finally began in Orlando, where a jury acquitted the defendant.[138]

The best that can be said of a change of venue is that while it cannot solve all extraordinary pretrial imagery problems, it might ameliorate them in a small number of cases if it were employed often. Voir dire, aimed at the individual juror's biases rather than community biases, does not do much better.

The racial images that a juror carries in her head are rarely revealed by voir dire. This is in part because voir dire on racial issues is not always permitted, even when inflammatory factual circumstances are present. In *Ristaino v. Ross*,[139] a truly outrageous decision, the Supreme Court held that the trial of a black man for violent crimes against a white man "did not suggest a significant likelihood that racial prejudice might infect [the] trial," and therefore due process did not require a question on racial prejudice.[140] Very few states have recognized a requirement of voir dire on racial prejudice, and most do not recognize such a right even under inflammatory factual circumstances.[141]

Even when trial courts permit inquiry concerning racial prejudice, questions are often limited in number and sometimes they are addressed to the entire venire rather than individual jurors.[142] Attorneys who have been permitted to conduct extensive voir dire report that prospective jurors reveal racial prejudice only after numerous sensitive and specific questions have been asked.[143] In part, this is because most modern racists do not have categorically hostile attitudes toward minorities and, therefore, general questions will not probe inconsistencies. A juror may sincerely answer that she has no bias against black people that would impair her partiality, while still believing that interracial marriage is wrong and that black people are more violent than white people. Moreover, even extensive questioning, which is rare, is unlikely to eliminate all persons whose deliberations will be influenced by racial imagery. Accordingly, the formal norm of equality renders the admission of racially prejudicial views socially stigmatizing and encourages dishonest proclamations of nonracist views.

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[138] *Lozano Attorney's Words Come from Poet*, UPI, May 31, 1993, *available in* LEXIS, Nexis Library, UPI File.

[139] 424 U.S. 589 (1976).

[140] *Id.* at 598. In Turner v. Murray, 476 U.S. 28 (1986), the Court reaffirmed *Ristaino*, but added a bizarre distinction for death penalty cases. Voir dire on racial prejudice is required at a capital sentencing proceeding for an interracially violent crime—but not at the trial for the underlying offense. As Justice Brennan asked in dissent: "Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?" *Id.* at 43 (Brennan, J., dissenting).

[141] *See* Johnson, *Black Innocence*, *supra* note 32, at 1672-74 (reviewing the cases).

[142] *Id.* at 1674.

[143] *See, e.g.*, Ann F. Ginger, *What Can Be Done to Minimize Racism in Jury Trials?*, 20 J. Pub. L. 427, 434-38 (1971); *see also* NATIONAL JURY PROJECT, JURYWORK §10.034 (1983); *cf.* Mark Soler, *"A Woman's Place . . .": Combatting Sex-Based Prejudice in Jury Trials Through Voir Dire*, 15 SANTA CLARA L. REV. 535 (1975).

B. Evidentiary Rules Restricting Racial Imagery in Testimony

If we must acknowledge that we cannot prevent jurors from walking into the jury box with racial imagery already in their heads, it would be nice to believe that the trial process will not underline preexisting images or introduce new ones. Certainly with regard to racial imagery coming from witnesses, this is a vain wish.

Federal Rule of Evidence 402 and the corresponding state rules adopt two axioms of the common law: relevant evidence is generally admissible, absent a reason to exclude it, and irrelevant evidence is invariably inadmissible.[144] In order for evidence to be relevant it must be material to an issue in the case and probative of that issue. Accordingly, when racial imagery is not probative of a disputed issue, it should be excluded for that reason. In fact, irrelevant racial questions are frequently asked and occasionally answered. When questions are asked—whether they are answered or the objection to them is sustained—the jury has heard inflammatory information for no legitimate reason. On conviction and appeal, courts respond in an uneven fashion. When a witness is asked for irrelevant facts concerning a black male defendant's sexual relationship with a white woman [and] the witness has been permitted to respond, the resulting conviction will usually be reversed on appeal.[145] Even here courts differ; a Tennessee state court upheld a conviction (ultimately reversed by the Sixth Circuit) where the prosecutor had been permitted to ask the black defendant whether the woman he said he had been with was white, whether he was the father of her child, and whether he had had intercourse with her the morning of the homicide.[146] When such a question has been asked, but the trial court sustains an objection and instructs the jury to disregard it, most courts do not reverse the conviction.[147]

Reversal is even harder to obtain when the irrelevant question does not relate to interracial sex. Even an overruled objection to irrelevant testimony that is racially tinged in a nonsexual way may not result in a reversal.[148] Thus, a New York court held that references to the race of an arresting police

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144 FED. R. EVID. 402; KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE 540-41 (Edward W. Cleary ed., 3d ed. 1984).

145 *See* Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976) (prosecutor permitted to ask black defendant whether he had had sex with a white woman the morning of the crime); Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988) (psychiatrist questioned about whether defendant's other victims were white women); People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980) (witnesses were asked about the race of prostitutes working for the black defendant, whether many white girls frequented defendant's disco, and about the race of the men who sought the defendant's prostitutes); *see also* United States v. Grey, 422 F.2d 1043, 1045 (6th Cir. 1970) (prosecutor asked black defendant's character witness if he knew defendant was "running around with a white go-go dancer;" however, it is unclear whether answer was permitted).

146 Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976); *see also* State v. Parker, 509 P.2d 272, 273 (N.M. Ct. App. 1973) (court said it did not condone question regarding race of defendant's wife, but question did not constitute fundamental error).

147 *See, e.g.*, Roberson v. State, 276 S.E.2d 114, 115 (Ga. Ct. App. 1981) (in a robbery case, appellant's brother was asked: "Back before you got committed for this pimping conviction you were out selling the services of white women; weren't you?"); State v. Bell, 209 S.E.2d 890, 892 (S.C. 1974) (defendant asked if he remembered his first date "with this white lady?"), *cert. denied*, 420 U.S. 1008 (1975) ; State v. Weaver, 386 S.E.2d 496, 498 n.3 (W.Va. 1989) ("I believe your wife is white, isn't she?"); *see also* State v. Monsees, 301 So. 2d 109, 110 (Fla. Dist. Ct. App. 1974) (white female defendant was asked: "There wasn't a black man with you in the store?"). *But see* Weddington v. State, 545 A.2d 607, 610-15 (Del. 1988) (reversing conviction of defendant who had been asked about his desire to see some "loose white women," despite trial court's instruction to jury to disregard the question).

148 For reversals, see Eiler v. State, 492 A.2d 1320 (Md. Ct. Spec. App. 1985) (white defendant asked for his characterization of black people as "spades" and a black neighborhood as "Spade City"); Commonwealth v. Mahdi, 448

officer and an informant during a witness's direct testimony and in the prosecutor's summation did not constitute such a "thematic reference to . . . race" that reversal was mandated.[149] Additionally, a Louisiana court agreed that whether the hotel frequented by the defendant was "predominantly black" was irrelevant, but did not reverse the conviction of a defendant whose witness had been required to answer that question.[150] Finally, a question asked of the defendant on cross-examination concerning whether the store at which he worked was owned by persons from the Dominican Republic was held not to deny the defendant a fair trial because the disputed references on cross-examination and in summation were not "numerous."[151] There are only two cases addressing irrelevant, nonsexual racial imagery in which objections to the questions were sustained and the jury was instructed to disregard them,[152] and in both the convictions were affirmed.[153]

Even if evidence is relevant, Rule 403 of the Federal and Revised Uniform Evidence Rules, codifying the common law, provides that such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."[154] One might expect to see numerous cases involving racial imagery litigated under the prejudice rules, simply because of the breadth of what is deemed relevant. For example, the characterizations by Officers Koon and Powell are clearly relevant; what the officers observed and how they interpreted King's behavior has probative value on the issue of whether their response constituted excessive force. Therefore, the question is whether the probative value of the phrasing of those characterizations outweighs the danger of provoking racial prejudice. Similarly, when a racial incident or motive may be hypothesized as the cause of a crime or the report of a crime, evidence of that incident or motive is relevant, but it still might be inadmissible as more prejudicial than probative. Additionally, some racially charged event may coincidentally occur during the course of a criminal escapade; however, because "considerable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the

N.E.2d 704, 711-12 (Mass. 1983) (defendant was asked many questions about the racial tenets of the Muslim religion); *see also* People v. Criscione, 177 Cal. Rptr. 899, 904 (Ct. App. 1981) (asking defendant's brother whether in a typical Italian family the "father is an ogre and the mother is a dominant overbearing person"); State v. Kaufman, 278 So. 2d 86, 96-98 (La. 1973), *cert. denied*, 429 U.S. 981 (1976) (reversing conviction when black defendant's common-law wife was asked about her comment about "honkies" and another witness was asked repeatedly whether a remark about "honkies" had been made); Commonwealth v. Tirado, 375 A.2d 336, 337-38 (Pa. 1977) (police officer testified as to Puerto Rican pride and machismo).

[149] People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div. 1990), (prosecutor's references to race of police officer and informant did not warrant reversal) *appeal denied*, 559 N.E.2d 683 (N.Y. 1990); *see also* People v. Bramlett, 569 N.E.2d 1139, 1145-46 (Ill. App. Ct.) (prosecutor asked without objection why black officer would falsely accuse a black defendant, arguing over objection that he would not), *appeal denied*, 580 N.E.2d 121 (Ill. 1991).

[150] State v. Tatum, 506 So. 2d 584, 588-89 (La. Ct. App. 4th Cir. 1987).

[151] People v. Espinal, 572 N.Y.S.2d 334, 335 (App. Div.), *appeal denied*, 581 N.E.2d 1065 (N.Y. 1991).

[152] *Cf.* United States v. Haynes, 466 F.2d 1260, 1264-67 (5th Cir. 1972) (reversal where prosecutor's line of irrelevant questioning of defendant culminated in his statement "burn, baby burn" and judge sustained objection to remark, but did not admonish the prosecutor or instruct the jury).

[153] Stanton v. State, 349 So. 2d 761, 764 n.1 (Fla. Dist. Ct. App. 1977) (affirming conviction in which prosecutor asked defendant, "Isn't it true in gypsy practice that it is okay to lie and cheat and steal if you can get away with it?"); State v. Monsees, 301 So. 2d 109, 110 (Fla. Dist. Ct. App. 1974) (reversing grant of mistrial after verdict was rendered because of prosecutor's question to a white female defendant, "There wasn't a black man with you in the store?").

[154] FED. R. EVID., BROWN ET AL., *supra* note 144, at 544-45.

background of the narrative and give it interest, color, and lifelikeness,"[155] this testimony would be inadmissible only if it were prejudicial.

Nevertheless, relatively few cases address whether the prejudicial effect of testimony that conveys a racial image outweighs its probative value. In one case, the prosecutor elicited testimony as to the obscenities uttered by the defendant, which included a remark to the effect that the witness was having sexual relations with "n*****s."[156] The appellate court, noting that two jurors were black, found a curative instruction by the judge insufficient to remove the prejudice that had been injected into the trial by the remark.[157] But in another case, when the insult at issue was "honkey," the reviewing court showed less solicitude and did not even discuss the possibility of prejudice inherent in the third-hand repetition of the defendant's use of a racial slur. Instead, the court confined its opinion to the impropriety of eliciting hearsay.[158] In the two cases where black-as-criminal imagery appears in the testimony, both reviewing courts found it reversible error to have admitted evidence they considered relevant, or arguably relevant, when that testimony had significant prejudicial impact. In one case with a Jamaican defendant, the D.C. Circuit found error in the admission of expert testimony on the role Jamaicans play in the local drug market and how they run their drug operations.[159] In the other case, the First Circuit found error in the admission of an ID card showing the defendant to be Colombian when other members of the conspiracy were known to be Colombian.[160] Another federal court found that evidence of racial motives for the killings (which I have categorized as employing "us-them" imagery) should not have been admitted absent any link between that evidence and the defendant, other than his race, because the danger of prejudice outweighed the probative value.[161]

However, it must be noted that New Jersey reviewing courts had found the evidence of racial motive admissible;[162] therefore, had the defendant been unable to secure counsel for habeas corpus, to which there is no constitutional right,[163] no reversal would have ensued. Moreoever, in another state case, the reviewing court deemed questions about the race of the victims ("black") and their sexuality ("either prostitutes or effeminate") relevant to sanity as it showed whether the defendant was exhibiting an organized pattern of behavior. The court did not even attempt to balance prejudice and probative value, but simply concluded that the questions were not *designed* to inject prejudice.[164]

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[155] BROWN ET AL., *supra* note 144, at 541.

[156] McBride v. State, 338 So. 2d 567, 568-69 (Fla. Dist. Ct. App. 1976).

[157] *Id.*

[158] Dixon v. State, 325 S.E.2d 893, 895-96 (Ga. Ct. App. 1985); *see* United States v. Brown, 720 F.2d 1059, 1064 (9th Cir. 1983) (not directly addressing prejudice-probative value of defendant's prior statement, "I sell dope to honkies and white bitches and whores," but finding admission of his remarks a violation of *Miranda* and finding prejudice due to the inflammatory nature of the police officer's precipitating remarks).

[159] *See* United States v. Doe, 903 F.2d 16, 21-23 (D.C. Cir. 1990).

[160] *See* United States v. Rodriguez Cortes, 949 F.2d 532, 540-43 (1st Cir. 1991).

[161] *See* Carter v. Rafferty, 621 F. Supp. 533, 538-47 (D.N.J. 1985), *cert. denied*, 484 U.S. 1011 (1988).

[162] *See* State v. Carter, 449 A.2d 1280, 1288-92 (N.J. 1982).

[163] Pennsylvania v. Finley, 481 U.S. 551 (1987); *see* Murray v. Giarratano, 492 U.S. 1 (1989) (even indigent death row inmates who lack counsel need not be provided with counsel at state expense).

[164] *See* People v. Anderson, 421 N.W.2d 200, 208 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 858 (1989).

Finally, in a state rape case where the witness was asked if the "Mexican-American" defendant had told him he had never had sex with a white girl before and was going to go over to the apartment that day to have sex with a white girl, the trial court sustained the objection.[165] However, the appellate court found the statement relevant as evidence of the defendant's intent and concluded that "evidence, admissible for one purpose, should not be excluded only because it is prejudicial."[166]

As with any balancing inquiry, these cases are a mixed bag, but one with a decided slant toward admissibility. All but one of them involve testimony actually admitted rather than images posed in a question to which an objection was sustained. Some of the evidence is arguably not even relevant, although it is presumed so. In this context, several courts do not even undertake a balance between probative value and prejudice.

Thus, whether we are talking about irrelevant or relevant but prejudicial evidence, to the extent appellate cases reflect the world of trials, protection from evidence or insinuation of evidence with racial imagery is sporadic at best. The informed prosecutor will know that asking a question invoking nonsexual racial imagery will probably be costless. If defense counsel objects and the court sustains the objection, the imagery has been presented and a mistrial need not be declared to vouchsafe the conviction; if counsel fails to object, the issue will not be preserved for appeal; and even if there is an objection that the court overrules, there is still a good chance that the conviction will be affirmed. Moreover, there are two reasons to believe that the situation in the trial world is substantially bleaker than the reported cases indicate. First, there are no recent cases even addressing "volunteered" racial imagery, such as witness characterization of a person of color as animal-like. Spontaneity, or rehearsed spontaneity, is apparently a complete defense in appellate review. Second, the cases reflect only the behavior of prosecutors. Accordingly, injustices caused by defense attorney proffers of racially charged testimony are likely more numerous, both because there are no reversals of acquittals and because, counting on that fact, defense attorneys can act more egregiously. Is it a surprise then that the prosecutor did not object to the animal imagery "volunteered" by the defendants in the King beating case? An objection calls more attention to the testimony even if sustained, which it might well not be.[167] Commentators, quick to second-guess other decisions of the prosecutor in this case, have not criticized this one.

C. Due Process and Other Legal Constraints on Prosecutorial Summation

Both prosecutors and defense counsel are theoretically constrained in summation by statutory requirements that prohibit arguing facts not in the record or appealing to the prejudice of jurors. But with respect to defense counsel's remarks, the prohibition against appeals from acquittals means that the failure of a trial judge to restrain improprieties has no remedy; it also means that trial judges have little or no guidance as to which remarks by defense counsel should be restricted. Prosecutors' arguments may be reviewed under statutory constraints, but are more often evaluated under the Due Process Clause although, occasionally, it will be unclear whether the "fundamental fairness" the court is assessing stems from the Due Process Clause or some other source. After reviewing the due process-fundamental fairness cases in some detail, I will briefly address the two cases applying equal

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[165] *See* State v. Maldonado, 675 P.2d 735, 737 (Ariz. Ct. App. 1983).

[166] *Id.*

[167] *Cf.* United States v. Haynes, 466 F.2d 1260, 1265 (5th Cir. 1972) (judge and defense counsel thought that admonition to disregard inflammatory statement would be counterproductive).

protection constraints to a prosecutor's use of racial imagery and, finally, the one statute that directly regulates prosecutorial references to race.

What is most striking is the large number of affirmances in cases where the prosecutor has employed racial imagery in her summation. There is a passel of reasons for these affirmances. First come the cases in which an instruction to disregard the prosecutor's comments is deemed to have cured the error.[168] In these cases, it is as though racial prejudice can only be stirred up with the judge's permission. Thus, for example, in a robbery prosecution of a Vietnamese defendant, the prosecutor's reference to roving gangs of gunmen committing hold-ups in Vietnam was deemed not so offensive and prejudicial that it constituted fundamental error, given the sustained objection.[169] The use of an ethnic slur has also been deemed cured by a reprimand.[170]

More surprisingly, inferences from the jury's observable behavior have provided sufficient assurance that a disputed verdict need not be reversed. In one instance the appellate court relied on the trial court's purported observation of the jury's adverse reaction to the prosecutor's racial argument;[171] in another, on the jury's request to review testimony and receive additional instructions;[172] and in a third, on the fact that the jury was composed of eight black persons who did not vote for the life sentence the prosecutor had urged.[173] Again, a false supposition underlies these cases. This time it is a misunderstanding of modern racism; a jury may disapprove of openly racist statements, it may rationally attempt to balance the evidence, and it may not blindly swallow everything said—but that only indicates that the jurors are not overtly racist and not whether they may be influenced by racial imagery.[174]

Another common reason for failing to reverse for racial imagery is that the defendant or her counsel invited or sanctioned the imagery.[175] At least two of these cases require real stretching. In one case, the reference to the defendant's Colombian origins in the prosecutor's opening statement was held to be nonprejudicial, given defense counsel's reference to the defendant's origins in his closing statement.[176] In the other case, the fact that both the prosecutor and the defense attorney had made numerous references to the complaining witness in a rape case as a "white woman" or "white lady"

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[168] *See, e.g.*, United States v. Pena, 793 F.2d 486, 490-91 (2d Cir. 1986); Nquyen v. State, 547 So. 2d 582 (Ala. Crim. App. 1988); People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979); Herring v. State, 522 So. 2d 745, 746-48 (Miss. 1988); State v. Martinez, 658 P.2d 428, 430-31 (N.M. 1983); People v. Dupree, 487 N.Y.S.2d 847, 849 (App. Div. 1985).

[169] *Nquyen*, 547 So. 2d at 589-90.

[170] *See, e.g.*, *Martinez*, 658 P.2d at 430-31 ("chola punk").

[171] *See* People v. Dukett, 308 N.E.2d 590, 596-97 (Ill.), *cert. denied*, 419 U.S. 965 (1974).

[172] People v. Rivera, 426 N.Y.S.2d 785 (App. Div. 1980).

[173] *See* Herring v. State, 522 So. 2d 745, 746-48 (Miss. 1988).

[174] *See generally* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

[175] *See, e.g.*, United States v. Cardenas, 778 F.2d 1127, 1131 (5th Cir. 1985); United States v. Yonn, 702 F.2d 1341, 1349 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983); Rhoden v. State, 274 So. 2d 630, 635 (Ala. Crim. App. 1973); Commonwealth v. Lopez, 530 N.E.2d 1247, 1250-51 (Mass. App. Ct. 1988).

[176] *Cardenas*, 778 F.2d at 1131.

was said to mitigate an overruled objection to the prosecutor's argument that if the jury believed the complainant they would have to believe that the black defendant "took it, he got him a white woman."[177] More broadly, the problem with relying on defense counsel "invitations" ignores that defense counsel too may be racist, that references to race not intended to provoke prejudice may nevertheless do so, and that references to race may be cumulative in their impact.

Then there are the cases that rely on defense counsel's failure to object to sustain the conviction. That failure to object should require a higher level of misconduct—"plain error," "manifest necessity," or its equivalent—is not surprising,[178] but what is not considered plain error is not surprising, but, to be blunt, itself racist. The following have been held not to be plain error: characterization of the defendant as a "n*****";[179] falsely attributing the epithet "honkey" to a black defendant;[180] arguing that the defendant's Middle Eastern background made him more likely to be greedy and not content to make money from a gas station;[181] arguing about the need to control individuals who support corrupt governments in Colombia, where cocaine is grown;[182] arguing that "no person in their right mind would want to remember three black men getting on her naked body;"[183] arguing that it was not believable that the defendant had not entered the robbed premises because it was incredible that the codefendant would leave "a black guy out there in a car . . . while a robbery is going on;"[184] arguing that because a white woman had lived with a black man for two years, she had already faced a lot of social disapproval and therefore would be more likely to lie for him;[185] telling the jury in a death penalty hearing opening statement that a detective would testify that the defendant's two prior victims, like the victim in the case being tried, were young white women who had been sexually assaulted by the defendant;[186] arguments making repeated references to the defendant's race;[187]

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[177] *Rhoden*, 274 So. 2d at 635.

[178] There may be some racial remarks that arguably should not be reversed absent an objection. A single bald reference to the race of the defendant or victim might fall into this category. *See, e.g.*, People v. Johnson, 499 N.E.2d 1355, 1368 (Ill. 1986) ("black man"), *cert. denied*, 480 U.S. 951 (1987). Even that depends on the context. As I have argued earlier, that type of reference in the King beating case was not trivial, given the pervasive racial imagery in the case. To take another example, in Sanders v. State, 428 N.E.2d 23, 28 (Ind. 1981), where the prosecutor alluded to "a black kid from Detroit" in his opening statement, the court's determination that its admission was not reversible error absent an objection may be correct. Still, one has to wonder about the extra baggage that "from Detroit" carries.

[179] Thornton v. Beto, 470 F.2d 657, 659 (5th Cir. 1972) (not prejudicial after objection and jury admonition).

