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Name It and Claim It: Implicit Bias

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Alyson Grine

Durham County Assistant District Attorney

Chapter 1

Recognizing and Addressing Issues of Race in Criminal Cases

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1.1 Purpose of Manual

This practice manual aims to assist criminal defense attorneys and other court personnel in recognizing and addressing issues of race in criminal cases at the trial level in North Carolina. In particular, the manual seeks to help attorneys identify and respond to improper considerations of race in criminal cases in accordance with their duty of zealous advocacy and obligation to ensure that their clients get a fair and impartial trial.

Racial disparities in criminal cases raise numerous concerns, including the possibility that race could affect particular stages within a case, the ultimate outcome of a case, and the actual or perceived fairness of the criminal justice system. For example, concerns about fairness may arise if the jury pool does not reflect the makeup of the community or if a defendant of one race is released on bond while a similarly situated defendant of another race remains in jail pretrial.

The following explanation of racial disparity is a useful guide:

Racial disparity in the criminal justice system exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population. . . . *Illegitimate or unwarranted* racial disparity in the criminal justice system results from the dissimilar treatment of similarly situated people based on race.¹

Racial disparities may be produced not only by intentional discrimination; seemingly race-neutral policies may result in disparities because of the influence of implicit bias or structural factors, discussed further below. Regardless of their cause, racial disparities may not only affect case outcomes but also may undermine confidence in the criminal justice system and harm communities.² The manual examines the contexts in which racial disparities may arise and the ways that defense attorneys may address those disparities and their causes.

In an effort to provide concrete tools for court actors, the bulk of the manual is comprised of legal analyses, practice tips, and tools such as sample motions. Throughout the manual, we have incorporated anecdotes in which North Carolina practitioners share their experiences in recognizing issues of race in a particular defendant's case. For example, a defense attorney may describe the procedures he or she used to raise the issue in court, the response or outcome that followed, and what the attorney might have done differently in retrospect. Where relevant, chapters include suggestions for systemic changes and provide examples of collaborations between court actors, such as defense attorneys, prosecutors, and judges, to address concerns about racial disparities in their jurisdictions.

Several issues are beyond the scope of this manual. This manual focuses primarily on noncapital cases and does not examine the role that race may play in the imposition of the death penalty. The manual also does not address possible questions of race in the appellate process, commutation, parole, and the treatment of prison inmates and jail detainees. The manual explores the ways in which law enforcement misconduct may be challenged in criminal cases, but does not address law enforcement misconduct claims in civil cases.

We recognize that African Americans are not the only ones who may experience bias in the criminal justice system. North Carolina is a diverse state, and other racial or ethnic groups, such as Latinos, Native Americans, and Asians, may be subject to discriminatory treatment. This manual addresses bias that pertains to race, skin color, and ethnicity, such as in vehicle stops resulting from "profiling" or targeting of individuals based on their actual or perceived association with a racial or ethnic group. This manual does not cover in depth issues relating to immigration law or language access. When appropriate, this manual includes cross-references to other resources on those topics.³

Finally, we recognize that the topic of race is challenging, emotionally charged, and often controversial. The term "race" itself is complex and subject to different interpretations.⁴ This manual does not try to resolve debates about the meaning of race. We are primarily concerned with differential treatment that people may receive in the criminal justice

system based on perceptions of their race. When we refer to race and ethnicity in this manual, we are referring to “groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance”; these categories, in turn, “are given meaning by society . . . [and are] self-reinforcing processes rooted in the daily decisions we make as individuals and institutions.”⁵

While race may not be an easy subject to address, it cannot be ignored. Defense attorneys have an obligation to identify and challenge disparate treatment of their clients based on race. Doing so may help to protect clients’ rights, foster a trusting attorney-client relationship, encourage scrutiny of possible unwarranted racial disparities in the criminal process, and promote fairness in the administration of criminal justice.

1.2 Scope of Chapter

This chapter is intended to provide a foundation for the discussion that follows, and addresses key concepts, such as: What is bias? What are its potential sources? What factors other than bias may contribute to racial disparities in the criminal justice system? What role does a defense lawyer have with regard to raising bias and these other factors during the course of representation? Many scholarly works examine the existence and causes of racial disparities in the criminal justice system, and some of these works are in conflict. This chapter is not intended to resolve those debates, but instead to distill major principles from the scholarly work and to provide a context, working vocabulary, and framework for considering issues of race in the criminal justice system.

1.3 Potential Factors Relevant to Racial Disparities in the Criminal Justice System

This section identifies factors that may contribute to racial disparities in the criminal justice system, including structural racialization, implicit and explicit bias, crime rates, and legislation. This discussion is not intended to quantify the extent to which these factors may be the cause of racial disparities in the criminal justice system. Instead, the aim of the discussion is to introduce concepts relevant to the consideration of racial bias, provide an overview of current research into racial disparities in the justice system, and suggest steps to take in addressing these issues.

A. Structural Racialization

The term “structural racialization,” also referred to as “structural racism,” stands for the principle that structures, such as neighborhoods and schools, shape opportunities in racially uneven ways. One scholar explains that “the structural model helps us analyze how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes . . . and how structures shape life chances.”⁶ Some scholars think that this framework helps to explain racial disparities in the criminal justice system because it accounts for factors such as poverty, culture, and history.⁷

Structural racialization does not depend on a bad actor or even a bad act, but instead describes the interrelated forces that contribute to inequality.⁸ “[R]ather than understanding racism as an isolated or individual phenomenon, a structural racism approach understands it as an outcome and suggests that different societal institutions work together to distribute or limit opportunity along racial lines.”⁹ Unlike other formulations of racism that rely on individual acts of prejudice, “[s]tructural racism operates automatically and thus is perpetuated simply by doing nothing about it.”¹⁰

Lawyers can use this framework to think beyond the confines of the courtroom when analyzing a case. For example, some pretrial release programs utilize electronic monitoring devices that require a telephone in the home. If a defendant is homeless or living in a home without a phone, this option is not available. Because people of color are overrepresented in impoverished communities, a policy of releasing only those people who can be monitored telephonically will have a disproportionate impact on minorities, and a lawyer may be able to challenge it on that basis.¹¹ A lawyer who recognizes the potential impact of structural racialization on his or her client may discover opportunities for advocacy where another lawyer would simply see insurmountable poverty issues.

Additionally, a structural analysis may help attorneys relay their clients’ experiences in a more detailed—and therefore more compelling—way to prosecutors, judges, and others. For example, in plea negotiations, a lawyer could explain to a prosecutor that her client was expelled from the Wake County school system as a result of a zero-tolerance policy that was applied overwhelmingly to youth of color.¹² This framework might also be useful in explaining to a judge the influence of racial profiling on a client’s criminal record. In *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), for example, a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of his prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record.

An understanding of structural racialization may facilitate collaboration among actors in the criminal justice system.¹³ Through this lens, criminal defense attorneys, judges, prosecutors, probation officers, law enforcement officers, and community leaders can address racial disparities without battles over causation or fault, and ask critical questions, such as: Is there a practice or policy in effect that is producing racial inequality in our jurisdiction? If so, what steps can we take to remedy the harm?

B. Overview of Bias

Unlike structural racialization, which describes a socio-cultural phenomenon, bias describes a mental state. Racial bias refers to positive or negative racial preferences, either conscious (explicit) or unconscious (implicit).¹⁴ As one scholar observes:

[A] typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff

to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done.¹⁵

The possible impact of these forms of bias on the criminal justice system is discussed below.

C. Explicit Bias

Of the two broad formulations of bias, explicit bias is easier to recognize. “Explicit bias is a conscious preference (positive or negative) for a social category,” and a person who expresses explicit bias does so knowingly.¹⁶ Explicit bias may not be readily observable, however. “If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us.”¹⁷ One example of explicit bias in the criminal justice system is former Los Angeles detective Mark Fuhrman’s use of over 40 racial slurs recorded on a series of audiotapes, portions of which were introduced into evidence in the O.J. Simpson murder trial.¹⁸ In a more recent example, Justice Sotomayor criticized a prosecutor’s cross-examination as racially biased and unconstitutional when the prosecutor challenged a defendant’s testimony by asking, “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say This is a drug deal?”¹⁹

Manifestations of explicit bias are evident in North Carolina history. For example, in the early 1800’s, North Carolina laws imposed harsher punishment on Black offenders than White offenders: the rape of a white woman was a capital offense when committed by enslaved or free Blacks but not when committed by Whites.²⁰ After ratification of the Thirteenth Amendment officially abolishing slavery in 1865, explicit bias continued in North Carolina by means of a “Black Code” preventing freed African Americans from voting, serving on juries, bearing arms, and exercising other rights. North Carolina’s Black Code was intended to replicate the controls of slavery. According to historian Laura F. Edwards, the Code’s purpose was to ensure that newly free African Americans would not “be confused with citizens . . . acquir[ing] only the duties and obligations, not the rights of freedom.”²¹ The explicit bias in North Carolina’s Black Code was followed by other manifestations of overt discrimination, such as the ban on miscegenation, and—beginning in the last quarter of the nineteenth century and persisting through much of the twentieth century—the establishment of Jim Crow laws denying African Americans access to public spaces, opportunities, and resources.