[180] United States v. Harvey, 756 F.2d 636, 649 (8th Cir.), *cert. denied*, 474 U.S. 831 (1985).

[181] People v. Marji, 447 N.W.2d 835, 841-43 (Mich. Ct. App. 1989), *appeal denied*, No. C6947-8, 1991 Mich. LEXIS 434 (Mich. 1991).

[182] Killings v. State, 583 So. 2d 732, 732-33 (Fla. Dist. Ct. App. 1991).

[183] State v. Mayhue, 653 S.W.2d 227, 237 (Mo. Ct. App. 1983) (emphasis omitted).

[184] State v. Snowden, 675 P.2d 289, 293 (Ariz. Ct. App. 1983).

[185] State v. Terry, 582 S.W.2d 337, 339 (Mo. Ct. App. 1979) (after objection and jury admonition).

[186] People v. Thomas, 561 N.E.2d 57, 75 (Ill. 1990), *cert. denied*, 111 S. Ct. 1092 (1991).

[187] State v. Savage, 522 S.W.2d 144, 146 (Mo. Ct. App. 1975); State v. Granberry, 530 S.W.2d 714, 722 (Mo. Ct. App. 1975).

and questioning, "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?"[188]

The next obstacle to reversal is the harmless error doctrine. While one court has held that the harmless error doctrine does not apply to racially inflammatory summations[189] and some commentators have agreed,[190] most courts do not make such an exception.[191] On finding overwhelming evidence of guilt, courts usually affirm the conviction, despite remarks they deem patently improper, on the supposition that any error is harmless.[192]

After the procedural hurdles to reversal come a variety of reasons relating to the content of what was said. Probably the most frequent reason for minimizing— or taking seriously—the offense is a reference to the prosecutor's supposed intent. It was not "race-baiting" to ask the jury to imagine the fear of the victim as a prisoner of three black strangers;[193] the repeated references to the black defendants, the white victims, and the black "projects" where the crime took place were not racially motivated, but just "amateur psychologizing."[194] Similarly, it was not misconduct to refer to black prison gangs to rehabilitate a white inmate witness when the prosecutor could have reasonably believed that the asserted attacks were relevant to the witness's fear of retaliation if he testified against the defendant.[195]

In another context, a reference to the defendant's country of birth was "in no way an attempt to arouse racially prejudiced attitudes;" rather, it was arguably relevant to whether the defendant had acted in concert with the codefendants.[196] Most surprising is a Utah court's pronouncement that while "[w]e express no opinion on the soundness of the proposition that casual sexual encounters between people of different races are less likely than those between people of the same race," as the prosecutor

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188 Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990) (Heaney, J., concurring and dissenting), *cert. denied*, 112 S. Ct. 89 (1991).

189 *See* Weddington v. State, 545 A.2d 607, 614-15 (Del. 1988); *see* United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 161 (2d Cir. 1973) (suggesting harmless error doctrine may not apply to verdicts tainted by racial prejudice); see also Miller v. North Carolina, 583 F.2d 701, 707-08 (4th Cir. 1978) (same).

190 *See, e.g.*, Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 820-24 (1970).

191 Given the Supreme Court's recent decision in Arizona v. Fulminante, 111 S. Ct. 1246, 1253-57 (1991), that even coerced confessions are subject to harmless error review, it seems unlikely that this position will gain adherents, at least as a matter of federal constitutional law.

192 *See, e.g.*, State v. Rankovich, 765 P.2d 518, 521-23 (Ariz. 1988) (en banc); Herring v. State, 522 So. 2d 745, 748 (Miss. 1988); People v. Rodrigo, 550 N.Y.S.2d 324, 324 (App. Div.), *appeal denied*, 555 N.E.2d 626 (N.Y. 1990); State v. Dien, 554 N.Y.S.2d 581, 581-82 (App. Div. 1990); *cf.* United States v. Doe, 903 F.2d 16, 27-28 (D.C. Cir. 1990), (reversing because evidence of guilt not overwhelming).

193 Russell v. Collins, 944 F.2d 202, 204 n.1 (5th Cir.), *cert. denied*, 112 S. Ct. 30 (1991).

194 Commonwealth v. Johnson, 361 N.E.2d 212, 219 (Mass. 1977).

195 People v. Malone, 762 P.2d 1249, 1265-67 (Cal. 1988) (en banc), *cert. denied*, 490 U.S. 1095 (1989).

196 People v. Longo, 543 N.Y.S.2d 115, 115-16 (App. Div.), *appeal denied*, 551 N.E.2d 115 (1989); see State v. Martin, 539 So. 2d 1235, 1240 (La. 1989) (in the prosecution of a defendant of apparently German origin, the prosecutor's reference to "Japanese, Germans and Commie-pinkos" was not considered an attempt to inject race or national origin, but rather an attempt to further a battle example).

attempted to imply, "[t]here is no indication that the remark was made with derogatory intent or to suggest that because defendant was black, he was more likely to have committed the alleged crime."[197] Why the prosecutor's motives should matter at all in these cases is unclear, since the question is not her moral purity, but the trial's fairness. Even if motive should matter, one would think that racist motives encompass more than unsophisticated, unfashionable, and straightforward racial animosity. Indeed, the very fact that courts find some of these arguments plausible suggests a greater danger that jurors will find them persuasive; the plausibility does not alter their racial character.

A more drastic minimizing device is to declare that some remarks have no racial content.[198] Thus, in one case with a black defendant and three separate prosecutorial references to animals (that jurors should not "digress to where the animals are," that they should rise above "animalistic intolerance," that the defendants had treated the victim's girlfriend "like an animal"), the court said that it could not say the remarks were racially prejudicial, given that the defendants were not *referred to* as animals.[199] In a black defendant-white victim case where the prosecutor told the jury that judges, reporters, prosecutors, and police could all do their work "til we're black in the face," but "[u]nless you do your job [those efforts will be wasted]," the court described the remark as an attempt to emphasize the gravity of the task and said that "it would take an extremely strained reading to find therein some racial innuendo designed to affect the jury's deliberations."[200] In the case where the prosecutor asked whether it was reasonable to believe the white victim would consent to sex "with . . . that [indicating the African-American defendant]," the court deemed the remark not racial because the evidence had shown disparate life styles, social standing, and dress.[201]

The court deemed "far-fetched" and "merit[ing] no further comment" a complaint that the prosecutor's statement was racially motivated where the defendant was black and the prosecutor said that the streets of the commonwealth were becoming a "jungle."[202] In the case of a black inmate charged with stabbing a white corrections officer, the prosecutor argued: "First of all, credibility. . . . Who are you going to believe in this case? It is absolutely black and white. It is either [the guard's version or the defendant's version]."[203] The reviewing court declared: "There is no indication that the remark contained racial overtones or was directed to anything other than the issue of credibilty."[204] A Missouri prosecutor's statement that 90 percent of all murders are committed by blacks on blacks, followed by an argument that it was time to say that such conduct would no longer be tolerated in "our

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[197] State v. Thomas, 777 P.2d 445, 448 (Utah 1989).

[198] There are enough of these cases that I am persuaded that the approach suggested by Earle, *see* Earle, *supra* note 5, at least without amplification, is unworkable. She argues that explicit references to race and indirect references, as judged by a "reasonable person" standard, should be considered prosecutorial racism. There is so much resistance to acknowledging the racial content of remarks that judges who think of themselves as reasonable people will not necessarily identify racial overtones. At a minimum, an illustrative list is necessary.

[199] State v. Lombard, 471 So. 2d 782, 789-91 (La. Ct. App. 5th Cir. 1985), *aff'd in part and rev'd in part on other grounds*, 486 So. 2d 106 (La. 1986).

[200] State v. Brown, 636 S.W.2d 929, 937 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983).

[201] Thomas v. State, 419 So. 2d 634, 635-36 (Fla. 1982).

[202] Commonwealth v. Layton, 376 N.E.2d 150, 153 (Mass. App. Ct. 1978).

[203] People v. O'Quinn, 537 N.Y.S.2d 626, 626 (App. Div. 1989).

[204] *Id.*

city,"[205] was said not to inject race into the proceedings, because both the victim and the defendant were black.[206] In another glaring case, the court found no anti-Semitic overtones in references to a Jewish employee as "Judas," and instead explained the imagery as a reference to the defendant's betrayal of his employer and other "themes of [the] case."[207] Perhaps most amazing is the escalating denial evident in the following explanation of a prosecutor's various comments:

> [The defendant] claims the State's final argument was calculated to inflame the passions of the jury through appeals to racial prejudice. [He] proposes the comment that [the codefendant] was "stuck, by his own stupidity" in a bedroom is an "indirect, but unmistakable reference to the race of the Defendants." He makes the same charge regarding a reference to the persons who simply carry out orders as "these privates," and the group of persons as "the boys". These terms are used as general slang, not a racial comment. [The defendant] professes to see a racial reference to the remark "this one and that one["] . . . . These remarks are not inherently racial comments. Two other phrases are discussed by [the defendant]. First, the prosecutor characterized the testimony of a black defense witness as "shucking and jiving on the stand." The term is clearly of black origin, used to mean to talk in a patently misleading or evasive manner. Its use reminds the jury of the untrustworthy appearance of this witness. Second, the prosecutor said [the defendant] "had to play Superfly" and shoot [the victim] where he lay. Despite the racial content of the term "Superfly," it is not out of bounds to make such an allusion by saying [the defendant] acted like "Superfly," either to characterize his actions by comparison with a known fictional figure, or to imply that [his] behavior is to some extent modeled on the fictional example.[208]

This opinion makes the reader wonder again if the only forbidden arguments are the ridiculously direct arguments from race (for example, "We know he did it because he is black."), the kind of argument the norm of formal equality suggests would rarely be risked.

Even when racial content is acknowledged—as sometimes it really must be—courts may deprecate its significance. It is not uncommon for a court to characterize the reference to race as isolated or not thematic.[209] Although that characterization is undoubtedly apt in some cases,[210] in others

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[205] State v. Noel, 693 S.W.2d 317, 318 (Mo. Ct. App. 1985); *see* State v. Franklin, 526 S.W.2d 86, 90-91 (Mo. Ct. App. 1975) (not an incitement to racial prejudice to argue that victims of 85% of crimes are the people who have to live in black areas or do live in those areas).

[206] *Noel*, 693 S.W.2d at 319.

[207] State v. Marks, 493 A.2d 596, 606 (N.J. Super. Ct. App. Div. 1985); *see* United States v. Weiss, 914 F.2d 1514, 1525 (2d Cir. 1990) (reference to Jewish Medicaid fraud defendants as "merchants of Franklin Square," characterized as merely a colorful figure of speech and not an attempt to associate defendants with the Shylock character in Shakespeare's *The Merchant of Venice*).

[208] Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

[209] *See, e.g.*, United States v. Abello-Silva, 948 F.2d 1168, 1181-92 (10th Cir. 1991) (focusing on prosecutor's remark that defendant "secure in the comfort of Colombian corruption . . . laughs at American justice" and defendant is the "biggest fish landed by United States out of that Colombian sea of narcotics," misconstrues prosecution in trial of several weeks and closing argument of several hours when statements were factually supported by the evidence) *cert. denied*, 113 S. Ct. 107 (1992); People v. Bramlett, 569 N.E.2d 1139, 1145 (Ill. App. Ct. 1991) (twice argued that officer should be believed because both he and the accused were black, and cross-examined defendant as to why another black person would accuse him); People v. Johnson, 499 N.E.2d 1355, 1368 (Ill. App. Ct. 1986) ("that black man"); People v. Traylor, 487 N.E.2d 1040, 1042 (Ill. App. Ct. 1985) (being a "white policeman in a black neighborhood" explains behavior of officers); Russell v. State, 518 A.2d 1081, 1085-86 (Md. Ct. Spec. App. 1987) (reference to Jamaican drug trafficking in opening statement); People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div.) (testimony of witnesses and one remark by prosecutor on race of police

it seems dubious, sometimes because several references have in fact been made. Thus, in one case where the prosecutor twice told the jury to believe the police officer because both he and the accused were black, the court deemed these remarks isolated.[211] On cross-examination the prosecutor had, however, also asked the defendant several questions regarding why another black person would accuse him, but because the questions had not been objected to, the court did not consider them in determining whether or not the summation remarks were isolated.[212] In other cases, one has to doubt whether the lack of repetition is important, given what the prosecutor said. For example, in one case the majority opinion said that the appellant's brief "emphasiz[ed], out of all proportion, a minor incident" without reporting the nature of the incident.[213] Because there is a dissent in this case, we learn that this "minor incident" was—an argument that when Indians drink they can't handle it, and that such drinking often leads to violence—like that at issue in the case. The prosecutor also included a diatribe on how people in the Indian community cannot be persuaded that a life without violence is possible, and concluded that the only thing left for the jury to do was to set a standard with its verdict.[214] That is a minor incident?[215]

Sometimes a court minimizes not the number, but the invidiousness of the remark.[216] Several cases comment that remarks about sex between black men and white women are not prejudicial, or at least not very prejudicial, because the jurors could see that the defendant was black and the victim white.[217] Thus, in the Alabama case where the prosecutor said that the jury had to believe that the defendant "took it, he got him a white woman," the court noted that everyone would be aware that a black man was on trial for the rape of a white woman and concluded that not every reference to race is bad, but only those remarks that emphasize differences and therefore appeal to prejudice.[218] Also

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officers and informant), *appeal denied*, 559 N.E.2d 683 (N.Y. 1990); State v. Thomas, 777 P.2d 445, 447 (Utah 1989) (argument that white victim was less likely to consent to sex with defendant because he was black).

[210] *See, e.g., Johnson*, 499 N.E.2d at 1368 (single reference to "that black man").

[211] *Bramlett*, 569 N.E.2d at 1145.

[212] *Id.*; *see Ali*, 551 N.Y.S.2d at 55 (race of the police officer and informer referred to in witnesses' testimony as well as in prosecutor's summation).

[213] Soap v. Carter, 632 F.2d 872, 876 (10th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981).

[214] *See id.* at 828 (Seymour, J. dissenting). For a portion of the prosecutor's verbatim remarks, see supra note 81 and accompanying text.

[215] See United States v. Abello-Silva, 948 F.2d 1168, 1181-82 (10th Cir. 1991) (arguments that defendant "secure in the comfort of Colombian corruption . . . laughs at American justice" and that the defendant was the "biggest fish landed by the United States out of that Colombian sea of narcotics").

[216] *See, e.g.*, State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984) (argument that witnesses were unreliable because they were defendant's countrymen, and also because of their foreign birth, was not so prejudicial as to deny them a fair trial); *see also* Commonwealth v. Askins, 465 N.E.2d 1224, 1226 (Mass. App. Ct. 1984) (reference to "foreign accent" of physician witness for defendant, "if intended as a racial slur," did not approach in emphasis or relevance and was not reversible error), *review denied*, 469 N.E.2d 830 (1984).

[217] *See, e.g.*, State v. Rhoden, 274 So. 2d 630, 635 (Ala. 1973); STATE v. MAYHUE, 653 S.W.2d. 227, 237 (Mo. 1983); State v. Thomas, 777 P.2d 445, 447 (Utah 1989); see also People v. Nichols, 308 N.E.2d 848, 852-53 (Ill. App. Ct. 1974) (prosecutor's reference to black defendant being married to a white woman not so prejudicial where already established in the testimony and wife had appeared as a witness).

[218] *Rhoden*, 274 So. 2d at 635.

remarkable is a Michigan court's conclusion that a jury would not have been diverted by the "limited number" of references to the defendant and his companion as "colored" "where [these references] were not made in a derogatory manner."[219]

Even more surprising are some of the racial arguments that courts find entirely proper. An argument that the prosecutrix, the daughter of a dentist and a religious person, would not go out with someone not of her race was deemed within the prosecutor's discretion.[220] Similarly, a judge's determination to permit the prosecutor to argue that a motel operator would have remembered seeing the black defendant and his white wife registering because "it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County" was deemed within *his* discretion.[221] One court explained that the prosecutor's statement, " 'it's hard for me to tell people of the Negro race apart,' " was proper to explain the complaining witness's doubts regarding the identity of one of the defendants.[222] (Apparently the relevance of this argument is that the jury should convict despite the witness's uncertainty!) A prosecutor's repeated references to an "Italian connection," to the defendant as a "Sicilian," and as "the Italian" were deemed permissible because the defendant *was* a Sicilian, had referred to himself as "the Italian," and had consorted with persons who had criminal backgrounds; the court noted that the prosecutor had not alleged that the defendant was a member of the Mafia or of organized crime,[223] a rather fine distinction it seems to me.

In a number of cases where the prosecutor made a plea for "equal enforcement" against African-American defendants, the courts have found no error.[224] All of the equal enforcement cases seem naive to me, given the conventions of modern racist speech, but one is particularly egregious. In a case in which the prosecutor urged the jury not to be hard on the defendant just because he was black and the child victim of his sexual offense was white, the reviewing court found no indication of his "lack of sincerity" and no error.[225] Do I need to go on?[226]

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[219] People v. Wilson, 198 N.W.2d 424, 427 (Mich. App. Ct. 1972); *see* Commonwealth v. Morgan, 401 A.2d 1182, 1140 (Pa. Super. Ct. 1979) (prosecutor's argument that white girl would not have patronized a black bar was poorly stated and to a degree improper, but did not constitute misconduct that subverted due process).

[220] State v. Bautista, 514 P.2d 530, 532-33 (Utah 1973).

[221] State v. Deas, 212 S.E.2d 693, 694-95 (N.C. 1975).

[222] Patterson v. Commonwealth, 555 S.W.2d 607, 610 (Ky. Ct. App. 1977) (alteration added).

[223] Haas v. State, 247 S.E.2d 507, 510 (Ga. 1978).

[224] Wilder v. State, 401 So. 2d 151, 162-63 (Ala. Crim. App. 1981), *cert. denied*, 454 U.S. 1057 (1981); State v. Stamps, 569 S.W.2d 762, 767-69 (Mo. Ct. App. 1978); State v. Lee, 631 S.W.2d 453, 455-56 (Tenn. Crim. App. 1982); Clark v. State, 692 S.W.2d 203, 205 (Tex. Ct. App. 1985).

[225] Dixon v. Commonwealth, 487 S.W.2d 928, 929 (Ky. Ct. App. 1972).

[226] *See* Turner v. State, 429 So. 2d 645, 647 (Ala. Crim. App. 1982) (reference to defendant as black was proper for purposes of identification and "to show apprehension on the part of the witness"); State v. Snedecor, 294 So. 2d 207, 209 (La. 1974) (permissible to argue that lounge where shots were fired from a passing car was having racial problems because it refused to serve black people—in light of the "vicious nightriding" nature of the killing, the comment was relevant to show the motive of the black defendant, although there was no apparent link between the defendant and those problems); State v. Parker, 509 P.2d 272, 274 (N.M. Ct. App. 1973) (references to African-Americans as "colored" was not objectionable as a matter of law); People v. Kong, 517 N.Y.S.2d 71, 71-72 (App. Div. 1987) (not improper to refer to defendant and his witnesses as belonging to the same "Jamaican organization" and "Jamaican social club" when defense had elicited that they all belonged to a club called the "Jamaica Social Club").

While it is somewhat reassuring to find cases with racial imagery that are reversed, in most such cases an examination of the reasons cited for reversal shows the same narrow view of racism and racist imagery that permeates the cases which are affirmed. Several of these cases note that the prosecutor's purpose clearly was to inflame the jury.[227] The most interesting of these cases is *United States v. Withers*,[228] in which the prosecutor said that "[n]ot one white witness" had been produced in the case to contradict the prosecution's witness.[229] The former United States Attorney who uttered the sentence said that it was "inadvertent" and that he did not "remember it."[230] Many connected with the trial, including the jurors, testified that they could not remember the argument.[231] Also, the district judge denied the motion to vacate sentence at least in part because he found "that the statement complained of was accidentally and unknowingly made by the United States Attorney."[232] Immediately after this statement, however, the United States Attorney said: "Members of the jury, you were qualified in this case. We are not trying this case because these defendants are black."[233] He then went on to refer to a case "where we were prosecuting a white fellow on very similar facts."[234] The circuit court reversed, citing these subsequent statements and concluding that whatever the U.S. Attorney *presently* recalled about the case, "at the time he said it, he clearly had race on his mind and wanted the jury to think about what he said."[235]

Why was the trial judge ready to characterize the statement as "inadvertent," given the remarks that immediately followed? What if the prosecutor had not made the follow-up argument? How reliable can determinations of intent be when conscious racism is highly stigmatized?

Just as affirming courts often cite the isolated nature of racial remarks, reversing courts often note that the offensive remarks were not isolated; indeed, often the remarks are merely parts of extended discussions.[236] Moreover, a significant number of the reversals come in cases where the court

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[227] *See, e.g.*, People v. Nightengale, 523 N.E.2d 141, 42 (Ill. App. Ct.) (prosecutor's conduct overall constituted an "open mockery of our judicial system" and was flagrantly done for the purpose of prejudicing the defendant), *appeal denied*, 530 N.E.2d 258 (Ill. 1988); People v. Lurry, 395 N.E.2d 1234, 1238 (Ill. App. Ct. 1979) (attempt to arouse racial fear and animosity); People v. Turner, 367 N.E.2d 1365, 1367 (Ill. App. Ct. 1977) (remarks were "apparent attempts to arouse racial fear and animosity"); Commonwealth v. Graziano, 331 N.E.2d 808, 813 (Mass. 1975)(remarks were calculated to appeal to prejudice); People v. Thomas, 514 N.Y.S.2d 91, 93 (App. Div. 1987) (no other purpose but to inflame); State v. Walker, 411 N.Y.S.2d 377, 380 (App. Div. 1978) (prosecutor's remarks were "designed to engender a collective rage").

[228] 602 F.2d 124 (6th Cir. 1979).

[229] *Id.* at 125.

[230] *Id.*

[231] *Id.* at 126.

[232] *Id.* at 125.

[233] United States v. Withers, 602 F.2d 124, 126 (6th Cir. 1979).