A recent example of explicit bias in the criminal justice context is illustrated by *Miller-El v. Dretke*, 545 U.S. 231 (2005), in which the court recognized that a particular prosecutor’s office had intentionally excluded minorities from jury service for many years. The court observed:

[T]he District Attorney’s Office had adopted a formal policy to exclude minorities from jury service. . . . A manual entitled ‘Jury

Selection in a Criminal Case' . . . [had been] distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later[.]²²

Similarly, at a national prosecutors' training, participants were given cheat sheets identifying race-neutral peremptory strike justifications to use when responding to claims that a prosecutor's peremptory strike was based on race.²³

Many criminal justice reforms have been enacted since the time of North Carolina's Black Code, and overt racial bias is no longer codified in North Carolina's laws. However, bias may still influence North Carolina criminal justice processes and may creep into individual cases via decision-making of individual actors. For example, in a 2002 hearing on a motion to dismiss, a North Carolina defense attorney testified that a highway trooper had justified pulling over his client in a previous case as follows: "[I]f they're Hispanic and they're driving, they're probably drunk."²⁴ In the case in which that testimony was offered, the N.C. Court of Appeals conducted an extensive review of evidence that the same trooper's stop of a Latino driver was racially motivated. Ultimately, the court upheld the trial judge's finding that the driver's seat belt, which the trooper had claimed was not buckled, was not actually visible to the trooper and therefore the stop was unlawful.

D. Implicit Bias

History and definition. Implicit biases are attitudes and stereotypes that people are not aware of, but that can influence their thoughts and behavior. These biases result from the brain's natural tendency to categorize stimuli into various categories or "schemas."²⁵ All people rely on schemas to help sort the vast amount of information facing them each day, and schemas often involve stereotypes.²⁶ As scholar John Powell puts it, "[w]e cannot live without schemas. Having biases and stereotypes does not make us racist, it makes us human."²⁷

Research suggests that people may not be aware of their own biases. In fact, an implicit bias may conflict with a consciously held belief.²⁸ For example, an employer may believe in equal opportunity hiring, but pass over a Black applicant for a job based on lack of relevant experience without realizing that White applicants with similar experience levels have not been eliminated.²⁹ In the criminal justice context, Justice Marshall recognized that "[a] prosecutor's own [possibly] . . . unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."³⁰ As the examples suggest, while implicit biases may arise from our natural tendency to associate categories, they may result in disparate treatment when they go unexamined.

Researchers have been interested in the brain's tendency to link racial categories with positive or negative attributes for some time. Many will be familiar with Kenneth and Mamie Clark's famous "doll test" conducted in the 1940's, which demonstrated that Black children preferred White dolls to Black dolls and were more likely to describe Black dolls as "bad" and White dolls as "nice."³¹ This study was recreated by filmmaker Kiri Davis in 2007 with similar results.³² The "doll test" was cited by the U.S. Supreme Court when it declared school segregation unconstitutional in 1954.³³ Today, implicit bias researchers address the same types of questions with more sophisticated techniques to measure unconscious attitudes and prejudices. In one example, an implicit bias study in the criminal justice context discovered that participants held implicit associations between "Black" and "guilty" and that these associations predicted the ways in which participants evaluated ambiguous evidence.³⁴

In recent years, social scientists have gained significant insights into the operation of implicit biases. The largest study of implicit bias is the Implicit Association Test (IAT), an electronically administered test that "revolutionized the way the world looked at and understood implicit bias."³⁵ The IAT emerged in the 1990s and has been administered over six million times.³⁶ In administering the IAT, researchers discovered that "the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks [and] dark-skinned people . . . among others. . . . [P]eople consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*."³⁷ Scholar Jerry Kang illustrates how implicit biases may play out in the courtroom through this example: "Do we associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?"³⁸

Studies specific to the criminal justice system raise concerns about the potential impact of implicit biases. Two studies found that criminal defendants with a relatively greater degree of what one study termed "Afrocentric" and what another study termed "stereotypically Black" facial features received more severe criminal punishment in some contexts.³⁹ Implicit racial biases have also been detected among judges and capital defense attorneys.⁴⁰ In another study, participants with implicit stereotypes of White lawyers as better litigators judged the performance of White litigators as superior, in accordance with their stereotypes.⁴¹

Litigating implicit bias. Awareness of implicit bias may empower criminal defense attorneys to neutralize or mitigate it in the courtroom. Research shows that implicit biases are malleable.⁴² When the subject of race is addressed explicitly, people tend to correct for their implicit biases and act in accordance with more objective standards. For example, jury studies show that when racial considerations are relevant and are explicitly brought to the attention of the jury, White jurors tend to treat Black and White defendants similarly. Thus, the act of addressing race during voir dire may counteract its influence in jury deliberations. "However, when race is present as a factor but not highlighted, White jurors tend to treat Black defendants more harshly."⁴³ Further, "suppressing or denying prejudiced thoughts can actually increase prejudice rather than eradicate it."⁴⁴ These studies suggest that raising relevant issues of race in criminal trials may cause implicit

biases to recede. Conversely, failing to raise issues of race may exacerbate bias or at least leave it in place.

Unexamined implicit bias may influence law enforcement practices. For example, disparities in drug arrests can result from police policies and practices in which “race shapes perceptions of who and what constitutes [the] drug problem, as well as the organizational response to that problem.”⁴⁵ As a result of the police department’s definition of the drug problem in Seattle, for example, police officers focused almost exclusively on crack cocaine sales.⁴⁶ Due in large part to this focus, 64.2 percent of drug arrestees were Black even though the majority of those who delivered serious drugs were White.⁴⁷ Closer to home, the Winston-Salem Police Department recently announced changes to its driver’s license checkpoint policy after the North Carolina ACLU’s Racial Justice Project reported the policy’s disparate impact on minority drivers. While there was no evidence that the policy was designed to target people of color, “85 percent of the 244 traffic checkpoints set up by Winston-Salem police in an 11-month period were in predominantly minority areas.”⁴⁸ Awareness of implicit bias research can help attorneys identify and challenge law enforcement policies and practices that have a disparate impact on minorities.

In addition, a defense attorney’s awareness of his or her own implicit bias can improve client representation. Unexamined implicit biases may prevent an attorney from understanding the circumstances of a client’s life or may cause the attorney to make inaccurate race-based assumptions about potential jurors or other court actors. For example, a lawyer may presume that Black people favor lenient sentencing and consequently fail to probe a prospective juror’s opinions on punishment as well as experiences bearing on the case. As defense attorney Andrea Lyon argued, it is important for defense attorneys to “recognize our own biases and ensure that they do not inhibit our ability to represent our clients.”⁴⁹

Implicit bias studies may be introduced into evidence in individual cases when relevant. Consider, for example, *Brown v. Board of Education*,⁵⁰ in which the Supreme Court referred to seven different social science studies in holding that “separate but equal” violated the Equal Protection Clause.⁵¹ More recently, courts have taken notice of the “growing body of social science recogniz[ing] the pervasiveness of unconscious racial and ethnic stereotyping and group bias,” in contexts such as the alleged exclusion of certain ethnic minorities from jury service.⁵² In one case, a federal judge relied in part on studies concerning implicit stereotypes of Asian Americans as passive in finding “a sizable risk that perceptions and decisions made here may have been affected by unconscious bias.”⁵³

Case study: A judge reflects on implicit bias. In the passage below, Judge Louis A. Trosch, Jr., District Court Judge for North Carolina District 26, reflects on the problem of implicit bias, including his own. His personal account captures, in ways that legal analyses may not fully convey, the importance of understanding and combating implicit bias in the criminal justice system.

I have been a District Court Judge for the past 13 years and have spent much of my time hearing juvenile court cases. About five years ago I found myself presiding over juvenile first appearance and detention hearings. One of the first cases that I called involved a newly filed armed robbery from a local fast food restaurant. Two young men were accused of attempting to rob the restaurant while wearing “Scream” masks and carrying handguns. They were not very accomplished robbers and were quickly apprehended.