[234] *Id.*

[235] *Id.*

[236] *See, e.g.*, People v. Lurry, 395 N.E.2d 1234, 1238 (Ill. App. Ct. 1979); People v. Turner, 367 N.E.2d 1365, 1367 (Ill. App. Ct. 1977); State v. Wilson, 404 So. 2d 968, 971 (La. 1981); People v. Thomas, 514 N.Y.S.2d 91, 93 (App. Div. 1987).

is unwilling to declare the racial arguments alone to be reversible error, but instead determines that all of the errors taken together warrant reversal.[237]

Finally, many of the reversals occur in cases where the court deems the argument extraordinarily offensive or inflammatory. As one might expect, four of these cases involve sexual threat imagery.[238] In one of these cases, the court said: "One must ask the ugly question: Does a black man's supposed sexual preference [for white women] have anything at all to do with whether he deserves to die for his deeds?"[239] In another case, the court even suggested that automatic reversal is required whenever the racially offensive remark has sexual content.[240] Lest one be too encouraged by these cases, it must be noted that not all courts have taken sexual threat cases so seriously.[241] Indeed, the reversed cases themselves bear witness to the scattered protection the law affords even here: while the Fourth Circuit reversed a conviction on habeas corpus for the egregious argument that "the average white woman abhors anything of [a sexual] nature that had to do with a black man,"[242] the state court had found it harmless error, with one justice asserting that the prosecutor's remarks were justified because they "simply stated a matter of common knowledge."(!)[243]

In one case involving, not sexual threat, but criminal propensity imagery, the Massachusetts court held that a long diatribe about Colombian drug dealers and the difficulty of infiltrating their organization (offered in a case with no evidence that the defendant was involved in a conspiracy) combined with the suggestion that Colombian drug dealers are more dangerous or violent than other drug dealers, would have "tapped any xenophobic feelings that might be latent in the jury" and therefore required reversal.[244] However, in another case with extraordinarily long and varied comments about black people—such as, that they all look alike, that black hairstyles are strange and unattractive, and that young black women are sexually promiscuous[245]—which were unrelated to the charges, two out of three federal judges found that those comments, however "vulgar and revolting" or "nauseating," did not warrant reversal.[246]

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[237] *See, e.g.*, State v. Filipov, 576 P.2d 507, 511 (Ariz. Ct. App. 1977); George v. State, 539 So. 2d 21, 21-22 (Fla. Dist. Ct. App. 1989); People v. Nightengale, 523 N.E.2d 136, 142 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 258 (Ill. 1988); People v. Sales, 502 N.E.2d 1221, 1226 (Ill. App. Ct. 1986); Sparks v. State, 563 S.W.2d 564, 569 (Tenn. Crim. App. 1978).

[238] *See* Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978); Reynolds v. State, 580 So. 2d 254, 256 (Fla. 1991); Dawson v. State, 734 P.2d 221, 223 (Nev. 1987); People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977).

[239] *Dawson*, 734 P.2d at 223.

[240] *Richardson*, 363 N.E.2d at 927.

[241] *See supra* notes 60-64 and accompanying text.

[242] Miller, 583 F.2d at 705.

[243] *Id.* at 704.

[244] Commonwealth v. Gallego, 542 N.E.2d 323, 326 (Mass. App. Ct. 1989).

[245] *See* United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 154-55 (2d Cir. 1973).

[246] *Id.* at 161-62. The court did reverse the defendant's conviction because one of these two judges saw a "blatant" appeal to racial prejudice in the closing sentence: "[W]e cannot take these people out of the community unless you twelve people sitting in judgment on these matters decide these things have got to stop." *Id.* at 162. The third justice "reluctantly dissent[ed]." He opined that his colleagues had been "led to disregard the difference between revolting vulgarity and unconstitutionally prejudicial conduct." *Id.*

There are only two genuine bright spots in the reversals. In *McFarland v.Smith,*[247] the Second Circuit, reviewing the prosecutor's argument that the credibility of a police officer's testimony was enhanced by the fact that he and the defendant were both black, held that "any reference to [race] by a prosecutor must be justified by a compelling state interest"[248] and that a compelling state interest would only be present if the factual or logical basis for the argument "has a sufficiently high degree of reliabilty to warrant the risks inevitably taken when racial matters are injected into any important decision-making."[249] Not finding this standard met by the highly speculative argument about the truthfulness of in-group accusations, the court found constitutional error in a case where the error was not clearly harmless[250] and, consequently, reversed.

Faced with a baseless question to the black defendant about his search for "loose white women," to which a defense objection was sustained, the Delaware Supreme Court noted in *Weddington v. State*[251] that any reference to race must be justified by a compelling state interest.[252] It cited *McFarland*, but went one step further, concluding that "the right to a fair trial that is free of improper racial implications is so basic to the federal Consitution that an infringement upon that right can never be treated as harmless error."[253] Nor may a sustained objection with instructions be treated as a cure, at least not when a mistrial has been requested.[254] The court added a second fallback rationale: the right it was announcing was also guaranteed as a matter of Delaware state constitutional law.[255] Interestingly enough, this pronouncement occurred in a case in which it was unnecessary; the state had conceded error and that the error was not harmless.[256]

One might expect a rash of reversals, and a position analogous to the *McFarland-Weddington* rule to come from the Louisiana courts as a matter of statutory interpretation. The relevant statute provides in pertinent part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

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[247] 611 F.2d 414 (2d Cir. 1979).

[248] *Id.* at 417.

[249] *Id.* at 419.

[250] *Id.* at 419-20.

[251] 545 A.2d 607 (Del. 1988).

[252] *Id.* at 614 citing McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979).

[253] *Id.* at 614-15.

[254] *See id.* at 615.

[255] *See id.*

[256] *See* Weddington v. State, 545 A.2d 607, 611-12 (Del. 1988). The court found the state's "candor . . . commendable." *Id.* at 611. This may be undue praise, given that the state first argued on appeal that the error was harmless, and then, reversing itself, urged the court to apply an ordinary "balancing test" to the case and find reversible error. *See id.* at 611-12. Is it too cynical to wonder if the state's change of position on the question of whether the error was harmless was not commendable candor at all, but an (ultimately futile) attempt to avoid the holding that racial remarks are not subject to harmless error analysis?

(1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury[257]

Nevertheless, the pattern of reversals in Louisiana seems no more generous than in states where there is no statute. Instead, the statute seems to have had three odd effects. First, it appears to have increased the appeal rate of racial remark cases.[258] This may be so because the language of the statute gives prospective appellants hope.[259] Second, in the extraordinarily egregious cases, cases that other state courts would likely reverse on due process grounds, the Louisiana courts ignore the Due Process Clause and rely on the statute.[260] In less egregious cases, the courts tend to ignore the language "directly or indirectly" and focus on the qualifying phrase "that might create prejudice against the defendant in the mind of the jury,"[261] with a somewhat cramped interpretation of "might."[262] Finally, their notion of which remarks are "material and relevant" has resulted, on occasion, in very surprising and rather disheartening decisions.[263]

D. Relevant Professional Ethics Constraints

The Model Code of Professional Responsibility has a three tiered structure: canons, which state a general duty, disciplinary rules (DRs), which identify more specific obligations that attorneys must follow, and ethical constraints (ECs), which contain guidelines that attorneys are encouraged to follow. Despite this structure, the Model Code, like its simpler predecessor, the Canons of Professional Ethics, says nothing explicit concerning the use of racial imagery and steroetypes. Two of the Model Code Canons are obviously relevant: Canon 1, which states that a lawyer should maintain the integrity of the legal profession,[264] and Canon 7, which states that "a lawyer should represent a client zealously within the bounds of the law."[265]

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[257] LA. CODE CRIM. PROC. ANN. art. 770 (West 1981).

[258] State v. Wilson, 404 So. 2d 968 (La. 1981); State v. Jenkins, 340 So. 2d 157 (La. 1976); State v. Thomas, 310 So. 2d 517 (La. 1975); State v. Jackson, 301 So. 2d 598 (La. 1974); State v. Snedecor, 294 So. 2d 207 (La. 1974); State v. Jones, 283 So. 2d 476 (La. 1973); State v. Kaufman, 278 So. 2d 86 (La. 1972); State v. King, 573 So. 2d 604 (La. Ct. App. 2d Cir. 1991); State v. Greene, 542 So. 2d 156 (La. Ct. App. 1st Cir.), *writ denied*, 548 So. 2d 1229 (La. 1989); State v. Lombard, 471 So. 2d 782 (La. Ct. App. 5th Cir. 1985).

[259] *See, e.g., King*, 573 So. 2d at 605 (prosecutor referred to victim as "a young black male"); *see also Thomas*, 310 So. 2d at 523 (prosecutor referred to the defendants as "two men, two Negro men, charged with a crime in the parish of St. Landry who were treated with justice"); *Jackson*, 301 So. 2d at 599 (prosecutor said in opening statement that defendant and "three other black males" had entered the apartment).

[260] Wilson, 404 So. 2d at 968; Jones, 283 So. 2d at 476.

[261] A. CODE CRIM. PROC. ANN. art. 770 (West 1981).

[262] *See, e.g., Thomas*, 310 So. 2d at 523; *King*, 573 So. 2d at 605-06; *Greene*, 542 So. 2d at 158; *Lombard*, 471 So. 2d at 790; *cf. Kaufman*, 278 So. 2d. at 98 (reversal where remark was also violation of evidence rules).

[263] *See, e.g., Snedecor*, 294 So. 2d at 209 (argument of racial animosity as possible motivation for killings was proper despite lack of evidence that defendant entertained such motives).

[264] MODEL CODE OF PROFESSIONAL RESPONSIBILITY canon 1 (1983) [hereinafter MODEL CODE].

[265] *Id.* canon 7.

Under Canon 1, DR 1-102(A)(5) prohibits conduct "prejudicial to the administration of justice"[266] and DR 1-102(A)(6) prohibits conduct that reflects adversely on the lawyer's fitness to practice;[267] under Canon 7, DR 7-106(C)(6) requires that a lawyer not engage in "undignified or discourteous conduct which is degrading to a tribunal."[268] Discipline under these provisions (or state analogues) for racial slurs is extremely rare and generally involves a lawyer who has engaged in other reprehensible conduct.[269] I found only one case in which an attorney was disciplined under these provisions for a single racial remark. In that case, a prosecutor with sixteen years experience said to a defense counsel in the hallway outside the courtroom, "I don't believe either one of those chili-eating bastards."[270] Discipline was limited to public censure.[271]

The reader may be incredulous that at least some of the prosecutors' summation remarks discussed earlier in this article did not result in discipline, but professional discipline for *courtroom* improprieties is virtually unheard of. Professor Gershman, after surveying "literally hundreds of truly egregious instances of prosecutorial misconduct," found that "none . . . resulted in punishment of the prosecutor by his superior or bar associations."[272] One would hardly expect more vigorous enforcement against defense attorneys, given the countervailing pressure of DR 7-101(A)(1), which requires that a lawyer not "[f]ail to seek the lawful objectives of this client through reasonably available means permitted by law and the Disciplinary Rules."[273] While they may disagree about the underlying causes, commentators agree on the "paucity of professional discipline for abuses in court."[274]

The related remedies of contempt of court and removal from the case are similarly rare for racist behavior or, indeed, any other forensic misconduct.[275] Interestingly enough, despite this general

[266] *Id.* DR 1-102(A)(5).

[267] *Id.* DR 1-102(A)(6).

[268] *Id.* DR 7-106(C)(6).

[269] *See, e.g., In re* Williams, 414 N.W.2d 394 (Minn. 1987) (public reprimand for statement to opposing counsel at deposition: "Don't use your little sheeny Hebrew tricks on me, Rosen" and, for other misconduct, a six month suspension), *appeal denied*, 485 U.S. 950 (1988); *In re* Vincenti, 554 A.2d 470 (N.J. 1989) (attorney given three-month suspension for threatening opposing counsel, engaging in vulgar name calling, failing to cooperate in appearing for the trial call, challenging defendant's investigator to a fight, using threatening and abusive language with judge's clerk, and using racial innuendo on at least one occasion); Mahoning County Bar Ass'n v. Cregan, 584 N.E.2d 656 (Ohio 1992) (one-year suspension from practice subject to possible reinstatement for using demeaning phrases based on race in referring to attorneys, insulting remarks based on race in addressing a counselor, and numerous harassing and threatening phone calls to counseling center).

[270] People v. Sharpe, 781 P.2d 659, 660 (Colo. 1989) (en banc).

[271] *See id.* The reviewing court noted without comment that the defense motion to bar the prosecutor's further participation in the case was denied. *Id.*

[272] GERSHMAN, *supra* note 96, 13.1, at 13-2 n.4.

[273] MODEL CODE DR 7-101(A)(1).

[274] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 620 (1986); Earle, *supra* note 5, at 1220; *see* GERSHMAN, supra note 96, at 13-1; Greg Rushford, *Watching the Watchdog*, LEGAL TIMES, Feb. 5, 1990, at 1.

[275] Wolfram, supra note 274, at 620.

reticence, a Superior Court judge in Washington, D.C. recently removed defense lawyer John T. Harvey from an assault case because he refused to agree that he would remove his kente cloth in the event of a jury trial.[276]

E. Controls on Jury Deliberations

The behavior of jurors is subject to both prospective control through jury instructions and retrospective control through the review of allegations of juror misconduct. Unfortunately, neither of these are very powerful tools, even in the abstract, and neither is well suited to the problem of racial imagery.

As a constitutional matter, jury instructions need only include the presumption of innocence[277] and the requirement of proof beyond a reasonable doubt.[278] Additionally, a judge must avoid instructions that infringe on constitutional rights.[279] Most courts do, however, provide some cautionary instructions in addition to directions concerning the elements of the specific offense with which the defendant is charged. While model instuctions commonly include a general admonition to consider the case "without prejudice, fear, or favor," they do not provide for a specific instruction concerning racial prejudice.[280] Of course, an individual judge might include such instructions at her discretion. Instructions, however, would be unlikely to provide much of a shield against racial imagery, even were judges more inclined to give them. The limited research from mock juries indicates that jurors often do not attend to, or are confused by, jury instructions.[281] Moreover, jury instructions assume that the influence of racial imagery on deliberations is conscious; even if instructions inhibit jurors from speaking in explicitly racial terms, they are unlikely to be very effective in erasing previously introduced racial imagery. Even more discouraging is the possibility that judicial references to race may serve to recall and emphasize a racial image presented earlier in the trial; mock jury studies on instructions regarding inadmissible evidence point in this direction.[282]

After-the-fact regulation of juror uses of racial imagery is also unlikely to be significant, first because only convictions could be reached and second, because the general rule that jurors may not

[276] See Stephen Gillers, *Fighting Words: What Was Once Comical Is Now Costly*, A.B.A. J., Aug. 1992, at 102.

[277] Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

[278] In Re Winship, 397 U.S. 358, 364 (1970).

[279] *See, e.g.*, Griffin v. California, 380 U.S. 609, 615 (1965) (forbidding instructions suggesting that silence by the accused may be taken as evidence of his guilt).

[280] *See, e.g.*, SEVENTH CIRCUIT JUDICIAL CONFERENCE COMM. ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN CRIMINAL CASES § 2.03, at 9 (1965). The language may vary slightly. *See, e.g.*, COMMITTEE ON PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), DISTRICT JUDGES ASS'N OF THE FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS 5 (1978) (the appropriate language is "without prejudice or sympathy").

[281] See AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12-17 (1982); David V. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 480-82 (1976).

[282] *See, e.g.*, Stanley Sue et al., Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemna, 3 J. APPLIED SOC. PSYCHOL. 345 (1973); Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors*, 7 J. Applied Soc. Psychol. 205 (1977).

impeach their verdicts unless influenced by external forces is widely accepted.[283] Moreover, a third reason dwarfs the first two, for even if more jurisdictions made racial arguments an exception to the general rule prohibiting impeachment of verdicts,[284] one would expect that few such arguments will come to light, and those that come to light by dint of one juror's report are likely to be contested.

III. Getting Serious

The protections for defendants of color against racial imagery used to enhance the likelihood of their convictions are woefully inadequate. Protection for victims and witnesses against racial degradation on the stand, intended to diminish the defendant's chance of conviction, is virtually nonexistent. Thus, we have a criminal process issue that is neither pro-prosecution nor pro-defense; politically, that should make it easier to agree that change is necessary.[285] If we are concerned enough about the perpetuation of racial stereotyping, if we care enough about the way such stereotyping degrades the person stereotyped and the criminal process, we will do something. Disagreement should be limited to the question of what we should do.

A. Giving a Nod

Making a gesture toward this problem is not nothing. It can be cheap and it can be a first step—even a nod acknowledges existence. The very least we might do, as lawyers, is to incorporate a provision forbidding the use of racial imagery into the legal ethical codes.

Because I have no expertise in professional responsibility issues, I would be the first to admit that others could draft a better canon and disciplinary rules. Still, I can name some essentials. Naturally, I advocate more than a prohibition against prosecutors' arguments that are calculated to inflame the passions or prejudice of the jury, as the ABA Standards for Criminal Justice presently provide.[286] Although I have not examined uses of racial imagery in civil cases in this article, I see no reason to limit the provision's applicability to criminal proceedings, and certainly it should cover defense attorneys in criminal trials. Moreover, the present ABA prohibition is neither specific nor broad enough.

The provisions ought to refer specifically to: (1) all unnecessary references to race or ethnicity, (2) all insinuations that a person's race or ethnicity make her more or less likely to make a choice in a

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[283] See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 60603, at 606-24 to -28 (1992); Christopher B. Mueller, *Jurors' Impeachment of Their Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 924-25 (1978).

[284] The Supreme Court has carved out a narrow exception to the rule, holding that when jurors alleged that a bailiff had, in effect, become a witness against the defendant, the defendant's right to be confronted with witnesses against him was violated. Parker v. Gladden, 385 U.S. 363 (1966). One lower federal court has reasoned that the introduction of extraneous racial issues analogously violated the defendant's Sixth Amendment right to an impartial jury. *See* Tobias v. Smith, 468 F. Supp. 1287, 1289, 1291 (W.D.N.Y. 1979). Minnesota has a racial prejudice exception to the rule against impeaching verdicts as a matter of statutory interpretation. *See* State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980).

[285] Moreover, a 1989 poll found that nearly 80% of all Americans believe that racism permeates the criminal justice system. Fred Strasser, *One Nation Under Siege*, Nat'l L.J., Aug. 7, 1989, 2, at 1.

[286] Standards for Criminal Justice, § 3-5.8(c) (ABA 1988). The commentary states that arguments which rely on racial, religious, or ethnic prejudices of the jurors introduce elements of irrelevance and irrationality into the trial.

given way,[287] and (3) all depictions of persons as less worthy of respect than other human beings because of their race or ethnicity. More generally, any other use of language, inflection, or gesture that deliberately calls on or unnecessarily emphasizes supposed differences between racial or ethnic groups should be forbidden.

I would not limit the canon to statements by counsel; of equal importance is the creation of an obligation to prevent the use of racial imagery by one's own witnesses. If this strikes the reader as extraordinary, I would remind her that counsel has an ethical duty under the present code not to put a witness, *even the criminal defendant*, on the stand when she anticipates perjurious testimony.[288] It seems to me that the threat to justice presented by a witness's use of racial imagery is far greater than the threat posed by the lying defendant; juries expect the defendant to lie in her own interest and are apt to treat any defendant's testimony with skepticism. Juries will be far less able to identify and resist racial imagery, for to discount it would often require an examination of their own deepest anxieties. To therefore create an ethical duty for counsel to intervene in anticipated racial perversions of justice does not strike me as asking too much.

Instead of objecting that my proposal asks too much of prosecutors and defense counsel, the reader may object that the practical effect of ethical constraints in this area would be so small that efforts in this direction are pointless. While I hope for more, I think this would be a start. It would be a step forward to acknowledge that racial imagery is a problem common enough to merit its own canon, and not a remnant of a racist past so aberrational that it can be relegated to a generality. An explicit Code provision would also mean that law students would have to think about racist imagery, at least briefly, in the required professional responsibility course. (It might even become a jumping off point for discussing the manipulation of other group biases.)

Even if there is no enforcement, some people will be swayed by the existence of the provisions and others will be swayed by the moral force behind the provisions, which the revised Code will give them occasion to think about. There will be yet others, mostly defense attorneys, for whom the provision will provide permission to follow preexisting moral qualms about the use of racial imagery, now relieved to learn that the duty of zealous advocacy does not require their employment of racial imagery when strategically useful to the client. The prohibition against the use of perjured testimony certainly functions this way.

Do these subsets together comprise most of the bar? I certainly doubt it, given lawyers' ability to rationalize. But it is *some* of the bar, and that is reason enough to try professional regulation. Moreover, active enforcement in egregious cases might be increased; it could hardly be lessened from the low levels produced by existing general provisions. Finally, it might be administratively enforced in some offices, particularly those prosecutor's offices in which pride is taken in running a clean, professional office. I am thinking here of the position of the Brooklyn District Attorney's Office on the racially discriminatory use of peremptory challenges during the tenure of Elizabeth Holtzmann as

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[287] This phrasing is intended to permit argument that the evidence shows racial motive on the part of this particular defendant; it is also intended to permit arguments based not on choice, but on inability. For example, an argument based on the statistically supported proposition that a white witness is more likely to be mistaken about the identity of a black person would be permitted, whereas an argument that she was more likely because of her race to be lying about her belief that the accused was the perpetrator would not.

[288] MODEL CODE OF PROFESSIONAL CONDUCT rule 3.3(a)(4) (1990) [hereinafter MODEL RULES].

D.A.; long before the Supreme Court reversed *Swain v. Alabama*,[289] and after the New York Court of Appeals had affirmed *Swain* as a matter of state constitutional law,[290] these challenges were not permitted in the Brooklyn office. It was well-known among criminal defense attorneys that if a judge reported racial use of the peremptory challenge by an assistant district attorney, that attorney would face reprimand from supervisors. I am also thinking of the reputation of the Manhattan District Attorney's office for relatively "clean" summations during the time I worked for the Criminal Appeals Bureau of the Legal Aid Society of New York. Given the propensity for affirmance under a harmless error rationale, inflammatory summations were unlikely to cost convictions. However, summations from another New York borough subject to the same First Department Appellate Division review were much dirtier, probably predicated upon the extreme unlikelihood of reversal. With Manhattan summations, the ethic of the office usually imposed sufficient restraint. Sometimes professionalism matters.

B. Giving a Rip

But why should we not do more? What would justify having a rape shield law but not a racial imagery shield law? Reform was warranted in rape prosecutions, because "good woman"/"bad woman" imagery threatened accuracy, because it rendered the victim's experience in court humiliating, because the prospect of such humiliation discouraged complaints, and because awareness that the rape of a "bad woman" would probably go unpunished may have encouraged some rapes.[291] Racial imagery presents obvious analogs to each of these dangers and adds one more: the possibility of convicting the factually innocent. Moreover, there is the additional force of constitutional command: governmental uses of race ordinarily require that the classification be necessary to the accomplishment of a compelling governmental interest. If we know adherence to that standard is sporadic at best, then surely the Fourteenth Amendment bolsters, if it does not command, a prophylactic statute.