When I called the first co-defendant’s, who I’ll refer to as Joe, case into the courtroom he entered from a holding cell wearing shackles and accompanied by two deputies. This was to be expected given the serious nature of the allegations and danger to the community. In addition, Joe’s parents, grandparents, relatives, and pastor also came into the courtroom. I heard a short rendition of the facts and then heard from the attorneys and Juvenile Court Counselor (JCC) regarding Joe’s detention status. As is typical in such serious cases, I ordered that Joe remain detained, but that the JCC investigate less restrictive alternatives, such as electronic monitoring or pre-trial supervision through our Alternatives to Detention (ATD) program. A detention review hearing was scheduled for the next week and the matter was adjourned. It was a pretty routine hearing really, except for the fact that Joe had no delinquent history of any kind. First offenders don’t typically start off with such serious charges.

Thinking that a bit odd, I called in the co-defendant’s, who I’ll call Sam, case. The deputies didn’t stir towards the holding cell. In fact, I was getting ready to remind them to retrieve the juvenile, when Sam walked into court with his family. He was dressed in khaki pants, a button down shirt and loafers rather than a jumpsuit and shackles. Like Joe, he also had a number of family members present to support him, along with his Coach. Everyone sat down and I proceeded with the first appearance. No one acknowledged the striking difference in circumstances between the two juveniles. I assumed there must be some difference between them that explained Joe being locked in detention while Sam was freed to live at home, so I began asking questions. Maybe Joe had been the one with the gun. No, they both had guns according to the police report. Maybe Joe was the mastermind or forced Sam into participating or was more threatening to the victims. Again the answer was no. As I asked more and more questions it became clear that Joe and Sam were alike in almost every way. They had been friends since childhood, they lived one street from one another, they both came from 2 parent families with tons of family support, both were average students with no history of suspensions, and both were involved in extracurricular activities, Joe in his church and Sam as a high school athlete. I couldn’t come up with a significant difference in these two young men that explained their detention status, save one.

The fact that most readers of this account know implicitly what that difference was along with the race of each of these juveniles says much about how deeply race impacts all of us and the decisions we make. Just to be clear, Joe was Black and Sam was White. I do not believe that anyone explicitly decided to lock up the Black juvenile and release the White juvenile, but implicit bias powerfully influenced the decisions made by the police, the JCCs, and the attorneys in this case. After putting Sam into detention and ordering that the JCC look into alternatives to detention, I left the courtroom and sat down to think. How many times have less egregious disparities for children of color gone right by me, unnoticed and uncorrected. How many times had my own implicit biases affected my decisions. These are daunting questions for all of us who work in the justice system. The good news is that there are many, many steps that one can take to mitigate implicit bias, both individually and systemically. As a judge, it is critical that I learn as much as I can about implicit bias and take steps to overcome my own bias. It is a constant struggle, but it is essential to reach just decisions.

E. Discretionary Decision-Making and the Cumulative Nature of Disparities

Subjective decisions may be particularly vulnerable to the types of bias described in the preceding sections. One recent study of millions of school and juvenile justice records in Texas illustrates the cumulative effect of discretionary decision-making. The researchers found, for example, that students of all races were removed from school for mandatory disciplinary violations at comparable rates, but Black and Latino students were far more likely than White students to be disciplined for discretionary reasons.⁵⁴

The exercise of discretion is an essential part of the criminal justice system. “It is neither desirable nor possible to eliminate discretion throughout the criminal justice system; professional judgment is a core component of making day-to-day operations manageable.”⁵⁵ Nevertheless, criminal defense attorneys and other court actors must be alert to the risk of bias creeping in at the numerous junctures in a criminal case that involve subjective decision-making. Discretionary decisions in the criminal justice system—made by law enforcement officers, magistrates, judges, prosecutors, and defense attorneys—include:

- Where checkpoints should be set up
- Which vehicles should be stopped on a busy highway
- When a brief investigatory detention or “Terry stop” should be initiated
- Who should be asked for consent to search
- Who should be arrested
- Who should be charged and with what offense
- Whether to seek a transfer to superior court for a juvenile
- When a plea to a lesser charge should be offered
- Who should be indicted as a habitual felon
- Who should be released before trial and what conditions of pretrial release should be imposed
- Who should be advised to accept a guilty plea
- Which prospective jurors to strike peremptorily
- Who should be sentenced to active time and who should be sentenced to probation

Any one of these decisions can affect the direction and outcome of a case. For example, defendants who are denied pretrial release are less able to assist their attorneys, more likely to plead guilty, more likely to be found guilty if they go to trial, and more likely to receive a sentence of imprisonment if convicted.⁵⁶ Recent publications highlight that disparities at early stages of criminal proceedings may be compounded at successive stages and affect criminal case outcomes.⁵⁷

Subjective decision-making may operate in tandem with other factors, such as structural racialization. One researcher concluded that outcomes in criminal cases are influenced not only by disparate treatment at certain key decision points, but also by structural

factors such as a defendant's economic resources and networks of support, which may come into play at various stages in the criminal justice process.⁵⁸

In drug cases in particular, the cumulative effect of subjective decision-making may have a racially disparate impact. For example, racial disparities in drug convictions are more pronounced than racial disparities in drug arrests.⁵⁹ Drug cases are discussed further in subsection F., below.

F. Crime Rates

Any discussion of racial disparities in the criminal justice system must address the question of whether minority overrepresentation in the justice system is simply a reflection of racially disparate crime rates. "The primary debate has been between those who argue that there are problematic racial disparities and those who argue or imply that observed differences in rates of imprisonment are for the most part 'warranted' by differential criminal involvement by the races."⁶⁰ This brief discussion does not attempt to resolve this issue; instead, it identifies key considerations and additional resources.

In the context of drug offenses, data indicate that racially disparate arrest, conviction, and incarceration rates do not reflect actual offense rates. In 2006, African Americans represented 35% of those arrested for drug offenses and 53% of drug convictions, but that same year, according to the U.S. Department of Health and Human Services, African Americans made up only 14% of drug users.⁶¹ In other words, although Blacks and Whites use drugs at roughly the same rates, African Americans are substantially more likely to be arrested and convicted for drug offenses. In North Carolina, Black inmates accounted for 84% of those admitted to prison for drug offenses in 1996, although only 22% of the State's population was Black.⁶² Beyond the drug offense context, the data is less clear. Unlike the rate of drug use, which is tracked by health departments, crime commission rates in other contexts are generally extrapolated from other criminal justice statistics.⁶³

Some criminologists have relied on arrest rate statistics as a proxy for offense rates.⁶⁴ The Uniform Crime Reports (UCR) published by the Federal Bureau of Investigation is one commonly cited source of national arrest rate data.⁶⁵ In 2006, for example, the UCR indicated that African Americans accounted for 39% of people arrested for violent crime and 31% of all people arrested for property crime.⁶⁶ These arrest statistics, however, do not necessarily reflect offense rates by African Americans. Experts increasingly recognize that arrest and offense rates cannot be equated.⁶⁷ Arrest rates are influenced by factors such as discretionary decisions by officers, distribution of police in low-income neighborhoods, and policies and priorities of various police departments. In other words, if "criminal investigations focus on African Americans, more African Americans necessarily will be arrested and convicted of crimes, thereby creating a self-fulfilling prophesy."⁶⁸ Some research suggests that minority suspects are more likely to be arrested than White suspects.⁶⁹ Additionally, arrest rates do not capture crimes that are *not* reported to the police, which account for more than half of all violent crimes and over 60% of all property crimes.⁷⁰

Another method employed by criminologists when estimating offense rates is to use “victimization survey data in which victims identify the perceived race of their assailant,” such as the National Crime Victimization Survey (NCVS).⁷¹ Data collected by the NCVS can be viewed on the website of the U.S. Bureau of Justice Statistics.⁷² However, there are some concerns about the reliability of data collected from victims about the race of offenders, as “perception bias on the part of victims with respect to offender race presents an intractable problem with NCVS race and crime data.”⁷³ The data collected by the NCVS is also incomplete: “information about victim perceptions of perpetrators’ race is available for only a few violent offenses,” so “crime victimization survey data present an incomplete picture of crime commission rates by race.”⁷⁴

Racially disparate arrest and victimization rates also do not explain racial disparities in imprisonment rates. One criminologist concludes, “[a]lthough violent crime arrest rates for Blacks are higher than for Whites, the differential has long been declining. Group differences in violent crime do not explain racial disparities in prison.”⁷⁵