Studying rape shield statutes for guidance reveals that they vary both in scope and procedural detail.[292] While all United States jurisidictions now have some provisions as the result of reform efforts[293] and these provisions all share a rejection of the common-law rule of automatic admissibility for proof of unchastity,[294] the unanimity ends there. The most restrictive prohibit the introduction of any sexual conduct, subject to enumerated exceptions.[295] The most lenient give trial judges unfettered discretion to balance probative value against prejudicial effect—simply requiring a judicial determination at an *in camera* proceeding prior to the introduction of the evidence.[296] Intermediate

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[289] 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 426 U.S. 79 (1986).

[290] State v. McCray, 57 N.Y.2d 542, 550 (1982).

[291] *See* Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1250-51 (1989); *see also* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 767-68 (1991) (noting the mixed motives behind rape shield statutes).

[292] *See* Galvin, *supra* note 291, at 769.

[293] *See* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, J. CRIM. L. & CRIMINOLOGY 644, 644-45 (1987).

[294] *See* Galvin, *supra* note 291, at 773.

[295] *Id.* at 774.

[296] *Id.* at 774-75.

approaches are exemplified by the federal rules: prior sexual-conduct evidence is generally prohibited, subject to enumerated exceptions *and* a "catch-basin" provision that allows unexcepted sexual-conduct evidence if the evidence is "constitutionally required to be admitted,"[297] or, in another formulation, "relevant and admissible in the interests of justice."[298]

The endeavor to formulate a racial imagery shield law may also be informed by the complaints made about rape shield laws. Second generation criticism of rape shield laws has been multifaceted. This is not surprising, given the variation in first generation reforms.[299] The most restrictive statutes (as well as specific decisions under more lenient statutes) have been criticized for violating the defendant's Sixth Amendment right to cross-examine witnesses against him;[300] the more lenient statutes (as well as unexpected decisions under intermediate and more restrictive statutes) have been criticized for offering too little protection to the witness.[301] In addition, means of circumventing the purposes of the statutes while complying with their terms have been discovered and subsequently critiqued.[302] In one post–rape shield law case, the jury foreman explained the decision to acquit based upon the clothes the complainant was wearing: "She asked for it. . . . [S]he was advertising for sex."[303] The defense has thus shifted from "she can't be raped because we know she is promiscuous" to "she can't be raped because she wears clothes that tell us she is promiscuous." We needed the rape shield laws because there were stereotypes about "good" and "bad" women and a prejudice that "bad" women cannot be raped; it should not be surprising that there is more than one way to tell the jury that the woman before them is "bad."

The experience with rape shield laws indicates that drafting a racial imagery statute will be difficult, that there will be glitches in applications, and that experience will show the need for various revisions. I do discern something of a consensus that the intermediate rape shield statutes are better; they specify what can be expected, while they also assume that factual patterns are too complex to anticipate all variations.[304] I therefore start with an analogous structure: racially charged testimony and argument should be presumptively excluded, with some specific exceptions where generalization is possible and a catch-all provision for admitting the evidence on the basis of particularized need.

This leaves three tasks for drafting a workable statute: defining racial imagery, or some like term; setting out some exceptions and the fallback test for nonexcepted racial imagery; and describing the mechanisms by which the prohibitions will be enforced. As for the first task, the reader may have

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[297] FED. R. EVID. 412(b)(1).

[298] N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 1981).

[299] *See, e.g.*, Tuerkheimer, *supra* note 291, at 1247-50.

[300] *See, e.g.*, Soshnick, *supra* note 293, at 656-58.

[301] *See, e.g.*, Galvin, *supra* note 291, at 873-76.

[302] *See, e.g.*, Catherine L. Kello, Note, *Rape Shield Laws: Is It Time for Reinforcement?*, 21 U. MICH. J.L. REF. 317, 344 (1988) (discussing defense attorney who filed civil suit against client's accusor before pending rape charges were resolved, rendering the rape victim subject to civil deposition to which the rape shield protections did not apply).

[303] Barbara Fromm, *Sexual Behavior: Mixed Signal Legislation Reveals Need for Further Reform*, 18 Fla. St. U. L. Rev. 579, 579 (1991) (alteration added) (citing FORT LAUDERDALE NEWS-SUN SENTINAL, Oct. 6, 1989, at 1A).

[304] *See, e.g.*, Soshnick, *supra* note 293, at 690-91.

already noted a lack of explicit definition for the subject of this Article. While "I know it when I see it" does not substitute for a definition, sometimes it is better not to attempt a definition until one has seen a little more of "it." Having now seen as much as I can stand, I propose:

> "Racial imagery" is any word, metaphor, argument, comment, action, gesture, or intonation that suggests, either explicitly or through commonly understood allusion, that
>
> (1) a person's race or ethnicity affects his or her standing as a full, capable, and decent human being; or
>
> (2) a person's race or ethnicity in any way affects the credibility of that person's assertions; or
>
> (3) a person's race or ethnicity in any way affects the likelihood that he or she would choose a particular course of conduct whether criminal or noncriminal; or
>
> (4) a person's race or ethnicity in any way affects the appropriate sanctions for a crime committed by or against him or her; or
>
> (5) a person's race or ethnicity sets him or her apart from members of the jury, or makes him or her allied with members of the jury or, more generally, that a person's race or ethnicity allies him or her with other persons of the same race or ethnic group or separates him or her from persons of another race or ethnic group.
>
> Racial imagery will be conclusively presumed from the unnecessary use of a racially descriptive word.
>
> Where a metaphor or simile uses the words "white," "black," "brown," "yellow," or "red"; where any comparisons to animals of any kind are made; or where characters, real or fictional, who are strongly identified with a racial or ethnic group are referred to, racial imagery will be presumed, subject only to rebuttal through proof that the term in question could not have racial connotations with respect to any witness, defendant, attorney, or judge involved in the case.
>
> That a speaker disclaims racial intent, either contemporaneously or at a later date, shall have no bearing upon the determination of whether his or her remarks or actions constitute a use of racial imagery.

I am sure there are racial images that are arguably outside the scope of this definition, but I hope to have captured the most common and the most egregious varieties.

Such a broad definition will require substantial exceptions. Because most of the cases that are presently litigated and reported do not present close calls, I assume any list derived from reported cases would have to be supplemented by talking to defense and prosecuting attorneys. But I start with the

assumption that the *McFarland* court was right; use of racial imagery should be[305] subject to the same strict scrutiny standard as other racial classifications. Assuming that discerning the truth in a criminal prosecution is a compelling governmental interest, any use of racial imagery should be *necessary* to the discernment of the truth. At the least, that would seem to require that the probative value of the imagery clearly outweighs the risk of prejudice; I think it also requires that the probative value of the evidence could not be captured in a way that did not implicate race, or that implicated race to a lesser extent. Therefore:

> The use of racial imagery by an attorney, witness, judge, juror, or other court personnel, in the presence of the jury, is prohibited except where
>
> (1) race is part of a description that was given or is being given to identify a particular person *and* the racial component of that description is neither unnecessarily repeated nor phrased in derogatory terms; or
>
> (2) attention is called to the fact that the race of the identifying person is different from that of the person being identified, or argument is made or evidence is adduced that interracial identifications are generally less reliable *and* psychological data does not contradict the correctness of the underlying generalization for the particular racial groups involved *and* differences are described, questioned or argued in terms that are not necessarily inflammatory; or
>
> (3) a racial motive is alleged for the offense *and* there is direct evidence that the defendant entertained a racial motive *and* that motive is described, questioned, or argued in terms that are not unnecessarily inflammatory; or
>
> (4) racial animosity is alleged to have motivated a witness to lie and there is a good faith basis[306] for that allegation *and* that motive is described, questioned, or argued in terms that are not unnecessarily inflammatory; or
>
> (5) a racial attitude, including race-based fear, is alleged to have contributed to the defendant's good faith belief that his actions were reasonable *and* his good faith is

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[305] I say "should be" because of the whole morass of the purposeful discrimination standard and the problem of how unconsious racism fits into that standard; but whatever the constitutional command, at least when legislation is being drafted, I think the drafters can stick to "should."

[306] The statute requires "direct evidence" that the defendant entertained a racial motive, but only "a good faith basis" for allegations that racial animosity motivated a witness to lie. The difference in standard is partly due to constitutional constraints imposed by the Confrontation Clause of the United States Constitution, which applies only to defendants. It also reflects my concern that there is enough bias against people of color that a more lenient standard is needed to permit inquiry, which in turn may often reveal bias. In two of the cases where African-American defense attorneys have been criticized for cross-examinations that inquired about racial motivations, some evidence of racial bias was in fact adduced. To lawyer Alton Maddox's question, "When you saw two black men walking in a civilized manner down Dyer Avenue, it ran across your mind that you were about to be raped?," witness Marla Hanson answered, "Yes, that thought ran through my mind." E. R. Shipp, *Defense Lawyers' Tactics: Unfair or Just Aggressive?*, N.Y. TIMES, Apr. 21, 1987, at B1, B4. In the Central Park jogger case, attorney Colin Moore asked witness Patricia Malone, "Was it their dark complexions that terrified you?" She responded, "Yes, . . . I feared they would knock out Jerry and rape me." Ronald Sullivan, *Judge Rejects Lawyer's Plea in Jogger Trial*, N.Y. TIMES, Oct. 27, 1990, § 1, at 27.

both relevant and disputed, *and* that attitude is described, questioned or argued in terms that are not unnecessarily inflammatory; or

(6) a racial attitude, including race-based fear or animosity, is alleged to have motivated the actions of a party who is alleged to have provoked or threatened the defendant, where there is a good faith basis[307] for that allegation *and* such provocation or threat is a defense or partial defense to criminal charges, AND the attitude is described, questioned, or argued in terms that are not unnecessarily inflammatory; or

(7) the racial imagery is expressed through the personal appearance of an attorney, witness, judge, or juror *and* that appearance is his or her ordinary appearance *and* that appearance does not express hatred for, contempt of, or intimidation of another racial or ethnic group;[308]

(8) the use of the racial imagery is in some other way necessary to the accurate determination of the truth of the charges against the defendant(s).

This list of exceptions is not to be read as requiring the admission of evidence that a court deems more prejudicial than probative under the particular circumstances of the case.

How would such provisions be enforced? When the application of the definition or the exception is subject to dispute, an *in camera* proceeding would be necessary before the racial imagery is in any way posed to the jury. The duty to seek such a hearing would have to rest on the party proffering the question, comment, or argument. When that duty is violated, and the court determines that impermissible racial imagery has been presented to the jury, the opposing side should have the choice of a mistrial or corrective instructions.

When the trial court errs in its determination that the imagery is not prohibited or defense counsel fails to object to that imagery, and the defendant is convicted, a second level of questions is raised, one not encountered with rape shield statutes. I am convinced that something very close to an automatic reversal standard is necessary.[309] The urge to affirm convictions of "obviously" guilty defendants is so strong, the pattern of finding a reason to affirm in these cases so thoroughly

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[307] *See supra* note 306 and accompanying text.

[308] Removing an attorney for his refusal to agree to remove his kente cloth in the event of a jury trial strikes me as outrageous. *See supra* note 276 and accompanying text. Undoubtedly some forms of appearance (particularly those put on for trial) may be inflammatory. For example, I would not expect the court to permit an attorney to wear a white hood. But appearance that is "unusual" only for its identification with a culture other than a white western culture seems completely unobjectionable.

[309] The one exception that strikes me as worth considering is a single, descriptive, neutral, but unnecessary reference to race in a context that is not inflammatory. Describing the victim as "a young black male" would fall into that category. Describing the victim as "a nice white lady" would not; because "white" is joined with "nice" in a way that plays on black-as-evil imagery, it is not neutral. Asking, "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?" Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 89 (1991), would not fall within the exception because it is inflammatory. *Cf.* DeBrota, *supra* note 5, at 383-81 (advocating an exception to the harmless error rule in all cases where the prosecutor has appealed to racial prejudice of jury, but discussing only egregious cases).

entrenched, that I know of no other way to assure each defendant that her trial was not unnecessarily tainted by racial prejudice. This position assumes that "taint" occurs not only when the result is altered, but also when race is injected into (or, perhaps more commonly, underlined during) the process.

Undoubtedly this statute would affect a lot of trials. Undoubtedly lawyers would become more cautious in preparing their witnesses and more inhibited in their summations. The nation would not hear that Rodney King "groaned like a wounded animal," and in the vast number of almost anonymous cases, the courtroom participants would be spared the ten-thousandth dose of poison. One small corner of our nation's discourse would be both more illuminating and closer to the truth.

C. Giving When It Hurts

Why is darkness a thing of dread? Maybe our ancestors feared the dark for the predators they could not see. But darkness is also the womb, the bed, the shade; why don't those "realities" find metaphors in our speech? Can white people see those realities? If they could see them, how could white prosecutors say all the things they have said?

A racial imagery shield law would not be enough. It is hard to imagine what could be enough to root out racial imagery from jury deliberations. In the end, the shield law might prevent the reinforcement of biases, the focusing of blurred images, the reconfiguration of old stereotypes, but it could never erase the reels and reels of racial films viewed over a lifetime. Nothing can do that.

It is hard for white people to admit we are not the standard, the neutral, the baseline decision-maker against which others should be compared. It is hard for everyone who wants to believe in ultimate fairness to acknowledge that the typical decision maker is not the ideal decision maker, that racial prejudice is not an aberration, that it taints everyone it touches, and that it touches everyone. It is one thing to say that a lawyer may not strike a juror because of his or her race; we admit only that a minority race juror in a case with a minority defendant is not presumptively *less* competent, *less* fair than the white juror. What is hard for white people to admit is that the minority race juror is *more* likely to be competent, *more* likely to be fair.[310]

Of course, people of color have seen the same films, heard the same metaphors, lived with the same torrent of images of white as pure, good, light, clean, true, safe, normal, right—and the contrasting flood of negative images of blackness, brownness, yellowness, redness, "nonwhiteness." But at least most of them have other images too. At least there is also the lived warmth of color, the contrary images, and the lived pain of the distorting images.

This is not a matter of speculation. If the entire body of relevant data is surveyed, the inference that race influences many white jurors' determinations of guilt is unavoidable. As I have argued at great length elsewhere, taking together the observations and statistics from criminal trials, the results of mock jury experiments, and conclusions from general research on racial prejudice, it is clear that justice would be advanced by greater representation of people of color on juries.[311] A survey of the breadth and frequency of the criminal trial uses of racial imagery provides one more reason for

[310] *See generally* Johnson, *Black Innocence*, *supra* note 32.

[311] *Id.*

mandatory inclusion of minority jurors; we cannot eradicate the imagery, but we can give voice to richer perspectives on that imagery.

It is humbling to think of what we *could* do were we willing, but it should not be paralyzing. Even if we do not yet have a consensus to do all that we might to ameliorate the effects of racial imagery on criminal trials, we can do something. An ethical provision forbidding the use of racial imagery would be better than nothing and a race shield statute would be better than an ethical provision.

IV. Conclusion

> Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.[312]

> We do not choose our dreams, either the endless nightmares or the fleeting images we see as we turn around. Those dreams come unbidden, populated by characters we did not draw. We do choose what to do with those dreams, and in choosing, shape the dreams of our children. We can pretend we do not remember those dream characters, do not recognize them in our waking hours, but we do. The face we see at the bottom of the well is the face we fling to the bottom of the well, is a face that falls to the bottom of the well, is the face we see at the bottom of the well, is the face. . . . Maybe racism is a circle with a tread so deep that we will circle around forever, whatever direction we try to step, however many of us reach out . . . But one step, one choice at a time. The first one: What color is the face at the bottom of the well? Do we lie politely, cautiously, with the best and worst of motives? Or do we tell the truth, in the hope of changing it?

[312] BELL, *supra* note 7, at preface page. I can acknowledge Professor Bell's metaphor, but I can't begin to acknowledge the influence of his work on my thinking. I am moved, enlightened, saddened, inspired, and grateful.

Appendix G

Module 4 Handouts

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Contents

This appendix contains the handouts for Module 4 of *Bias in the Court!* The handouts are:

- HO4-1: *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System.* Send a copy of this handout to participants before the program. Include a letter instructing participants to read the article before the day of the program. HO4-1 begins on page G2.

- HO4-2: *Examples of Nonverbal Behavior in the Court.* You will distribute this handout during the program. Make enough copies for all participants. HO4-2 begins on page G21.

- HO4-3: *The "Clever Hans" Phenomenon.* You will distribute this handout during the program. Make enough copies for all participants. Handout 4-3 begins on page G23.

Handout 4-1: Race and Perception in the Courtroom*

Race and Perception in the Courtroom:
Nonverbal Behaviors and Attribution in the Criminal Justice System

By

D. A. Clay

> If racial bias were an exceptional occurrence, and if it were largely composed of conscious hostility towards persons of other races, then we would expect that in an "ordinary" decision determining the "facts" of guilt, prejudice would be much less likely to operate than in a decision regarding how to punish a person. But these assumptions are both empirically wrong: race affects the thinking of virtually everyone in this society, and for more and more people this influence is neither conscious nor motivated by hostility.[1]

The iconic symbol of the American legal system is the Statue of Justice. Depicting a blindfolded woman balancing a pair of scales, it personifies the message that justice ignores the personal characteristics of her recipients. Although many Americans would like to accept this ideal as true, unfortunately it is not. As with so many other institutions in our society, the criminal justice system is not color-blind.

Still others would like to believe that the overt use of racism to secure criminal convictions has been exorcised from the criminal justice system. Nonetheless, as one commentator suggests, caution is warranted, since not all forms of racism are overt.[2] To a large degree, subtle manipulations of courtroom behavior can transmit racist messages, thereby eliminating any need to express them verbally.

This note discusses two distinct mechanisms through which these subtle forms of racism can influence jury verdicts. One mechanism is nonverbal behavior, the other attribution.[3] In exploring each of these categories, the focal point will be studies that have analyzed and explained the impact of both nonverbal behavior and attribution on the decision-making process. Unfortunately, some of the effects will prove difficult, if not impossible, to eliminate; for example, many believe little can be done about the inherent prejudice a white juror brings to a rape trial involving a white victim and a

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[1] Sheri L. Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022 (1988).

[2] The commentator, Professor Sheri Lynn Johnson, refers to this phenomenon as "unconscious racism." *Id.* at 1019.

[3] "Attribution" is the process through which a person makes decisions based on the physical characteristics of the other individuals involved. Other commentators have referred to this phenomenon as "extralegal factors." *See, e.g.*, Ronald L. Michelini & Stephan R. Snodgrass, *Defendant Characteristics and Juridic Decisions*, 14 J. RES. PERSONALITY 340, 340-41 (1980).

black defendant.[4] As its purpose, however, this note highlights such bias as the first step toward minimizing or eliminating it. Thus, the note aims to promote Lady Justice's ideal that an accused be convicted only for what he did, not simply for who he is.

I. Nonverbal Behavior

In 1968, Albert Mehrabian published an article in *Psychology Today* suggesting that the verbal component of a spoken message accounts for only 7 percent of its total content.[5] Of the remaining 93 percent, 38 percent comes from the vocal portion of the message and 55 percent from facial expression.[6] Mehrabian offers this example: In response to his argument, one listener smiles and says "Baloney!," while another frowns and says sarcastically "Isn't science grand."[7] The message received is clear: the first person finds the conclusion believable while the second person remains skeptical. This is understood, despite the actual content of the message, because of the first listener's smile compared to the second listener's frown and sarcasm.[8]

Given this example, the question arises: To what extent do such behaviors have an impact in the courtroom? As explained below, innumerable techniques are available to the attorney to make a message less believable, without saying anything at all.[9] But more troubling than these recognized techniques are the latent mannerisms that transmit messages that, unknown to the attorney, convey meanings different than those actually intended.

A. Speech Patterns

A person's speech pattern constitutes one such mannerism.[10] A major distinction exists between the impact of a message conveyed using "powerful" as opposed to "powerless" speech.[11] Powerless language is characterized by the use of hedge words ("sort of," "kind of"), intensifiers ("really"), fillers ("uh," "you know"), and "inquisitive intonation in declarative sentences."[12] Consider the contrasting levels of persuasiveness illustrated by the following testimony:

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[4] This author neither endorses this view, nor suggests that it is even legitimate. Rather, the statement merely reflects the findings of social scientists that this is in fact true. *See infra* notes 143-54 and accompanying text. For a case illustrating the exploitation of such prejudices by a prosecutor, see Miller v. North Carolina, 583 F.2d 701, 706-07 (4th Cir. 1978).

[5] Albert Mehrabian, *Communication Without Words*, PSYCHOL. TODAY, Sept. 1968, at 53, 53.

[6] The vocal portion, as opposed to the verbal portion, is that which is erased once a message is written down, including "intonation, tone, stress, length and frequency of pauses." *Id.*

[7] *Id.*

[8] *Id.*

[9] As Mehrabian points out, however, nonverbal behavior may also serve to reinforce what is being communicated verbally. *Id.*

[10] Speech patterns belong in the category of nonverbal behaviors because they connote the manner in which words are spoken, not the content of what they say.

[11] John M. Conley, *Language in the Courtroom*, TRIAL, Sept. 1979, at 32, 34.

[12] *Id.*

Q. "Approximately how long did you stay there before the ambulance arrived?"
A. (Powerless) "Oh, it seems like it was about, uh, twenty minutes.
Just long enough to help my friend, Mrs. Davis, you know, get straightened out."
(Powerful) "Twenty minutes.
Long enough to get Mrs. Davis straightened out."
Q. How long have you lived in this town?
A. (Powerless) "All my life, really."
(Powerful) "All my life."
Q. "You're familiar with the streets?"
A. (Powerless) "Oh yes."
(Powerful) "Yes."
Q. "You know your way around?"
A. (Powerless) "Yes, I guess I do."
(Powerful) "Yes."[13]

Jurors find powerful speakers more credible, competent, and intelligent compared to their powerless-speaking counterparts.[14] Mehrabian cites studies done at Yale that reveal that as a speaker's discomfort or anxiety level rises, so does the use of fillers.[15] Such a relationship suggests that witnesses who feel uneasy while testifying may tend to use less powerful speech and thus appear less persuasive to the jury.

Another type of speech pattern affecting listener perception is "hypercorrect speech."[16] This occurs when witnesses "unaccustomed to dealing with the court . . . react to its pomp and circumstance by speaking in as formal a manner as possible."[17] For example, if a speaker describes an unconscious victim as "semicomatose," a slightly hurt victim as "not in a very dire condition," or uses phrases like "a very loud implosion" and "it happened very, very instantaneously,"[18] the speaker suffers from hypercorrect speech. As with powerless speakers, jurors exposed to this type of speech perceive the speaker as "significantly less convincing, less competent, less qualified and less intelligent than a witness presenting the same information in a more subdued form of standard English."[19]

The results of these speech pattern studies have racial implications. If a correlation can be drawn between the use of powerless or hypercorrect speech and a person's status or background, such persons will have a diminished chance of persuading the jury. In such a situation, "the outlines of a

[13] *Id.*

[14] *Id.*

[15] Mehrabian, *supra* note 5, at 54

[16] Conley, *supra* note 11, at 34.

[17] *Id.*

[18] *Id.* at 34-35.

[19] *Id.* at 35.

constitutional question become apparent."[20] In other words, "[w]hile the specifics remain unclear, it is possible . . . that jury evaluations based in part on sex- or race-related aspects of a litigant's speech style may ultimately require some form of legal control."[21]

Tone of voice also influences the import of a message.[22] Experiments have demonstrated that listeners can discern the general meaning of a statement even after the verbal portion is removed, leaving only the vocal portion.[23] Some courts have recognized this and permitted appeals grounded upon objections to the judge's tone of voice. For example, in *Schaffner v. Greco*,[24] a former New York City building inspector jailed on bribery charges sought federal habeas corpus relief based on the allegedly "contemptuous" tone of the judge when he referred to defense counsel and the possible sentences the defendant might receive.[25] The court granted the petition, stating that the defendant's guilty plea was the functional equivalent of a coerced confession, given his fear of how the judge would sentence him.[26]

In another case, *People v. Rawlings*,[27] the trial judge delivered the following instruction at the close of evidence:

> Now, with respect to the charge that I am now giving you, I must caution you that all parts of my charge, both the verbal and non-verbal aspects of communication are of equal importance. Specifically the words of the contents and the vocal content that I may give to you with any physical gestures, facial expressions, etc. Everything is of equal importance and value.[28]

The appellate court reversed the defendant's conviction, holding that this instruction constituted prejudicial error. The court explained that the charge "was dangerously improper in that it attempted to direct the jury to be influenced by inflections in the Judge's voice, his gestures and body language—none of which would be reflected in the record and all of which could deprive the defendant of a fair trial."[29]

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[20] *Id.* at 36.

[21] *Id.*

[22] Mehrabian, *supra* note 5, at 53.

[23] *Id.* at 53-54. For an explanation of the distinction between the vocal and verbal portions, see *supra* note 6. This is done through electronic filter separation that eliminates "the higher frequencies of recorded speech, so that words are unintelligible but most vocal qualities remain." *Id.*

[24] 458 F. Supp. 202 (S.D.N.Y. 1978).

[25] *Id.* at 207.

[26] *Id.* at 208-09.

[27] 577 N.Y.S.2d 493 (N.Y. App. Div. 1991).

[28] *Id.* at 494.

[29] *Id.* For a discussion of the problems of preserving such matters in the record, see *infra* notes 62-66 and accompanying text.

Defendants seeking relief on this point are not always successful, however. In *State v. Turner*,[30] the court refused to grant relief in an appeal based on the judge's tone, which allegedly "impugned [defense] counsel's dignity and prejudiced the jury against the defendant."[31] The appellate court heard evidence *de novo* by listening to a tape recording of the incidents.[32] It then stated that "[w]hile the trial judge's voice may have been somewhat sharp and impatient, it was neither overloud nor sarcastic. The statements made were not vindictive and cannot be construed as impolite under the circumstances in which they were made."[33] The court thus concluded that

> [e]ven though the trial judge may have shown impatience with defense counsel, his remarks and tone of voice do not warrant reversal of defendant's conviction. A verdict will not be set aside because of improper remarks by the judge unless the reviewing court is thoroughly convinced that the jury was influenced by the remarks and that they contributed to the verdict.[34]

The court did not explain, however, how the defense might meet this burden if a tape recording is not sufficient. Under the Federal Rules of Evidence, a juror may not testify concerning anything influencing his decision, although he is permitted to "testify on the question whether extraneous prejudicial information was improperly brought to [his] attention or whether any outside influence was improperly brought to bear upon any issue."[35] Yet, the advisory committee note to Rule 606 seems specifically to prohibit testimony concerning the mental operations of a juror, a prohibition that appears to bar completely testimony concerning the impact of nonverbal behavior on that juror.[36] The result appears to be an unsolvable catch-22.

B. Body Language

Another mannerism that can influence the persuasiveness of a message is body language, which includes "manual and facial gestures, posture, trunk movement, and distance."[37] Take, for example, lying. In their study of deceptive communication, Pryor and Leone[38] identify eight nonverbal behaviors that the public at large associates with lying.[39] Among these are backward leaning, lack of eye contact, trunk twisting, excessive leg movement, and rocking.[40] A jury perceiving such mannerisms might be inclined to discount the content of the speaker's speech. Such a mannerism can prove especially detrimental when the speaker is the defendant's attorney.

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[30] 440 So. 2d 834 (La. Ct. App. 2d Cir. 1983).

[31] *Id.* at 836.

[32] *Id.*

[33] *Id.* at 837.

[34] *Id.*

[35] Fed. R. Evid. 606(b).

[36] *Id.* advisory committee note.

[37] John L. Waltman, *Nonverbal Elements in Courtroom Demeanor*, FBI L. ENFORCEMENT BULL., Mar. 1984, at 21, 22.

[38] Bert Pryor & Charner Leone, *Behavioral Stereotypes of Deceptive Communication*, TRIAL, June 1981, at 14.

[39] *Id.* at 18.

[40] *Id.*

The defendant's anxiety level can also influence the credibility of his testimony.[41] Defendants who display little or no anxiety while testifying tend to be more credible, thus spawning a perception of innocence.[42] Conversely, defendants manifesting high or moderate levels of anxiety suggest low credibility, reinforcing perceptions of guilt.[43] Interestingly, moderately anxious defendants, not extremely anxious ones, represent the highest percentage of defendants receiving a guilty verdict.[44] Further, female jurors more often reported being influenced by the defendant's behavior than male jurors.[45]

Nonverbal behavior in the courtroom is not confined to witnesses and lawyers, however. A judge's behavior in front of the jury can also have an effect on the verdict, especially when the judge fails to create "the appearance of justice."[46] In some cases the impact is severe enough to justify reversing the defendant's conviction.[47] For example, in *Veal v. State*,[48] the Tennessee Supreme Court overturned the defendant's conviction for illegal possession of whiskey.[49] During defense counsel's closing argument, the trial judge shook his head in apparent disagreement with what was being argued.[50] The supreme court explained that this conduct justified reversal because

> [t]he jury was left to speculate whether his Honor's collar was too tight or whether he disbelieved what was being said for the defense. The influence of the Trial Judge on the verdict of the jury is so great that no action nor word of the Trial Judge should be allowed to indicate the Judge's conclusions of guilt or innocence.[51]

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[41] *See supra* note 15 and accompanying text.

[42] Bert Pryor & Raymond W. Buchanan, *The Effects of a Defendant's Demeanor on Juror Perceptions of Credibility and Guilt*, J. COMM., Summer 1984, at 92, 98.

[43] *Id.*

[44] *Id.* at 97.

[45] *Id.* at 98. This does not mean that women were affected to a greater degree than men. Statistical analyses performed by the researchers failed to demonstrate any significant main or interaction effects when gender was controlled. "Our findings suggest that males and females were similarly influenced by the defendant's non-verbal behavior, but females were either more aware of this influence or simply more willing to report it." *Id.* at 99.

[46] Offutt v. United States, 348 U.S. 11, 14 (1954).

[47] For a summary of case law in this area, see J. A. Bryant, Jr., Annotation, *Gestures or Facial Expressions of Trial Judge in Criminal Case, Indicating Approval or Disapproval, Belief or Disbelief, as Ground for Relief*, 49 A.L.R.3d 1186 (1973).

[48] 268 S.W.2d 345 (Tenn. 1954).

[49] *Id.* at 346.

[50] *Id.*

[51] *Id.*

In *Schaffner v. Greco*,[52] the defendant alleged that the trial judge rolled his eyes, looked up at the ceiling, and grimaced at witnesses.[53] Defense counsel made repeated objections to these actions,[54] and the appellate court concluded that the defendant "came to view the judge as an adversary rather than as impartial mediator."[55]

One might think that the courts would acknowledge the influence of nonverbal behavior and adopt prophylactic measures to ensure that such factors do not receive excessive consideration by the jury. In fact, however, just the opposite is true. For example, Florida judges are permitted to instruct the jury that it may weigh nonverbal cues in making their decision.[56] A similar jury instruction is available in California.[57] The Fifth Circuit, however, has no such instruction available in criminal cases.

With respect to the behavior of the judge,[58] however, appellate courts have been more proactive, attempting to develop ways to curb the influence of nonverbal behavior. A four factor, "sliding scale" has emerged which examines: "(1) the materiality or relevance of the behavior or comment; (2) the emphatic or overbearing nature of the behavior or comment; (3) the efficacy of any curative instruction used to correct the error; and (4) the prejudicial effect of the behavior or comment in light of the trial as a whole."[59]

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[52] 458 F. Supp. 202 (S.D.N.Y. 1978); *see supra* notes 24-26 and accompanying text.

[53] *Id.* at 207.

[54] "Your Honor, I object to your Honor's manner in standing over the witness, your tone of voice, which I think is intimidating, your Honor, in respect to the witness." *Id.* at 207 n.14.

[55] *Id.* at 208.

[56] "In determining the believability of any witness, and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence." Pryor & Buchanan, *supra* note 42, at 94 (citing U.S. Supreme Court Committee on Standard Jury Instructions, Florida Standard Jury Instructions, §2.2 (1977)).

[57] "In determining the believability of a witness, you may consider *anything* which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude, and manner while testifying. . . ." Peter D. Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 154 (1985) (emphasis added) (citing California Pattern Jury Instructions— Credibility of Criminal Witnesses—Misdemeanor Instructions §7, pt. 16 (1979)).

[58] Perhaps the closest one available is Instruction 1.09—Credibility of Witnesses, which provides that:

> [a]n important part of your job will be making judgments about the testimony of the witnesses. . . . You should decide whether you believe what each person had to say. . . . [A]sk yourself a few questions: Did the person impress you as honest?. . . Did the witness have the opportunity and ability to . . . answer [the questions] directly?

U.S. FIFTH CIRCUIT DISTRICT JUDGES ASSOC., PATTERN JURY INSTRUCTIONS— CRIMINAL CASES WITH CASE ANNOTATIONS 20 (1990).

[59] Blanck et al., *supra* note 57, at 95-96 (citations omitted).

Nevertheless, even this formula fails to address the problem completely. In many instances, the alleged prejudicial conduct can not be preserved in the record for appeal.[60] Even courts that have tried to supplement the record through direct examination of jurors have been unable to assess the prejudicial impact of a judge's behavior.[61]

Part of the problem in many cases is the defense counsel's failure to make a contemporaneous objection preserving the alleged misconduct in the record. Courts have continually stressed that a timely objection to the offending body language must be made at the earliest opportunity.[62] Failure to do so may result in waiver of error in some jurisdictions.[63] Moreover, the objection should provide a "clinical description" of the conduct; counsel should avoid "couching the statement in apologetic or diplomatic terms in an effort to avoid antagonizing the trial judge since appellate courts seem to be of the opinion that the characterization of the event at the time is more significant than its later characterization in the appellate brief."[64] A recent Fifth Circuit decision concisely addressed these concepts, noting that:

> A trial transcript is lifeless, bereft of the nuances of behavior, facial expression and inflection of voice that so powerfully influence the participants and jury. A transcript may be misleading: it may suggest for instance, that the trial judge made a comment arguably demeaning to the defendant, although the trial judge actually intended to display wry humor or to mutter to himself rather than reprove the defendant. Only a contemporaneous objection, difficult as it may be to criticize comments by the judge or opposing counsel's argument, distinguishes harmless remarks from those truly felt to be prejudicial to the defense.[65]

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[60] For example, in State v. Barron, 465 S.W.2d 523 (Mo. 1971), the defendant's conviction was affirmed despite the judge's alleged bias against a witness. *Id.* at 527. As the witness was testifying, providing the defendant with an alibi, the judge put "his hands flat to the sides of his head, shook his head negatively once, and swiveled his chair it 180 degrees around." *Id.* The appellate court explained that this behavior, if true, would be the same as if the judge had verbally commented on the evidence. *Id.* at 528. Because Missouri law requires a contemporaneous objection to such a comment, the court refused to grant any relief to the defendant. *Id.*

[61] *See, e.g.*, Hill v. State, 217 S.W.2d 1009 (Tex. Crim. App. 1948). In *Hill*, the defendant alleged that the judge "indulged in facial expression in the nature of scowls or frowns, and shook his head from side to side in a negative manner, and was thus guilty of improper conduct before the jury . . . [preventing] the defendant from receiving a fair and impartial trial. . . ." *Id.* at 1011. The appellate court heard testimony *de novo* from ten jurors. Five jurors admitted seeing the expressions yet claimed not to have been affected by them. The other five jurors denied seeing the expressions. *Id.* The court refused to set aside the conviction, stating "we are at a loss to see how we can rule on the expression on the face of a judge, or what was meant by means of a scowl or a frown or a movement of the head." *Id.* at 1011-12.

[62] *See* Billeci v. United States, 184 F.2d 394, 402 (D.C. Cir. 1950) ("[I]f the intonations and gestures of a trial judge are erroneously detrimental to a defendant in a criminal case it is the duty of counsel to record fully and accurately, *at the time and on the record*, although not in the hearing of the jury, what has transpired.") (emphasis added); *Barron*, 465 S.W.2d at 528:

> An accused in a criminal case cannot remain silent under the circumstances which appellant asserts here occurred, and thereby gamble on a favorable verdict by permitting the trial to go to conclusion without objection, and then contend for the first time in a motion for a new trial that reversible error occurred.

[63] Van Dalen v. State, 789 S.W.2d 334, 337 (Tex. 1990).

[64] Bryant, *supra* note 47, at 1189. For a case illustrating this, albeit in the civil setting, see Braxton v. Faber, 604 A.2d 543 (Md. Ct. Spec. App. 1992). For a practical guide to making objections to preserve the record, see *Making and Preserving the Record—Objections*, 6 Am. JUR. TRIALS 606 (1967).

[65] Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3684 (Mar. 16, 1993) (No. 92-1558).

Of course, nonverbal behavior may also have an impact before the trial itself even commences. Recently, in Washington, D.C., the prosecutor charged two men with killing an innocent bystander during a war between rival gangs. On voir dire, one juror told the court that he looked at the defendants' "body language," remembered the crime they were accused of, and reached his decision right there. He told the court: "They certainly look guilty to me."[66]

C. Dress and Supervision

What a defendant wears to court and whether he is under guard while there can have considerable impact on the jury's assessment of his credibility. In an attempt to study these two phenomenon, Fontaine and Kiger[67] systematically manipulated the dress (either institutional or personal) and the supervision (either armed or not supervised) of defendants in mock trials.[68] Their results indicate that institutional dress and armed supervision often cause jurors to conclude that the defendant was unable to post bail.[69] Such an inference, taken a step further, "might lead to the assumption that the defendant is guilty, an assumption not so strongly attached to a defendant released prior to trial."[70] Based upon the sentences recommended by the mock jurors, however, the researchers determined that "[i]nstitutional dress and armed supervision occurring alone biased verdicts against defendants but not when they occurred together."[71] In other words, institutionally clothed defendants under armed guard appeared to inspire jury sympathy and leniency.[72]

Further exploring the cause of this phenomenon, Fontaine and Kiger repeated their study with a different group of subjects, adding additional questions designed to probe this apparent "sympathy factor."[73] Answers to these questions indicated that people "felt most sorry for the defendant [in institutional dress with armed supervision] and felt he had already suffered most in this condition."[74] This sympathy again manifested itself in lenient sentences and judgments by the jurors.[75]

The racial implications of these studies, while seemingly obvious, are admittedly dependent on stereotypical conceptions of criminal defendants. As Fontaine and Kiger put it, "the poor and minorities who find it more difficult to obtain bail suffer not only from months in jail prior to trial but also from bias during the trial itself."[76] But following the Supreme Court's decision in *Estelle v.*

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[66] Catherine Toups, *Jurors Scarce for High-Profile Cases*, Wash. Times, June 8, 1992, at A1.

[67] Gary Fontaine & Rick Kiger, *The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 Law & Hum. Behav. 63 (1978).

[68] *Id.* at 65.

[69] *Id.* at 66.

[70] *Id.* at 64.

[71] *Id.* at 67.

[72] *Id.*

[73] *Id.* at 68.

[74] *Id.* at 69.

[75] *Id.*

[76] *Id.* at 70.

Williams,[77] a defendant can no longer be compelled to appear for trial in prison garb, although he may choose to do so.[78] Given the results of Fontaine and Kiger's studies, defense attorneys will want to investigate whether the defendant will be under guard before allowing him to appear in prison garb.[79]

II. Attribution

In 1969, Landy and Aronson published a study examining the interaction of the defendant's and the victim's race on the jury's sentencing decision. They posited that jurors perceive a crime as more serious, and thus demand stiffer punishment, when the victim is depicted as a "good, attractive person"[80] as opposed to an unattractive one. The results of their initial experiment indicate that when the victim was portrayed as "attractive," the court delivered a mean sentence of 15.77 years; however, when the victim was described as "unattractive," the mean sentence was only 12.9 years.[81]

In a second version of the experiment, the attractiveness of both the victim and the defendant were systematically varied.[82] Those asked about an attractive victim sentenced the defendant to an average of 10.55 years, while those exposed to an unattractive victim recommended an average sentence of 8.48 years.[83] When the attractiveness of the defendant was factored in, the mock jurors tended to assign stiffer penalties to the unattractive defendant. The mean sentence for the unattractive defendant was 11.75 years, while the attractive defendant received 8.58 years and the neutral defendant 8.22 years.[84]

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[77] 425 U.S. 501 (1976)

[78] *Id.* at 504-08, 512.

[79] *See* id. at 508 (noting that allowing the defendant to wear prison garb "is not an uncommon defense tactic").

[80] David Landy & Elliot Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141, 142 (1969). Since the attractive-unattractive methodology permeates many other studies, an understanding of the language employed by researchers to differentiate between the two proves useful. A typical description might provide:

Attractive victim. "The victim, 48-year-old Martin Lowe, was a senior partner of a successful stock brokerage firm and an active member of the community welfare board. He was a widower and is survived by his son and daughter-in-law, Mr. and Mrs. Thomas Lowe. At the time of the accident the victim was on his way to the Lincoln Orphanage, of which he was a founding member, with Christmas gifts."

Unattractive victim. "The victim, 48-year-old Martin Lowe, was a notorious hoodlum and ex-convict who had been convicted of assault and extortion. He was a henchman for a crime syndicate which had been under police investigation for some time. A loaded 32-caliber pistol was found on his body." *Id.* at 145.

[81] *Id.* Note that these results did not reach an acceptable level of statistical significance. *Id.*

[82] In this version, the defendant was described either as attractive, unattractive, or neutral. *Id.* at 147.

[83] *Id.* at 149. Again, this result was not statistically significant. *Id.*

[84] *Id.* at 150. These results did reach statistical significance ($p < .05$).

Landy and Aronson identify two implications of these findings. First, jurors facing neutral or attractive defendants tend to identify with them.[85] In other words, they find "it easier to imagine themselves involved in a similar situation when the defendant [is] attractive or neutral simply because they ha[ve] potentially more in common with the defendant in those conditions."[86] Second, jurors "not only perceive the crime as being more serious when the victim is attractive as opposed to unattractive, but . . . they also view the defendant as being more unattractive when the victim is attractive."[87]

Following publication of the Landy and Aronson article, several other researchers conducted follow-up studies; some simply attempted to repeat their methodology while others attempted to probe its implications by studying particular dimensions more closely. The results of these studies prove interesting, as more fully discussed below.[88]

A. Manipulation of the Victim or the Defendant

In their study, Miller and Hewitt[89] repeated the format of Landy and Aronson, but shifted the focus from sentencing judgments to the determination of guilt.[90] Their results indicate that a defendant is more likely to be convicted when the juror and the victim are of the same race.[91] When faced with a black victim, black jurors convicted black defendants eighty percent of the time, but white defendants only forty-eight percent of the time.[92] White jurors confronted with white victims convicted white defendants sixty-five percent of the time, but black jurors only thirty-two percent of the time.[93]

One noteworthy aspect of this study is its tendency to discredit the notion, at least with respect to black defendants, that jurors feel greater sympathy for defendants of the same race. Instead, the study suggests that similarity between the race of the juror and the race of the defendant has little bearing when the juror and the victim are of the same race.

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[85] *Id.* at 151.

[86] *Id.*

[87] *Id.*

[88] The scope of this note does not allow for a complete review of every such published study. Thorough reviews of this extensive body of literature can be found in JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 241-301 (1987); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 99-117 (1988) (Chapter 5); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1618-51 (1985). This note simply aims to expose the criminal trial lawyer to some of the vagaries of the trial process in an effort to heighten awareness of the role "unconscious racism" can play in a criminal trial.

[89] Marine Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOL. 159 (1978).

[90] *Id.* at 159.

[91] *Id.* at 160.

[92] *Id.*

[93] *Id.* Miller and Hewitt also hypothesized that a juror's gender would influence determinations of guilt or innocence in rape cases. An analysis of their data confirms this hypothesis. Of the female jurors, 65% voted to convict the defendant of rape; only 45% of the male jurors voted to convict. *Id.*

A great number of studies have probed the effect of altering different characteristics of the defendant. For example, researchers Gordon et al.[94] manipulated the race of the defendant and the type of crime committed (either burglary or embezzlement).[95] Their results indicate that jurors *always* view a black defendant as more likely to repeat a crime, regardless of the crime in question.[96] Moreover, their analysis reveals a distinct relationship between the crime committed, the race of defendant, and the recommended sentence. With the crime of burglary, black defendants received average sentences of 72.86 months, while those of white defendants averaged 45.00 months.[97] With the crime of embezzlement, however, the average sentence for black defendants was 55.29 months and for white defendants 66.43 months.[98] This disparate treatment led the researchers to suggest that the jurors "viewed a white defendant committing the white-collar crime as a more typical event than the black defendant committing the white-collar crime."[99]

Their analysis also reveals a relationship between the juror's race and the perceived severity of the crime. White jurors rated embezzlement as a more severe crime than burglary; black jurors reported the reverse.[100] This "suggests that the perceived severity of a crime may be a function of both [the] race of the perceiver and the specific type of crime."[101]

The variations possible in such studies are numerous. Hoffman[102] compared the socioeconomic status ("SES") of the defendant with that of the juror.[103] He discovered that the defendant's SES correlated with the jury's perceived attractiveness of the defendant.[104] Further, lower SES defendants were often viewed as a "stereotypical" offender.[105]

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[94] Randall A. Gordon et al., *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191 (1988).