G. Legislation

Laws passed by local, state, and federal legislatures can significantly affect the racial composition of the population that is involved with the criminal justice system. In one of the most well-known examples of this phenomenon, the Anti-Drug Abuse Act of 1986 employed a 100:1 crack/cocaine sentencing differential in federal criminal sentencing. Thus, the Act created harsher penalties for drug offenses involving crack (disproportionately used by African American cocaine users) than for offenses involving powder cocaine (used more by White cocaine users). For example, a person convicted of possessing only 5 grams of crack cocaine was subject to the same mandatory prison sentence (5 years) as a person convicted of possessing 500 grams of powder cocaine. This sentencing scheme had a remarkably disproportionate impact on African Americans and, in the words of one court, had no “penological or scientific justification.”⁷⁶

At the time the law was passed, the media portrayed “crack-user horror stories” in which “[i]mages of young black men [involved in the drug trade] . . . saturated the screens of our televisions . . . [and] branded onto the public mind and the minds of legislators that young black men were solely responsible for the drug crisis in America.”⁷⁷ Congress considered these media accounts in concluding that crack cocaine caused violence and crack users posed a greater threat to society than cocaine users.⁷⁸ Scientific evidence, however, refuted the notion that crack was more addictive and caused users to be more violent, and showed that the effects of powder cocaine and crack cocaine on the body are essentially identical.⁷⁹

Lawyers, scientists, the U.S. Sentencing Commission, judges and others all called for the repeal of the 100:1 crack/cocaine federal sentencing ratio. Although the ratio remained law for 24 years, in 2010 Congress modified the ratio to 18:1.⁸⁰ Data from this period shows the racially disparate impact of the crack/cocaine distinction. During the period in which the 100:1 ratio was in effect, the average time African American drug offenders served in federal prison increased by 77%, compared to an increase of 33% for Caucasian

offenders.⁸¹ The average federal drug sentence for African Americans was 11% higher than the average federal drug sentence for Whites when the Anti-Drug Abuse Act was passed in 1986; four years later that disparity had grown to 49%.⁸² In 2010, the year the law was changed, almost 80% of those sentenced under federal crack cocaine laws were African Americans, and less than 8% were White.⁸³ Changes in drug laws and sentencing for drug offenses have been identified as playing a role in the decreasing incarceration rate for African Americans; however, while the rate has declined over the last decade, it still exceeds the incarceration rate of Whites and Latinos.⁸⁴

Racial disparities related to legislation can be found at the state level as well. Three strike schemes and other habitual offender laws have been adopted by many states. By the mid-1990s, “‘repeat offender’ laws [had been] passed in forty-one states as well as in the federal system, and twenty-four states [had] enacted ‘three strikes’ laws.”⁸⁵ North Carolina’s habitual felon law imposes a significant sentencing enhancement for a defendant who, having already been convicted of three felonies, commits a fourth.⁸⁶ This enhancement does not attach automatically on conviction of a fourth felony; rather, prosecutors have discretion whether to indict a person as a habitual felon. Statistics suggest that the law has had disparate results. The NCAJ Task Force on Racial and Ethnic Bias reports that “African Americans are 2.46 times as likely to be incarcerated as habitual felons than Caucasians” and represent “70% of all incarcerated habitual felons.”⁸⁷

Because of concerns about the potential impact of sentencing legislation, Minnesota, Iowa, Oregon, and Connecticut now require the preparation of racial impact statements during the legislative process to prevent unwarranted racial disparities in the criminal justice system.⁸⁸ In Florida, Mississippi, Wisconsin, and Arkansas, racial impact statement legislation has been introduced.⁸⁹ A racial impact statement serves as “a predictive report summarizing the effects that legislation may have on minority groups. The goal of these statements is to force lawmakers to confront the potential racial consequences of criminal sentencing policies prior to enacting new legislation.”⁹⁰ North Carolina does not currently have such a procedure, but attorneys, other court actors, and community members can play a role in informing legislators about the potential racially disparate impact that may result from existing or proposed legislation.

1.4 Sources of Law

Below is a brief summary of the sources of law for addressing racial disparities in North Carolina criminal cases. These sources are discussed in greater detail in the applicable chapters of this manual.