[95] *Id.* at 191.

[96] *Id.* at 194.

[97] *Id.*

[98] *Id.* at 194-95.

[99] *Id.* at 195.

[100] *Id.*

[101] *Id.* A similar result was obtained in a study reported by Randall A. Gordon, *Attributions for Blue-Collar and White-Collar Crime: The Effects of Subject and Defendant Race on Simulated Juror Decisions*, 20 J. APPLIED SOC. PSYCHOL. 971 (1990). The results of this study generally confirmed the previous study. However, in this particular study, black jurors always recommended stiffer sentences than white jurors. *Id.* at 981. Gordon suggests that this "may reflect a desire to project a strong negative attitude toward crime." *Id.*

[102] Eric Hoffman, *Social Class Correlates of Perceived Offender Typicality*, 49 PSYCHOL. REP. 347 (1981).

[103] *Id.* at 348-49.

[104] *Id.* at 349.

[105] *Id.*

Shepherd and Sloan[106] probed the connection between legal attitudes, the defendant's social class and degree of criminal intent.[107] Their study revealed that jurors who adhere to a strict "law-and-order" philosophy tend to judge defendants with similar ideologies less severely than other defendants.[108] Notably, however, jurors with such attitudes generally recommend more severe sentences, even for defendants with unstated positions on law and order.[109] Shepherd and Sloan's findings also fail to detect any correlation between the defendant's SES and sentencing.[110]

Another study, conducted by Barnett and Field,[111] manipulated several of these variables simultaneously.[112] The examination considered the defendant's character, gender, and race, along with the type of crime committed (either rape or burglary).[113] In the rape experiment, unattractive defendants received a much longer sentence than did attractive defendants, with 17 percent of the variance in sentence attributable to outward appearance.[114] When the crime was burglary, however, attractiveness was not as significant a variable, and had to be combined with gender to have any effect at all.[115] These results insinuate that "defendant attractiveness influences jurist judgment in person-oriented crimes; however, attractiveness may be less significant in defendant sentencing in property-oriented crimes."[116] This result stands in contrast to that reached by Gordon, et al.[117]

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[106] Donald H. Shepherd & Lloyd R. Sloan, *Similarity of Legal Attitudes, Defendant Social Class, and Crime Intentionality as Determinants of Legal Decisions*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 245 (1979).

[107] *Id.* at 245

[108] *Id.* at 246-47.

[109] *Id.*

[110] *Id.* at 248. Interestingly, the study reported that the single most significant verdict determinant was "intentionality of the crime." *Id.*

[111] Nona J. Barnett & Hubert S. Field, *Character of the Defendant and Length of Sentence in Rape and Burglary Crimes*, 104 J. SOC. PSYCHOL. 271 (1978).

[112] *Id.* at 274.

[113] *Id.* at 274-75.

[114] *Id.* at 275.

[115] *Id.*

[116] *Id.* at 271.

[117] *See supra* note 94 and accompanying text.

B. Manipulation of the Jury and the Defendant

Nemeth and Sosis[118] conducted a study that manipulated the defendant's attractiveness and race, and the composition of the jury.[119] Their analysis reveals that the attractiveness of the defendant is the single most important variable in the trial process—attractive defendants generally receive much lighter sentences.[120] Further, while students from the junior college recommended stiffer sentences than those from the University of Chicago,[121] the University of Chicago students did not vary their sentences based on the defendant's attractiveness.[122]

In contrast to earlier studies, Nemeth and Sosis failed to detect any link between race and recommended punishment.[123] When the defendant was white, however, junior college students chose harsher punishments (ten years versus three years).[124] The authors suggest that "the junior college sample who . . . could identify with the working-class defendant [are] especially punitive towards such an individual when he commits a crime."[125]

Bernard[126] performed a similar study, manipulating the racial composition of the jury and the race of the defendant.[127] Jurors initially arrived at individual decisions on guilt or innocence and then collectively deliberated to reach consensus verdicts.[128] Although 45 percent of the initial ballots contained guilty verdicts, the percentage dropped to 15 percent after jury deliberations. The jurors within that 15 percent were all white and were all judging black defendants.[129] Statistical analysis also revealed that white jurors were "harder" on the black defendant on initial

[118] Charlan Nemeth & Ruth H. Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221 (1973).

[119] *Id.* at 223-24. The jurors were drawn from two schools: the University of Chicago and a junior college located in southwestern Chicago. Nemeth and Sosis suggest that the University of Chicago students might "bend over backwards' toward the black defendant because of their political ideology, whereas the junior college sample would favor the white defendant." *Id.*

[120] *Id.* at 227.

[121] *Id.* at 226.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 229.

[126] J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103 (1979).

[127] *Id.* at 106. Each defendant was presented to five different mock juries: (1) 100% black; (2) 75% black and 25% white; (3) 50% black and 50% white; (4) 25% black and 75% white; and (5) 100% white. *Id.* at 107.

[128] *Id.* at 108.

[129] *Id.* at 109.

ballots and, on the final ballot, were more likely to find a black defendant guilty.[130] The study detected no variance between black jurors viewing a white defendant and black jurors viewing a black defendant.[131] Significantly, however, none of the black jurors voted guilty on final ballot.[132]

The 50 percent white/50 percent black jury was the only jury unable to reach a consensus verdict; all white jurors voted to convict, while all black jurors voted for acquittal.[133] The researchers repeated the experiment with a jury of similar composition; it too was unable to reach consensus, even after taking five separate notes.[134] In the end, only one jury unanimously voted to convict the defendant—the 100 percent white jury judging a black defendant.[135]

Another study, conducted by Lipton,[136] probed the relationship between defendant and juror ethnicity. His calculations revealed that prior to deliberations, Anglo jurors perceive Hispanic defendants to be more guilty than did Hispanic jurors, but that after deliberation, the judgments of guilt equalized.[137] Anglo jurors also considered Hispanic defendants less intelligent and more dishonest.[138] The most noteworthy aspect of this study, however, was the change between pre-deliberation and post-deliberation judgments of guilt based on jury composition. Following deliberations, Anglo jurors tended to vote innocent if the jury was predominately Hispanic, while Hispanic jurors tended to vote guilty if the jury was predominately white.[139]

C. Manipulation of Both the Defendant and the Victim

Still other studies have manipulated the characteristics of the defendant and the victim simultaneously. Ugwuegbu[140] varied both of these factors, along with the strength of the evidence submitted and the composition of the jury.[141] His analysis indicated that white jurors considered the offense "more culpable" when confronted with a white, rather than a black, victim.[142] Moreover, "a black defendant who committed interracial forcible rape was rated as most culpable . . . when compared to a white defendant who committed interracial rape . . . and a black or white defendant

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[130] *Id.* The difference in the treatment of black defendants by white jurors was "insignificant" while the difference in treatment on the final note was "highly significant." *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 110.

[134] *Id.*

[135] *Id.*

[136] Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983). This study did not focus on white-black manipulations, but rather Anglo-Hispanic ethnic differences.

[137] *Id.* at 282.

[138] *Id.*

[139] *Id.*

[140] Denis C. E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979).

[141] *Id.* at 133.

[142] *Id.* at 136-39.

who committed intraracial forcible rape."[143] The study further detected a change in the verdict depending on the sufficiency of evidence: "When the evidence was strong or near-zero the subjects rated the defendants, irrespective of race, as equally culpable. However, when the evidence was marginal a black defendant was rated significantly more culpable by the [white] subject-jurors than a white defendant."[144]

When Ugwuegbu conducted the same experiment using an all-black jury, the jurors rated black defendants as less culpable than white ones.[145] Moreover, the jurors considered the offense more severe when the victim was black than when the victim was white.[146] Again, however, the strength of the evidence submitted against the defendant bore a direct relationship to the level of culpability: the greater the degree of evidence, the higher the perception of culpability.[147]

Similar results were achieved by Field,[148] who manipulated the races of the defendant and the victim, the victim's physical attractiveness and prior sexual experience, the level of evidence presented, and the type of rape committed.[149] The results showed race to be one of the most important factors in determining recommended sentences—black defendants received harsher treatment than white defendants, and the race of the victim affected the jurors' decisions.[150] In fact, when the victim was black, she received similar treatment from black and white jurors, but when the victim was white, black defendants received stiffer sentences.[151]

D. Attribution and the Attorney

Not all studies have focused on manipulations of the defendant, the victim, or the jury. Research by Cohen and Peterson[152] focused on the attributes of attorneys as determinants of jury verdicts.[153] The attorneys were characterized as male or female and black or white.[154] The researchers asked the jurors to determine guilt and to indicate their confidence in their decision.[155]

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[143] *Id.*

[144] *Id.*

[145] *Id.* at 141.

[146] *Id.*

[147] *Id.*

[148] Hubert S. Field, *Rape Trials and Jurors' Decisions*, 3 LAW & HUM. BEHAV. 261 (1979).

[149] *Id.* at 266. The type of rape was classified as either "nonprecipitory" or "precipitory." As the author explains: "The nonprecipitory case described an assault on the victim which could not be attributed to her appearance or behavior. Conversely, the precipitory rape case characterized an assault that could be interpreted as resulting from the victim's appearance and/or behavior." *Id.* at 267.

[150] *Id.* at 277.

[151] *Id.* at 278.

[152] David L. Cohen & John L. Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts*, 9 SOC. BEHAV. & PERSONALITY 81 (1981).

[153] *Id.* at 81.

[154] *Id.* at 83.

[155] *Id.*

When the defense attorney was female, the jurors attributed significantly less guilt to the defendant than when the attorney was male, contrary to the researchers' predicted outcome.[156] More significantly, when the attorney was white, jurors perceived significantly less guilt than when the attorney was black.[157] The study demonstrated no relationship between race and sex as a single determinant of guilt, however.[158]

Based on their findings, Cohen and Peterson suggest that the "race of the defense attorney has a biasing effect upon juror's verdicts. . . .[J]urors have a predisposition against black attorneys which is reflected in their verdicts."[159] The authors believe this reflects juror stereotypes of blacks that are improperly imputed to black attorneys.[160]

Despite the results of the foregoing studies,[161] courts have continued to reject challenges to convictions grounded on statistical studies. As the Supreme Court has stated:

> [I]f we accepted a defendant's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since [defendant's] claim relates to the race of his victim, other claims could apply with equally logical force to statistical discrepancies that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone of the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in decision making.[162]

Given the Supreme Court's unwillingness to indulge in post-conviction review of verdicts based on statistical probabilities, it seems unlikely that the lower federal courts will do so.

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[156] *Id.* at 84.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 85.

[160] *Id.*

[161] And many others not summarized here. See *supra* note 88 for information on more extensive reviews of such literature.

[162] McCleskey v. Kemp, 481 U.S. 279, 315-18 (1987) (footnotes omitted).

Yet some attorneys, perhaps cognizant of these influences, have attempted to probe the matter on voir dire. For example, in *United States v. McDowell*,[163] the defendant requested that the trial judge ask the veniremen if "the race or religion of any of the parties, witnesses, or attorneys [would] have any bearing on your decision in this case."[164] The appellate court held that refusal to grant this request did not constitute error in light of an alternative instruction the trial judge had delivered.[165]

In the federal courts, however, the rule has long been that when the defendant is from a minority racial group, "a trial court *must* inquire as to possible racial bias of veniremen."[166] Defense counsel concerned about the role unconscious racism may play in the jury's determination may wish to request such interrogation by the trial court.

III. Conclusion

This note has attempted to draw attention to the underlying racial tensions existing in the American legal system. Based on the statistical studies cited, courts can no longer rely solely upon instances of overt and explicit racism to justify reversing criminal convictions infected by racial considerations. Courts must look closer to uncover the subliminal uses of racial bias that might be played upon by an ethically unconstrained attorney. Moreover, appellate courts must become receptive to arguments that appeals to racism were used to secure a conviction, even if that racism is not reflected in the written record. Although the mechanism an attorney should use to preserve objections to racism and the standard of review appellate courts should apply to detect its existence remain elusive, the daunting nature of the task should not prevent it from receiving the attention it rightfully deserves.

[163] 539 F.2d 435 (5th Cir. 1976).

[164] *Id.* at 436.

[165] *Id.* at 437.

[166] United States v. Powers, 482 F.2d 941, 944 (8th Cir. 1973) (citing Aldridge v. United States, 283 U.S. 308 (1931)), *cert. denied*, 415 U.S. 923 (1974).

Handout 4-2: Examples of Nonverbal Behavior in the Court

This handout summarizes research by D. A. Clay, as reported in *Race and Perception in the Courtroom: Nonverbal Behaviors and Attribution in the Criminal Justice System* (*Tulane Law Review*, vol. 67, no. 6, 1993).

Example #1: People v. Rawlings [1]

The trial judge delivered the following instruction at the close of evidence:

> Now, with respect to the charge that I am now giving you, I must caution you that all parts of my charge, both the verbal and non-verbal aspects of communication are of equal importance. Specifically the words of the contents and the vocal content that I may give to you with any physical gestures, facial expressions, etcetera. Everything is of equal importance and value. [2]

The appellate court reversed the defendant's conviction, holding that this instruction constituted prejudicial error. The court explained that the charge "was dangerously improper in that it attempted to direct the jury to be influenced by inflections in the Judge's voice, his gestures and body language—none of which would be reflected in the record and all of which could deprive the defendant of a fair trial."

Example #2: Veal v. State [3]

During defense counsel's closing argument:

> . . . the trial judge shook his head in apparent disagreement with what was being argued. [4]

The Tennessee State Supreme Court overturned the defendant's conviction for illegal possession of whiskey. The supreme court explained that this conduct justified reversal because the jury was left to speculate whether his Honor's collar was too tight or whether he disbelieved what was being said for the defense. The influence of the Trial Judge on the verdict of the jury is so great that no action or word of the Trial Judge should be allowed to indicate the Judge's conclusions of guilt or innocence.

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[1] 577 N.Y.S.2d 493 (N.Y. App. Div. 1991).

[2] *Id.* at 494.

[3] 268 S.W.2d 345 (Tenn. 1954).

[4] *Id.*

Example #3: Schaffner v. Greco [5]

The defendant alleged that:

> . . . the trial judge rolled his eyes, looked up at the ceiling, and grimaced at witnesses. [6]

Defense counsel made repeated objections to these actions:

> "Your Honor, I object to your Honor's manner in standing over the witness, your tone of voice, which I think is intimidating, you Honor, in respect to the witness." [7]

The appellate court concluded that the defendant "came to view the judge as an adversary rather than as impartial mediator." [8]

Example #4:

This example is from "Racism as a Strategic Tool at Trial: Appealing Race-based Prosecutorial Misconduct" (*Tulane Law Review*, vol. 67, no. 6, 1993). Permission granted by *Tulane Law Review*.

The prosecutor warned during closing argument of a case involving a black defendant, whose alleged victim was also black:

> "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know, maybe it will be somebody that I know. . . ."

This was one of several racially charged statements made by the prosecutor, which prompted the defendant to petition for a writ of habeas corpus. In such circumstances, federal courts generally focus on breaches resulting from failure to observe fundamental fairness. The court found the prosecutor's behavior "inflammatory" and "impermissible" and effectively denied the defendant the right to a fair trial.

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[5] 458 F. Supp. 202 (S.D.N.Y. 1978); *see supra* notes 24-26 and accompanying text.

[6] *Id.* at 207.

[7] *Id.* at 207 n.14.

[8] *Id.* at 208.

Handout 4-3: The "Clever Hans" Phenomenon

Body movement signs express emotions, mood, and psychosocial orientations to others. But some do more. Many nonverbal signals act as implicit expectations of how partners should respond. That is, they tell receivers how to manage their half of the face-to-face encounter. Depending on emitted cues, one's manner may tend to flippancy or respect, intimacy or aloofness, guardedness or openness.

These overt scripting signs operate in accordance with the "Clever Hans" phenomenon. They set up cycles of self-fulfilling prophecy in relationships. Hans, a nineteenth-century carnival horse, could add and subtract—or so it seemed. A spectator would ask Hans how much is, say, three plus four? And the horse would stomp his hoof seven times in reply. Hans's frequent correct answers astounded onlookers, causing intense speculation about the animal's supposed high intelligence. Ultimately, the mystery was solved when a less than obvious relationship linking horse and questioner became apparent. The interrogator, it was determined, would subliminally cue Hans when to stop tapping. A spectator's head would nod more emphatically with the last stomp, the eyes would widen, brows would raise, or the mouth might drop open at the next-to-last hoof tap. Apparently, human body signs—not the animal's talent for math—told Hans the right answers.

The Clever Hans phenomenon can be seen in many daily interactions. For example, juries seeing a judge who consistently leans backward while a public defender speaks, but leans forward while hearing the district attorney, may sense a preference for the prosecution. Like Hans, they may act in line with their observations. Favoritism is hard to mask. Bias leaks easily in nonverbal behavior because we are programmed to show our true feelings toward others. Unlike reptiles or fish, we are endowed with extraordinary expressive features, mobile faces, freed arms and hands, moveable heads, and kinetic eyes. To look impartial, therefore, is not only difficult, but almost impossible.[1]

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[1] This section is excerpted from *Workforce Diversity Program, Program I: Effective Delivery of Public Service in a Multicultural Community, Participant's Manual*, May 3, 1994. Adapted with permission from the State of New York Unified Court System.

Appendix H

Handout 5-1: A Self-Training Guide to Cultural Awareness

Appendix H.
Handout 5-1: *A Self-Training Guide to Cultural Awareness*

Contents

This appendix contains the handout for Module 5 of *Bias in the Court!* The handout is:

- *A Self-Training Guide to Cultural Awareness*, by Gladys E. Maged and Dianne E. Mahony.

The handout was excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*.

Send a copy of HO5-1 to each participant ahead of the program. Send a letter with the handout instructing participants to read the material before the day of the program.

Handout 5-1: *A Self-Training Guide to Cultural Awareness* *

We live in a world populated by millions of unique individuals whose behavior and beliefs are shaped by multiple influences. When we approach another person often we plan our contact with them by trying to anticipate their reactions. If we can accurately predict their response to us, we can more successfully interact with them.

We make assumptions based upon the skin color, accent, socioeconomic class, ethnic or religious background, and physical or other characteristics of people with whom we interact. In all societies throughout history, physical characteristics, religious beliefs, language, or other factors have either brought groups closer together or fractured them into conflicting segments. We would be naive to think it is otherwise in our own country. The history of the United States is filled with the ebb and flow of conflicts between religious, ethnic, racial, socioeconomic, and linguistic groups. The promise and genius of the United States is that, more often than not, the newly arrived and often despised outcast group of one decade gains enough economic and political power to gain status within the dominant social structure of a later decade.[1]

Historically, the process by which one group gains acceptance by other, more powerful groups has been gradual. The dominant culture often assumes that its dominance is a natural product of the characteristics that differentiate it from less advantaged groups. Members of different ethnic groups often celebrate flattering characteristics attributed to their ethnicity while challenging unflattering stereotypes about their group.

Non-dominant groups (i.e., groups that are not associated with economic, social, political, or other power in our society) often adapt some of their characteristics to more closely mimic the dominant groups. Non-English speaking people often learn to speak English, people who dress differently from the majority style often adopt the styles of the dominant culture. Sometimes the outcast group teaches the dominant group to honor and respect attributes of the minority group—the Black Pride movement of the 1960s not only enhanced the self-image of blacks, but also educated the dominant white culture to respect people with different skin colors. Rarely, if ever, does a non-dominant culture completely assimilate into the dominant culture. Instead, while the non-dominant culture partially adapts to the styles, beliefs, conduct, speech, or other characteristics of the dominant culture, the dominant culture simultaneously is influenced by the practices, beliefs, and appearance of the non-dominant groups. Jazz, for example, once a musical style associated with the members of one racial group and enjoyed by only a small fraction of the U.S. population, grew to be recognized as one of the dominant forms of original U.S. music, enjoyed by a broad spectrum of the population. If the dominant culture recognizes that a democratic society can best succeed when all of its members (regardless of the group with which they identify) have an equal opportunity to participate fully, the juxtaposition of dominant and non-dominant cultures often can avoid destructive conflict.

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*This chapter is borrowed from *Ensuring Equal Justice: Addressing Cultural and Linguistic Issues in the Courts of Massachusetts*, Maria C. Walsh ed.; Massachusetts Bar Association 1995. Reprinted with permission. All rights reserved.

As a professional dedicated to the cause of justice, you are, by definition, a member of the dominant power structure in our culture. While you may not be a member of the most populous racial group, the most populous religious group, the most successful economic group, or the most populous ethnic group, your position as a court officer, judge, or lawyer places you in the top tier of the social power pyramid. You have power to make justice accessible to anyone who needs it; and, correspondingly, you have the power to ignore the denial of justice to those who need it. Unless you are superhuman you probably make assumptions about people based on what you see of their skin color, dress style, accent, etc. To help you better recognize the assumptions about others that may interfere with your ability to ensure equal access to justice for members of non-dominant groups, this chapter offers a self-evaluation guide to understanding which of your attitudes and beliefs may interfere with your ability to successfully deliver equal justice to all.

Training ourselves to recognize our assumptions

Often our assumptions provide helpful background information that make us more sensitive and understanding toward others so that we can deal with them more effectively. Sometimes, however, our assumptions about how someone will behave or think are based on inaccurate information and our ability to effectively conduct business with the other person is damaged by our own ignorance. We cannot always stay sufficiently informed about everyone who is different from us to be certain that our assumptions are correct. Instead, we can only train ourselves to recognize when and how we are making assumptions that may interfere with our ability to understand and deal effectively with another person.

What do we see when we look at other people

Most people notice when another person has markedly different physical characteristics from themselves—a much taller or smaller physique, a body missing certain limbs, a different accent, a different skin color, or a very different style of dressing, styling hair, or adorning the body with make-up or jewelry. When we learn that someone practices a different religion, holds radically different political beliefs, or has a different sexual preference than our own we usually make note of that too. Ideally, all this information becomes part of what we understand about the person.

Frequently, however, when we notice certain differences in physique, race, language, etc., we mistakenly assume other information about the person. For example, attractive women with blond hair often complain that they must struggle with being stereotyped as dumb. Workplace studies have revealed that supervisors tend to focus more attention on the work habits of the employee who is most visibly dissimilar from the majority. If an employee who is a noticeable minority due to gender, race, ethnicity, language, physique or some other characteristic makes a mistake, the supervisor is more likely to notice the mistake than if it was made by an employee whose appearance more closely resembles the majority of co-workers. Such studies help to explain why discriminatory assumptions about members of different groups often seem reinforced by the behavior of the group members. If we assume that members of certain groups are likely to act in certain ways, we are more likely to notice when members of the group do act that way.[2] We notice the behavior that we expect to see. The same behavior by an individual who seems more familiar to us (because he or she shares our skin tone, gender, ethnic background, occupation, or other notable characteristics) or about whom we have different expectations, may escape our notice. Educators have long recognized that children can be "programmed" for success or failure by the expectations of their teacher. If the teacher expects a

child to fail, the child usually will fail—not necessarily because he or she is less capable of performing, but because the teacher will notice (and reinforce) failure more when expecting to see it. Court officers, lawyers and judges can also "program" success or failure into the experience of people who interact with the courts.

First steps to recognizing our own assumptions

First, recognize that cultural difference is neither good nor bad. There is a common tendency for human beings to fear, and usually to reject, things they cannot understand.[3] We often fear people who are different. Remaining open to and accepting of differences is not easy. We may withdraw either emotionally or intellectually when confronted with behaviors or other differences that seem incomprehensible.[4] We may be uncomfortable or suspicious of people who are not accustomed to our cultural practices, or who express ideas that we do not understand, or who speak a language different from our own. We may make assumptions about other cultures or may consider them inferior to ours. We often apply pejorative labels to people who are different, by calling them "bad" or "crazy." The ancient Greeks called all non-Greeks "barbarians," considering them to be without culture.[5] The Russian word for a German is "nemetz," which means "one who is mute," reflecting the belief that those who could not be understood could not speak at all.[6]

Understanding the influence of our background on our attitudes toward others

Although there is a possibility that attention to group affiliations or group characteristics will reinforce the tendency to stereotype, we must recognize that most individuals are influenced by their identity as a member of certain groups whether racial, ethnic, religious, or other. As a result, some understanding of the group's identity often can enhance our understanding of individuals who are members of the group. Even if we believe group identities are relatively unimportant in our own self-definition, they may influence how others react to us.[7]

Assess how you describe yourself. Do you emphasize gender, race, religion, ethnic background, geographic origin, language, education, profession, hair color or style, dress conventions, marital status, etc.? In what order do you organize these factors to describe your identity? Now think about someone whom you've met for the first time recently. What attributes did you first notice about them? Were they the same attributes, in the same order, that you would use to identify yourself? Try this experiment while thinking particularly of someone whose skin color, first language, or country of origin is different from yours. Generally, we do not notice identifying characteristics that seem most common to us (often that includes race, if our race is the dominant race in our community, and language, when our language is the dominant language in our community). Instead, we usually notice first those characteristics that seem most dissimilar to what we believe is "the norm."

Because our cultural background or language is our own, we naturally assume, that it is "normal." Any difference in culture or language is "abnormal." Implicit in this equation is a judgment that "normal" usually is good or superior, and that "abnormal" often is bad or inferior. Frequently, we treat those whom we consider "abnormal" as inferior to us. If we can recognize that "the" norm for us

is really only "our" norm, we will be better equipped to stop ourselves from making assumptions about individuals based merely on their membership in a group that has different "norms" than our own. If we first notice the characteristics that differentiate another from us, rather than the characteristics that another person shares with us, we will tend to emphasize the differences between us rather than the similarities. Emphasizing differences can make communication harder.

Think about situations in which you have felt different from others. Examine whether you ever felt either superior or inferior as a result of your recognition of the differences. Analyze what made you feel either superior or inferior. Did feelings of superiority come from identifying yourself with some social, cultural, or other power? Did your feelings of inferiority come from perceiving that you were in the minority? How did the behavior of others toward you affect your perception of yourself, them, and your situation?

Assess the influences that your culture, race, religion, or language have had on your own background. In the United States many of us enjoy a heritage of mixed ethnicity, religion, and/or race. Think about how you identify yourself and about who in your family influenced your sense of ethnic identity. What aspects of your racial, ethnic, religious, or linguistic background are you most proud of? Of what are you least proud? Can you identify some of the stereotypes that others often associate with your racial, ethnic, or religious background? Do the stereotypes accurately describe you? How have people of racial, ethnic, or religious groups similar to yours contributed to the culture of the United States? How has your heritage shaped your ideas about people from other backgrounds?

Here are some additional self-study exercises to evaluate your own ability to transcend stereotypical thinking:

- Clarify how you feel about people who are racially, ethnically, linguistically, religiously, politically, socioeconomically, or physically different from you. Which cultural groups, other than your own, do you *think* you understand best? How did you gain your understanding?

- What differences do you notice in members of other cultural groups that make you uncomfortable or provoke in you some strong negative reaction? Can you identify the reasons for your reactions?

- Can you identify any personal or professional values that you believe might conflict with the beliefs or behavior of members of other cultural groups? If you identify values that conflict, what action might you take to minimize or eliminate the conflict? Can you modify the words you use, your physical gestures, your tone of voice, or other aspects of the way you appear to others in order to minimize the conflict?

How to expand your cultural professionalism

Simple steps—like learning how to properly pronounce names; refraining from staring at physical attributes that seem unusual to you; refraining from judging an individual on the basis of his or her accent, dress, hair style, or other characteristics— can help to reassure the person with whom you are

dealing that they will be treated fairly. If you can reduce their anxiety, they will better be able to participate appropriately in any judicial proceeding. You undoubtedly have seen the stress and anxiety of people new to a courthouse as they try to find their way through the physical environment. Finding their way through the legal procedures of a courthouse is even more stressful. The effort you make to demonstrate your respect for them as human beings will contribute to the administration of equal justice as significantly as many of the other suggested steps in this book.

Guidelines for enhancing multi-cultural competence in your professional community[8]

It is idealistic to think that we will be able to understand everyone from a different culture with whom we come in contact. Nevertheless, we can focus on a few groups with whom we have considerable contact, and we can educate ourselves to be more aware of the values, practices, and beliefs of those groups.

Contact organizations which represent the interests of different ethnic, racial, linguistic, religious, and other groups. These organizations may recommend speakers who would be willing to address a lunchtime gathering of your professional peers, or may suggest training materials designed to increase understanding of their community.

Organize a cultural resource "library" containing information from newspaper articles, books, magazines, and other sources describing different ethnic, religious, racial, linguistic, and national groups and their cultures.

Organize public outreach programs. Invite speakers (community leaders, law enforcement officers, social work professionals) to address ethnic and cultural issues that they've observed in their communities.

Be aware of important ethnic and religious holidays such as the Chinese New Year, Ramadan, Passover, and Easter.

Cultural awareness is a skill that must be learned and that, just like speaking, reading, and writing, enhances our ability to communicate effectively with others. The diversity of our United States mandates that court officials, judges and lawyers must develop a professional competence in cultural awareness in order to ensure equal access to justice for all.

Endnotes

[1] Many historians have observed that prejudice against immigrants to the United States has promoted the concept of a single United States "culture." As new groups immigrated to the U.S., the earlier arrivals could find a common cause in condemning and criticizing the new arrivals for their failure to learn English, their failure to conform their dress or hairstyles to U.S. fashion, their failure to adopt the same dietary or sanitary practices as the dominant culture in their region of arrival, their failure to relinquish their minority religious beliefs, etc. This "melting pot" never was a creamy puree of complimentary components. Instead, U.S. culture has always been a bubbling stew of diverse, often conflicting ingredients.

[2] Often the stereotype evolves because some members of the group have openly demonstrated the behavior with which all members of the group later became associated. In 19th century Boston, the dominant "Yankee" culture perceived Irish immigrants as unclean drunkards devoted to the Pope rather than to the civil government of the U.S. The poverty and social stress experienced by the newly arrived Irish immigrants caused many to abuse alcohol publicly, to wear clothing desperately in need of washing, and to seek comfort through devotion to their religion. As a result, the entire immigrant population became associated with particular behaviors. Our assumptions about groups linger long after the evidence has disappeared.

[3] Ethnicity and Family Therapy 4 (Monica McGoldrick et al. eds., Guilford Press 1982).

[4] *Id.* at 27

[5] *Id.* at 4-5

[6] *Id.* at 5

[7] Taylor Cox, Cultural Diversity in Organizations 44 (Berrett-Koehler Inc. 1993) (discussing research by E. T. Hall, Beyond Culture (Doubleday 1976)).

[8] Adapted from videotape of Racial, Cultural, and Ethnic Sensitivity—A Must for the Modern Judge, by Judge David E. Ramirez and Professor Larry LeFlore.

Appendix I

Module 6 Handouts

Appendix I.
Module 6 Handouts

Contents

This appendix contains the handouts for Module 6 of *Bias in the Court!* These handouts are:

- Handout 6-1: *Language and Communication Skills*, by Dianne E. Mahony. The handout was excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*. Send a copy of this handout to each participant before the program. This handout begins on page I2.

- Handout 6-2: *Comparing Cultural Norms and Values*. You will distribute this handout during the program. Make sure that you have enough copies for all participants before the program begins. This handout begins on page I13.

- Handout 6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*. This handout was also excerpted from the Massachusetts Bar Association's publication *Ensuring Equal Justice*. You will distribute this handout during the program. Make sure that you have enough copies for all participants before the program begins. This handout begins on page I15.

Handout 6-1: Language and Communication Skills for Effective Cross-Cultural Communication[1]

Effective cross-cultural communication is an essential part of professional competence as an administrator of justice. Communicating well with a person from a different culture, from a different country, or whose native language is other than yours requires knowledge, skill, and sensitivity. You can improve the quality of cross-cultural communication through several means.[1]

CULTURAL CUSTOMS AND NORMS THAT AFFECT CROSS-CULTURAL COMMUNICATION[2]

Cultural customs and norms affect communication significantly. A person's tone of voice, manner of speaking, eye contact, and gestures are variables of communication that may be influenced by their national, regional, neighborhood, racial, religious, or socioeconomic background. All these influences, and more, combine to form the components of a "culture." Human behavior is a product of culture. Judges, court personnel, and lawyers face the challenge of communicating daily with people from diverse backgrounds. Different cultural norms often interfere with effective communication. If we hope to provide equal access to justice of all, we must recognize that our individual values and cultural norms are not necessarily shared by everyone else with whom we interact.

COMMUNICATION

Many languages can be categorized as either high or low "context." Context means the amount of attention one pays to *how* something is said versus *what* is actually put into words.[3] Knowing whether a person uses language in a "high" or "low" context may help to explain the importance the speaker places on the actual spoken or written words. In a "low" context culture, the communication emphasizes exactly *what* is said or written rather than the *way* it is spoken or written.[4] The United States judicial system is a "low" context culture in which great emphasis is placed on the exact meaning of words. People from cultures that place greater emphasis on the context of words (i.e., upon the order of words in sentences, or upon the use of hand and facial gestures, or upon inflections of speech, etc.) need to be alerted to the fact that court proceedings in the U.S. focus more on the precise words chosen, rather than the context in which they are spoken, to determine meaning. In a "high" context culture, such as Guatemala, reliance is placed on *how* something is said or written and on the circumstances surrounding the communication. The focus is on what is understood rather than on what is stated.[5]

[1] This chapter is borrowed from *Ensuring Equal Justice: Addressing Cultural and Linguistic Issues in the Courts of Massachusetts*, Maria C. Walsh ed.; Massachusetts Bar Association 1995. Reprinted with permission. All rights reserved.

DRESS AND APPEARANCE

In U.S. courtrooms, conservative professional dress is expected by those who administer the judicial system. Just as many U.S.-born people are unaware of dress standards in court, so are many foreign-born people unaware of the dress expected by court personnel or jurors.

In many cultures, dress may reflect prestige, social or occupational position, wealth, or religion. Lawyers should educate clients and witnesses as to the local dress codes of the court in which the client or witness will appear. Court personnel, including judges, should attempt to minimize the prejudicial impact of unconventional dress on the treatment given to litigants, defendants, and witnesses. It may be tempting to interpret a person's dress, hairstyle, adornment, or appearance as reflective of their character or otherwise relevant to the legal dispute in which they are involved, but cross-cultural variations are so divergent that assumptions based on the style prevalent in one culture usually are inapplicable to another culture. Moreover, individual styles of dress and appearance vary so much that it is usually foolish to jump to conclusions about a person based solely on dress or other aspects of appearance. For example, while many young Hispanic men living in Lowell may wear a bandanna as a sign of gang membership, not every young Hispanic man who lives in Lowell and wears a bandanna is a gang member. As with every aspect of appearance or behavior, you should investigate and test your assumptions before making judgments based upon them.

Similarly, the administration of justice requires court personnel, judges, and lawyers to guard against making assumptions about litigants, clients, and witnesses based on irrelevant factors like dress and appearance. Lawyers presenting witnesses or representing clients whose appearance may provoke erroneous assumptions about their character or conduct need to preempt juror prejudice either by inviting the witness or litigant to modify his or her appearance for court, or by giving the witness or litigant an opportunity to explain the significance (or insignificance) of any characteristics that might engender misunderstanding among jurors.

CLASS OR SOCIOECONOMIC STATUS

In the United States, there is no official class system, although most people recognize that our society is stratified (sometimes rigidly) by wealth, occupation, education, heritage, and other factors.

In other countries, there may be a structured and formal class system, or a caste system. A person who belongs to a certain class may expect certain treatment by others in his or her culture. As an attorney, court official, or judge, your awareness that a person is from a culture that recognizes class may help you to better understand the person's expectations, attitudes, and style of interacting with others.

PERCEPTION OF KINSHIP AND FAMILY

For decades, many in the United States have subscribed to the belief that "nuclear" families—mother, father, and children—are the standard family structure. More recently, many in the U.S. have acknowledged other family structures that include single parents, multiple generations, and legally unrelated individuals.

It is important for administrators of justice to recognize the influence of assumptions concerning family structure when relevant to the legal resolution of a matter, and to understand the family structure of the litigant or witness whose action or testimony is to be evaluated. If family structure is relevant to a case, lawyers, judges, and court personnel, before judging whether the litigant's family structure is good, bad, or neutral, must recognize their own assumptions relating to family structure, and try to understand how the litigant's family structure may reflect the culture from which they come and may in turn influence issues in the case.

PERCEPTION OF GENDER ROLES

In most parts of the United States equality between men and women is a legal mandate and a social goal. It is important for court personnel, judges, and attorneys to be aware that in many other cultures, equality between the genders is not intended or expected. Women often are considered lower in social status than men, and a woman's role in many cultures is to submit to a dominant male role. In other countries women may not have legal rights, such as the right to contract or the right to own property. Certain legal issues that may arise in immigration or family law, for example, may be affected by gender roles that are different from those subscribed to in the U.S.

Even the cultural customs of different groups are affected by differences in gender roles. In some cultures, for example, respect is shown by speaking to the oldest male first, before speaking to anyone else who is with him. It may be considered insulting to the oldest male if this tradition is not followed. In other cultures, the oldest female is the subject of greatest solicitude.

Asking litigants about their attitudes toward gender may help to identify any material differences between the litigant's assumptions and legal requirements in the United States.

SOCIETAL VALUES AND NORMS

Characteristics valued by a society often influence the development of its members' individual work and life styles. Upbringing, culture, education, and experience all affect our work and life styles. It often has been observed that the cultures of the United States tend to place high value on independence, individuality, and personal success.

In many other countries, and in some cultures within the United States, individuals may place higher value on group orientation, conformity, harmony, and the "greater good" as desired societal norms. The particular orientation of a litigant or witness to these different social norms may influence his or her behavior in a legal proceeding. Judges and court personnel may see this, and lawyers must be cognizant of it when evaluating the conduct of someone from a different cultural orientation. For example, a witness may choose not to testify against the interests of the group despite the witness' own self-interest.

TEMPORAL CONCEPTION

There are generally two ways cultures view time: monochronic and polychronic.[6] From the monochronic perspective, time is viewed as inflexible. Schedules are fixed and adhered to closely, and preset schedules are a priority over personal relationships.[7] From the polychronic perspective, time is viewed as flexible. Personal relationships take precedence over preset schedules. Most of the world's cultures are polychronic.[8] In counseling a client, however, lawyers should explain that U.S. courts follow a monochronic scheme and view time in a strict manner. Litigants and witnesses should be advised to adhere closely to court calendars.

NONVERBAL BEHAVIOR

Nonverbal communication is equally, if not more important in cross-cultural communication. Nonverbal communication will vary greatly from culture to culture. The lawyer, judge, or court officer should be aware of the characteristics particular to a culture and how they differ from his or her own culture. Nonverbal behavior is deeply ingrained at a young age, even before language is acquired,[9] and for this reason it may be very difficult to modify. The following are the major components of nonverbal communication/behavior.[10]

Body movement and facial expressions: In some cultures, overt gesturing may be considered aggressive, while in other cultures the use of hand or facial gestures is expected and, therefore, familiar and nonthreatening. Often it is appropriate to ask a litigant to explain his or her use of hand gestures. It is inappropriate to make assumptions concerning the speaker's personality or emotional stability based upon the use of such gestures alone.

Distance: Norms for physical distances between persons conversing in public places vary widely.[11] In some cultures people are used to standing closer together than is usually the norm in the United States.[12] Violation of space norms may create uneasiness, and people may move away to create the distance at which they are most comfortable.[13] This moving away could be interpreted as rude by individuals from other cultures and set the stage for misinterpretation.[14]

Touching behavior: Avoid touching or patting unfamiliar persons on the back, until you can assess whether the person is comfortable with such physical contact. For many decades most U.S.-born individuals did not regularly touch others except for close friends or family. Observers of United States customs have noticed that the practice in the United States may be changing as it becomes more common for people to greet each other with embraces or kisses on the cheek. Because physical touching during conversation may be more common in many other cultures[15] court personnel and lawyers may need to inform the litigant or witness with whom they are communicating of the touching standards of behavior that prevail in the court, in order to avoid miscommunication.

Tone of voice and nonlanguage sounds: All cultures use tone of voice to communicate underlying messages. Do not expect a person from another culture to necessarily understand your tone if it is meant to communicate emotions such as sarcasm, praise, or blame. They may understand the message in a literal sense. In the same way, do not read into the tone of a person from another

culture. What you hear as a rude tone might mean something completely different in the person's native language.[16]

Eye movements and eye contact: Eye contact is a frequent source of confusion in intercultural communication. The following juvenile case demonstrates how eye contact can have a profound effect on the disposition of a case.[17]

> A detention hearing was held for a youth in court to answer charges of vandalism of public property. The judge was concerned that the youth did not make any eye contact with her when she asked him questions and spoke to him. The judge repeatedly asked the youth to look at her when she addressed him. The youth, however, hung his head and mumbled to the judge. The judge took the youth's behavior to be an admission of guilt and lack of cooperation. Based upon the recommendations of the probation report as well as the perceived attitude of the youth in the court room, the judge concluded that detention was her only alternative.

How could communication between the judge and the youth have been improved? In many cultures, lowering one's eyes when confronting authority is a sign of respect. Some cultures believe that making eye contact with an individual in a position of authority is considered confrontational and offensive. In dominant cultures of the United States, eye contact is often thought to be a sign of open communication. Because of the prevalence of this custom, some in the United States may interpret the absence of eye contact as a sign of secrecy or untrustworthiness. Eye contact, like many other nonverbal behaviors, is a very misleading indicator of an individual's guilt or innocence.

Better communication could be fostered if the judge had explained to the juvenile exactly what was happening and what would happen to him. The judge should have asked the juvenile if he understood what was being said and should have solicited his feedback to confirm that he understood.

Although cultural backgrounds influence behavior, different individuals will react differently when faced with authority. The lawyer who represents the individual must try to be aware of this fact and advise the client accordingly. For example, any attorney who represented the juvenile should have discussed with him the issue of eye contact. The attorney could have confronted possible assumptions by mentioning the lack of eye contact to the court in order to give the youth an opportunity to confirm that no disrespect is intended.

Most individuals are extremely fearful about going to court. The stress of participating in a judicial proceeding, compounded by extra anxiety when one is the defendant, can impair anyone's ability to communicate effectively. If justice is to prevail, court personnel, judges, and lawyers must maintain a heightened sensitivity to the ability of litigants and witnesses to both communicate and understand.

AUTHORITY CONCEPTION

Many immigrants coming into the United States are fleeing from political persecution in their country and seeking political asylum. In some countries, systematic and widespread torture and killings by the government are routine. The circumstances of migration to the United States may

have a significant effect on how an individual views the court system, authority, and the government. Similarly, in many cultures within the United States, experiences with the legal system, socioeconomic status, or other factors may make people highly suspicious of government, court personnel, and/or lawyers.

When lawyers handle a case involving a person from another country, it is imperative to determine how the person perceives the police and courts in their country of origin, and to explain the role of the police and the court system in the United States. Immigrants who have fled political persecution may not trust any authority figure, and the attorney representing the individual must gain the person's trust to adequately represent him or her.

Many people, including many racial minorities, immigrants, and others who perceive themselves as separate from the dominant culture, view the judicial system with skepticism. Many cannot afford their own lawyers and are instead assigned court-appointed lawyers who often have large caseloads and sometimes lack sufficient time to learn about the individual and his or her culture. People who feel alienated from the dominant culture often perceive that they will not get a fair hearing.[18] As one Haitian-born man commented:

> The perception of many Haitians is that if they have to go to court for one reason or another, even if there is a mistake (i.e., they are innocent), they pay the fine or do whatever their public defender tells them to do because they feel that either they cannot win, or else they feel it is too difficult to explain the real situation. It is much easier just to do as you're told.[19]

Equal access to justice requires vigilance to prevent assumptions from obscuring facts. If each of us can improve our cultural competence, we can ensure that members of the multiple cultures that turn to our judicial system for help will receive equal access to the justice we all strive to preserve in the United States.

TECHNIQUES TO ENHANCE CROSS-CULTURAL COMMUNICATION

To enhance your ability to effectively communicate with someone from a different cultural background, review what you know about this person and their culture. Be aware of differences between your culture and theirs, and what assumptions you may bring to the situation. Actions viewed or words heard in the context of one set of social norms may appear vastly different in the context of another set of social norms. Language, behavior, and appearance that seem odd or inappropriate in your culture may be very "normal" or "legitimate" in another culture.

Be patient and allow extra time for communication. Conversations between people who speak different languages or are from diverse cultures will take longer, no matter what the task. When using an interpreter, an interview may take twice as long. Thus, attorneys and others must allow extra time for the client or witness interview. The extra time spent is crucial to permit the parties to understand each other. Court personnel, including judges, must recognize that extra time will be needed to respond to the questions of, or to conduct a proceeding with, a non-English speaker.

Attorneys should use the client or witness interview as an opportunity to gain understanding of the individual and their culture. Gathering as much information as possible will also make it possible to clearly communicate the legal alternatives to the client.[20]

Use open-ended questions, thereby placing no limits on the length of the interviewee's answer and allowing the interviewee a chance to interpret the subject matter.[21] These open-ended questions early in the interview may help to put the interviewee at ease.

Emphasize the main point you want to communicate. Communicate one idea at a time. Do not overload the person with information.

Use simple language. Rephrase your sentences and try a variety of words until you are understood. For instance, ask "where do you live?" instead of "what is your place of residence?"

Speak slowly and clearly, being careful not to exaggerate your speech. Be careful not to speak louder when you are not understood. Speaking loudly is a common reaction, but to the listener you may seem intimidating, impatient, possibly condescending or even aggressive. Recognize that the person with whom you are communicating may also attempt to make themselves understood by speaking more loudly to you. Try not to misinterpret their frustration with language as anger or frustration with you.

Avoid slang, broken English, or mixed languages (i.e. "Spanglish"). Usually, the use of mixed languages just confuses communication more.

Do not use sentences with negatives because you and the person with whom you are communicating may become confused. For instance, if you ask, "You did not see the car?" and he or she responds, "Yes," this may mean: "True, I did not see the car." An even more confusing response is "No," meaning either: "False, I did see the car," or "No, I did not see the car." For this reason, you should avoid all negative questions, and in this case, phrase the question: "Did you see the car?"

Use consistent terminology to simplify your communication. Don't refer to "the husband" at one point, "the father" at another, and "that man" in the same conversation. The listener may misinterpret and think you are referring to different people.

It may be necessary to ask the same question several times to obtain an accurate response. Initially, the other person may respond in a way that he or she thinks will please you. This frequently occurs in the courtroom where witnesses may be frightened or confused and may wish to demonstrate their desire to cooperate. In the Japanese culture, for example, there is a custom of speaking and acting "only after due consideration has been given to the other person's point of view" and "a habit of not giving a clear-cut yes or no answer . . . a long tradition of avoiding unnecessary friction."[22] Often a person from Japan may place greater importance on silence than their English-speaking counterparts from the United States.[23] A Japanese speaker may say "yes," to indicate that he or she has heard and understood the speaker without necessarily agreeing with the speaker. Alternatively, the Japanese speaker may choose to remain silent to avoid disagreement.[24]

You must always be conscious of the fact that all communication is passing through a cultural barrier; therefore, the meaning of words spoken may not be as clear as they seem.[25]

Remember that some people may signify their attention to your speech by responding "yes" each time the speaker pauses. This may indicate that the person is listening, but does not necessarily indicate that he or she agrees with or even understands what you are saying.

Pay attention to nonverbal cues that signal lack of understanding such as facial expressions that may indicate confusion.

Many non-English speakers understand English better than they can speak English. Do not assume that a non-English speaker can speak with the same facility or understanding with which they listen. Conversely, do not communicate confidential information in the presence of someone whom you assume is unable to understand you, without being certain that they do not understand you. You may unwittingly disclose confidential information to someone who is able to understand English better than you expect.

Recognize that when you supplement your communication with expressive hand or facial gestures you may be adding another source of confusion. Instead, consider the use of nonverbal visual aids such as pictures or hand signals (i.e., to indicate numbers, sizes, and other similar information that can be communicated non-verbally).

Court officers and attorneys often must explain the United States system of justice to litigants or witnesses who come from other countries. Not every country has a presumption of innocence, a bail system, or a jury system.[26] Parties may need assistance to understand the role of an attorney, and the attorney-client privilege. For example, after a fatal car accident in which two young children were killed, the driver, a man who did not speak English, claimed that he had misread a traffic sign. He was arrested and jailed on manslaughter charges pending bail. Unaware of the concept of bail, and mistakenly believing that he would be jailed for the rest of his life, he hanged himself in his cell.[27]

QUALITIES IMPORTANT TO CROSS-CULTURAL COMMUNICATION[28]

Approach people from other cultures with empathy and genuineness[29] to establish trust and promote openness in the communication. A person from a different culture may be extremely apprehensive and fearful about a legal case. Your sensitive attitude will go a long way to encourage the person to communicate more effectively. Attorneys representing clients from other countries or from different cultures must secure their client's trust before they can serve as effective advocates.

EMPATHY

There are two dimensions of empathy: understanding and communication of that understanding.[30]

Understanding the person: Ask yourself the questions, "If I were this person, given what this person has told me, how would I feel?" *not* "How would I feel in this person's shoes?" Instead think, "What if I were *this* person in *this* situation?"

Imagine if you had to appear in the court of a foreign country or in a court of a part of this country where you would not be a member of the dominant race, religion, or ethnic group. What things would you need to know and what help would you require?

Empathizing with someone whose differences seem more apparent than his or her similarities to you can be especially difficult if you know little about his or her background. When an attorney interviews a client whose background seems different from that of most of the court officials, jurors, and judge with whom the client will interact, the attorney should invite the client to describe how and

where the client grew up, or how and why the client came to the United States to better equip the attorney to understand the client's perspective.

Communication of the understanding: Court officers, judges, and lawyers may need to respond both to what the individual is saying explicitly, and to what is implied or hinted.[31] Use playback to understand both explicit and implicit messages, and to reaffirm what has been said:

- "Let me make sure I understand what you are saying . . ." or
- "I want to be certain I understand you so we are not confused . . ."

GENUINENESS

Lawyers representing a client need to convey to the client that speaking honestly is acceptable and desirable, perhaps by explaining the concept of the attorney-client confidentiality privilege. Remember that the attorney-client confidentiality privilege may be a foreign concept to many clients. Be honest about your own knowledge. If your knowledge of a country or culture is limited, ask the person with whom you're communicating to enlighten you. Asking questions about subjects with which the other person is familiar will make the person more comfortable, and will also signal to them that you are interested in them. By learning more about their background you will increase your ability to deal effectively with their situation.[32]

Endnotes

[1] Adapted from Skills for Effective Cross-Cultural Communication, Training in Cultural Differences for Law Enforcement/Juvenile Justice Practitioners, Juvenile Court Appendix (hereinafter Training for LE/JJP) at 19-22 (American Correctional Association and Police Executive Research Forum).
[2] Adapted in part from the Multicultural Curriculum for Training for Judges and Court Personnel, Criminal Justice Institute at 53, and David A. Victor, *Cross Cultural Awareness*, in The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches 15 (James R. Silkenat and Jeffrey M. Aresty, eds., 1994).
[3] *Id.* at 19.
[4] *Id.*
[5] *Id.*
[6] Victor, *supra* note 2, at 22
[7] *Id.* Other countries that the author lists as monochronic are Germany, Austria, Norway, Sweden, Iceland, Denmark, Great Britain, Luxembourg, the Netherlands, Australia, New Zealand, English-speaking Canada, the British and Afrikaner cultures of South Africa, the Flemish portion of Belgium, and the German-speaking portion of Switzerland.
[8] *Id.*
[9] *Id.* at 21
[10] *Id.*
[11] Taylor Cox, Cultural Diversity in Organizations 108-09 (Berrett-Koehler, Inc. 1993) (discussing research by E.T. Hall, Beyond Culture (Doubleday 1976)).
[12] *Id.* at 109.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Training for LE/JJP, *supra* note 1, at 27.
[17] Adapted from Training for LE/JJP, *supra* note 1, at 15.
[18] Training for LE/JJP, *supra* note 1, at 17.
[19] Interview with a man from Haiti in Boston, Massachusetts (July 21, 1995).
[20] Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 22 Beverly Hills B. Ass'n.J. 251, 252 (Fall 1988).
[21] *Id.* at 257.
[22] *Id.* at 259 (quoting Ishii, *Thought Patterns as Modes of Rhetoric: The United States and Japan, in* Intercultural Communication: A Reader 334 (L. Samovar & R. Porter, 4th ed. 1985)).
[23] *Id.*
[24] *Id.* at 260.
[25] Karen J. Crawford, Working with Guatemalans: A Model for Cross-Cultural Lawyering at 20 (Fall 1991, Independent Study Project, Boston College).
[26] For more information about the judicial system in selected countries please see the Profiles of Ethnic Communities, Appendix D *infra* p. 130.
[27] Spencer Sherman, *When Cultures Collide*, 6 Cal. Law. 33-35(Jan. 1986).
[28] Adapted in part from Crawford, *supra* note 25, at 20.
[29] *Id.*
[30] *Id.*
[31] Kessler, *supra* note 20, at 258 (quoting Barkai & Fine, *Empathy Training for Lawyers and Law Students*, 13 S.W. U. L. Rev. 505, 507-08 n.18 (1983)).
[32] Crawford, *supra* note 25, at 21-22.

Handout 6-2: Comparing Cultural Norms and Values[2]

Aspects of Culture	Mainstream American Culture	Other Cultures
1. Sense of self and space	Informal Handshake	Formal Hug, bows, handshakes
2. Communication and language	Explicit, direct communication Emphasis on content-meaning found in words	Implicit, indirect communication Emphasis on context-meaning found around words
3. Dress and appearance	"Dress for success" ideal Wide range in accepted dress	Dress seen as a sign of position, wealth, prestige Religious rules
4. Food and eating habits	Eating as a necessity—fast food	Dining as a social experience Religious rules
5. Time and time consciousness	Linear and exact time consciousness Value on promptness—time equals money	Elastic and relative time consciousness Time spent on enjoyment of relationships
6. Relationships, family, friends	Focus on nuclear family Responsibility for self Value on youth, age seen as a handicap	Focus on extended family Loyalty and responsibility to family Age given status and respect
7. Values and norms	Individual orientation Independence Preference for direct confrontation of conflict	Group orientation Conformity Preference for harmony
8. Beliefs and attitudes	Egalitarian Challenging of authority Individuals control their destiny Gender equity	Hierarchical Respect for authority and social order Individuals accept their destiny Different roles for men and women
9. Mental processes and learning style	Linear, logical, sequential Problem-solving focus	Lateral, holistic, simultaneous Accepting of life's difficulties
10. Work habits	Emphasis on task Reward based on individual achievement Work has intrinsic value	Emphasis on relationships Rewards based on seniority, relationship Work is a necessity of life

[2] This section is borrowed from *Ensuring Equal Justice: Addressing Cultural and Linguistic Issues in the Courts of Massachusetts*, Maria C. Walsh ed.; Massachusetts Bar Association 1995. Reprinted with permission. All rights reserved.

Handout 6-3: *How Cultural and Linguistic Differences Can Impede Equal Access to Justice*[3]

In 1990 more than 850,000 Massachusetts residents, approximately 15 percent of the total population counted in the census, came from homes in which English either was not spoken or was a second language to more than 150 other languages.[1] Also in the 1990 census United States residents reported that they belonged to 300 races, 600 Indian tribes, 70 Hispanic groups, and 75 combinations thereof, offering contemporary confirmation of Alexis de Tocqueville's 1835 observation that the United States was "a society formed of all the nations of the world . . . [p]eople having different languages, beliefs, [and] opinions."[2] The diversity generated by linguistic, racial, and ethnic differences is complicated by other factors such as religion,[3] socioeconomic status, political philosophy, family structure, education, and gender. It is no wonder that many commentators wonder whether "the melting pot [will] give way to the Tower of Babel."

The essence of diversity is its complexity. Not only is there diversity between groups, but there is diversity within each group.

> [N]o matter how much "factual" information [one] may have about the beliefs, values, norms, and customs of a particular culture, [there is] no way of knowing where the individual . . . stands along a continuum from close adherence to the norms of a culture to acculturation into a new culture. Cultural patterns, after all, are generalized abstractions that do not define the individual nor predict what an individual believes or does. Cultural patterns are simply hypotheses of the greater likelihood of their occurrence in a member of that culture than in someone who is not a member.

It is no wonder that in the midst of all these differences, people find communication difficult, and understanding elusive.

Patricia's Story

Twenty-nine-year-old Patricia risked loss of custody of her two small children because she was not at home when the social worker came to visit. Patricia had left the children locked in her two-room apartment while she went by bus to care for her own mother who suffers from kidney failure. When Ann, an Anglo-American social worker drove to Patricia's building and discovered the children had been left unsupervised she was dismayed at Patricia's irresponsibility. She criticized Patricia for failing to arrange for adequate child care. In response, Patricia could not find English words to explain that her sister who lives in the same apartment building was accessible to the children in the event of trouble. Although Ann spoke some Spanish, Patricia did not believe that her extended family life should be any business of the well-dressed government worker, and so declined to describe the unspoken understanding she had with her sister. Instead, Patricia relied on the emphatic hand gestures commonly used by her Nicaraguan family to emphasize important points, and on the street-wise English learned from American friends and neighbors and filled with expletives

[3] This chapter is borrowed from *Ensuring Equal Justice: Addressing Cultural and Linguistic Issues in the Courts of Massachusetts*, Maria C. Walsh ed.; Massachusetts Bar Association 1995. Reprinted with permission. All rights reserved.

when expressing significant feelings. Ann heard Patricia's foul language and rambling communication, and saw her violent hand gestures as signs that this mother might be angry and emotionally unstable, as well as irresponsible. Ann concluded that she should recommend immediate removal of the children from Patricia's custody.

As soon as Patricia learned of Ann's recommendation, her fear of arbitrary government intervention in her life was confirmed. Patricia was too ashamed to admit to her family that she had been so disgraced. She did not understand the significance of the hearing process by which her fitness as a mother would be evaluated; and she failed to participate. When another social worker arrived to take the children from the home, Patricia responded by screaming threats of anger and frustration. The foreigner was trying to take her children and she felt powerless to protect them. In an effort to be understood, Patricia yelled more loudly. She tried to communicate the strength of her resolve through the hand gestures that she'd used since her childhood to convey emphasis. The second social worker saw Ann's worst fears confirmed by the crazed threats and flailing hand gestures of the unstable woman. The well-dressed social worker's calm, articulate testimony at the custody hearing was persuasive in contrast to the inarticulate, loud, expletive-filled rantings of the poorly attired mother trying to communicate in her new language.

Ann misinterpreted Patricia's hand gestures because of a culturally based assumption that the gestures signaled violent emotions. The gestures, coupled with an English vocabulary that consisted principally of expletives, understandably led the well-educated, middle-class, suburban social worker to believe that the children might be at risk. Similarly, Patricia's cultural heritage caused her to misinterpret the government worker's questions about her child care arrangements as an attempt to disgrace her and to secure government control over her family. She refused to cooperate with such an effort. The government worker's confusing speech, filled with multisyllabic words and complex sentence structures, coupled with the woman's enigmatic facial expressions, gave Patricia no indication of the social worker's real motive.

No one can now convince Patricia that the social worker had only the best interests of Patricia's young children in mind when she initiated proceedings to remove the children from Patricia's home. Nor is Ann, the social worker, likely to reconsider her evaluation of Patricia as too angry, too potentially violent, and too unconcerned with her children's needs to be a fit parent. But the gross misunderstandings between the players in this drama caused a separate tragedy: the wrenching relocation of two young children and their separation from their only active parent. Professionalism, whether as a social worker, court clerk, lawyer, judge, teacher, or other provider of services imposes the responsibility to try to minimize such escalating misunderstandings.

If Ann had had access to an interpreter to assist her talk with Patricia, at least she would have understood more of what Patricia chose to say. If, in addition, Ann had developed some greater awareness of Patricia's personal communication style she might have discounted some of the excessive hand gestures and accepted them as normal for Patricia—rather than as signs of emotional turmoil. While in an ideal world Patricia should assume corresponding responsibility to understand Ann's communicative style and her legitimate purpose, as a practical matter, the onus is on Ann, as the professional, to educate herself about her client and about how best to ensure an accurate, appropriate communication.

The Tale of Tinh and Bien

Tinh Huynh and her husband, Bien Nguyen, emigrated to the United States three years ago from Vietnam via a relocation/resettlement camp in Thailand. They and their four young children now live in Massachusetts. Bien Nguyen taught college level courses in Vietnam, but his inability to speak English fluently, has prevented him from finding any job in the United States other than factory work. The financial stress of supporting four children makes him eager to work overtime whenever possible, so he has found no time to take English courses since his arrival in the United States. The English he knows is limited to what he has learned on the factory floor.

Tinh Huynh, also college educated, works in a neighborhood grocery store owned by another Vietnamese-American and frequented by Vietnamese customers. Tinh has had no opportunity to learn English at work, since the language is rarely used in the store. Recently Tinh's boss offered Tinh the opportunity to become a partner in the grocery business; but the partnership would require Tinh's investment of all the modest savings she and her husband have accumulated since their arrival in the United States. When Tinh shared her exciting news with Bien, her husband became upset. He reminded her that they had planned to work to accumulate sufficient savings to permit him to quit his job and return to school full-time in preparation for his return to teaching, his beloved profession. Tinh argues that they should seize the opportunity to invest in the store now, rather than chase the pipe dream of Bien ever being employed in the United States as a teacher. Tinh says that she is certain that he will never speak English well enough to satisfy a school board or college hiring committee, and that even if he could overcome the language barrier, racism would bar his advancement. Bien's frustration with his situation becomes rage at his wife's disparagement of his future. The couple continue to argue and the tension between them escalates until, one day in the midst of an argument, Bien can no longer permit Tinh to insult him, and he strikes her to silence her.

The next day, when Tinh reports this incident to her friend and coworker, Le Ly Minh, the woman tells Tinh that Americans have a legal remedy to prevent future beating. Fearing the potentially disastrous consequences of any law enforcement authority in their lives, Tinh thanks Le Ly Minh for the information, but declines to go to the police. Bien's frustration with his situation escalates, however, and with it also escalates the frequency with which he answers Tinh's statements with blows. Tinh is forced to seek outside intervention. In her effort to assimilate with the United States culture, she decides to follow Le Ly Minh's advice and seek legal intervention. Le Ly walks with Tinh to the local District Court.

When the women arrive at the courthouse they cannot figure out where to go for information. None of the posted English signs use the common words with which they are familiar. A well-meaning court officer, who finds them wandering in the hall, directs them to the Probation Office. Once there Le Ly manages to convey their desire to stop Tinh's husband from hitting her. They are then directed to the office of the Civil Clerk. One of the English-speaking, American-born clerks looks at them and calls another Cambodian-born, bilingual clerk to assist the two Asian women. The Cambodian-speaking clerk knows no Vietnamese, but seeks out a Vietnamese-American lawyer who had appeared that morning in a different matter for assistance. The Vietnamese-American lawyer generously volunteers to explain to Tinh the process for obtaining a restraining order, and assists Tinh to complete the paperwork necessary to begin the process. Tinh is directed to the courtroom, where an ex parte hearing is held, with interpretation by the Vietnamese-American lawyer. The lawyer recognizes that he is not a certified interpreter and explains both to Tinh and to the judge the limitations of his ability to interpret for them. Nevertheless, given the emergency situation, and the absence of any other available alternative, the lawyer agrees to serve as a compromise substitute for a certified interpreter.

When the judge hears the interpreted description of Bien's behavior, she agrees to issue the temporary order that directs Bien to refrain from hitting his wife. The judge is able, with the assistance of the lawyer, to learn from Tinh enough to surmise that Bien and Tinh need social service intervention. The judge tries to explain to Tinh that counseling services are obtainable, and gives Tinh the name of a local office that employs a Vietnamese-speaking social worker. When the clerk prepares the restraining order to be served on Bien, he recognizes that Bien will probably not understand the language of the no-abuse order. The clerk writes an English note for Tinh to bring with her to the police department, alerting the police department to the need for interpretive services. Tinh and Bien are fortunate to live in a community with a sufficiently large Vietnamese population to warrant employment of two Vietnamese-speaking police officers. One of the Vietnamese-speaking officers is assigned to serve the no-abuse order on Bien, and is able to explain to Bien what is happening. Although Bien is confused and intimidated by the presence of the officer at his home, and although he doesn't understand how his wife could take their problems outside the home to strangers, he understands the gist of the paper that the court has issued; he will avoid hitting his wife. Armed with the social worker information provided by the court, and committed to her marriage, Tinh suggests to Bien that they might benefit from a conversation with a Vietnamese-speaking social worker.

A fantasy? In part. These stories are fictionalized composites of true experiences. Names have been changed to protect identities. Patricia lost custody of her children for a time, in part because she and the social workers responsible for safeguarding the welfare of her children could not adequately communicate with each other. In contrast, although the interpretation services of the Vietnamese-American lawyer who helped Tinh were not ideal, the fact that Tinh could communicate more effectively with the court led to the court's ability to respond with sensitivity to the linguistic and cultural needs of her family. The court's sensitivity to the family's needs helped prepare the police department to effectively respond to the family's crisis. Tinh's experience was much different from that of Patricia. In fact, Tinh and Bien eventually participated in family counseling long enough to reach a mutually agreeable decision about whether to invest in the grocery store.

The potential for cultural and linguistic misunderstandings will always be large in society as diverse as that of the United States. Each participant in every interaction brings his or her own cultural background to the interpretation of the situation. Miscommunications are predictable. The following pages offer guidance and information to equip those who work for justice to minimize or avoid unnecessary miscommunication. Each of us can work to prevent our own cultural assumptions and linguistic limitations from contributing to similar misunderstandings.

Endnotes

[1] 1990 United States Census of Massachusetts, Table 2, Summary of Social, Economic, and Housing Characteristics.

[2] ALEXIS DE TOCQUEVILLE, JOURNEY TO AMERICA. De Tocqueville had no reason to comment on racial diversity in the United States because a citizenship law dating from 1790 banned all but "free white persons" from immigrating to citizenship.

[3] When the United States was less linguistically, racially, and ethnically diverse, religion appeared more fractious than we now perceive. George Washington, in a letter to Edward Newenham, wrote, "[o]f all the animosities which have existed among mankind, those which are caused by a difference of sentiments in religion appear to be the most distressing, and ought most to be deprecated" (October 20, 1792).

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