Equal Protection. As long ago as 1891, the U.S Supreme Court recognized that under the Fourteenth Amendment, “no state can deprive particular persons or classes of persons of equal and impartial justice under the law.”⁹¹ The Equal Protection Clause has been the subject of numerous interpretations in the intervening years. As one scholar observed, however, it was “[n]ot until the last decade of the Warren Court,” when heightened

scrutiny became law, “[that] the equal protection clause evolve[d] from a largely moribund constitutional provision to a potent egalitarian instrument.”⁹²

Today, the Equal Protection Clause of the Fourteenth Amendment is an important source of rights for defendants challenging unequal treatment in the criminal justice system. It may be relied on by defendants challenging practices such as selective policing based on race,⁹³ selective prosecution based on race,⁹⁴ discrimination in the pretrial release setting,⁹⁵ racially biased jury selection procedures,⁹⁶ racially biased grand jury foreperson selection procedures,⁹⁷ race-based use of peremptory challenges,⁹⁸ and considerations of race at sentencing.⁹⁹

Due Process. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prevents states from depriving “any person of life, liberty, or property without due process of law.” This right includes protections against racial bias in criminal cases. For example, the Due Process Clause is an important source of rights for defendants challenging an unreliably suggestive cross-racial identification.¹⁰⁰

Fourth Amendment. The Fourth Amendment to the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Generally, evidence of a law enforcement officer’s racially-motivated purpose cannot be considered in a Fourth Amendment challenge to a pedestrian or traffic stop. This is because “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”¹⁰¹

However, a Fourth Amendment claim may succeed where reasonable suspicion is lacking or evidence of racially biased intent undermines the credibility of the officer’s stated reason for a stop.¹⁰² Additionally, a defendant may challenge as pretextual a license or other checkpoint where the real purpose of the stop was impermissible under the Fourth Amendment.¹⁰³

Sixth Amendment. The Sixth Amendment to the U.S. Constitution requires that trial juries be drawn from a “fair cross-section” of the community.¹⁰⁴ Unlike an equal protection challenge, in which a defendant must show intentional discrimination in the composition of the jury venire, a fair cross-section challenge requires a defendant to demonstrate that the exclusion of a distinctive class of people was “systematic” or an inevitable result of the selection procedure.¹⁰⁵

North Carolina Constitution. The North Carolina Constitution is a significant and sometimes overlooked source of protections against racial bias in criminal cases. Article I, section 19 provides:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No

person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The Equal Protection and Law of the Land Clauses in this section of the state constitution provide protections analogous to those in the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. The North Carolina Supreme Court has held generally that “[t]he law of the land and due process of law are interchangeable terms.”¹⁰⁶ In general, “law of the land” and state equal protection challenges should be raised whenever parallel federal challenges, such as federal due process violations, are raised.

The North Carolina Constitution is a particularly important source of rights in the jury context. Article I, section 26 prohibits exclusion “from jury service on account of sex, race, color, religion, or national origin.” This section, along with the “law of the land” clause in article I, section 19, may be relied on to challenge discrimination in the selection of a grand jury,¹⁰⁷ or in the selection of a grand jury foreperson.¹⁰⁸ Article I, section 24 of the N.C. Constitution guarantees the right to a trial by jury, providing that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.” Defendants raising fair cross-section challenges may rely on this section as well as on article 1, section 26 of the N.C. Constitution.¹⁰⁹

Outside of the jury context, article 1, section 27 of the North Carolina Constitution contains a provision prohibiting excessive bail, which may be useful to defendants raising challenges in the pretrial release context. It states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”

North Carolina statutes. Last, North Carolina statutes are a source of rights for criminal defendants challenging racial bias in a criminal case. Several statutes address law enforcement investigations.

To help address potential racial profiling, North Carolina law requires the Division of Criminal Information of the Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers.¹¹⁰ This statute also requires the Division to collect statistics on many local law enforcement agencies.¹¹¹

North Carolina statutes also provide rights relating to interrogation and eyewitness identification, such as the right to have counsel present during a nontestimonial identification procedure,¹¹² and the right to have live identification procedures videotaped whenever practical.¹¹³ Such rights may be important in ensuring that race does not play an improper role in criminal cases. Nationwide, in over one third of wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict the defendant.¹¹⁴

In the context of police interrogations, protections against coerced statements may be important for populations that are potentially susceptible to improper law-enforcement pressure. Recently enacted legislation expands interrogation recording requirements to include all custodial interrogations of juveniles conducted at a place of detention, along with all custodial interrogations conducted at a place of detention related to a “Class A, B1, or B2 felony, and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.”¹¹⁵

Requirements for motor vehicle checkpoints are also addressed by North Carolina law. Under G.S. 20-16.3A(d), the “placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity.”¹¹⁶ Under G.S. 20-16.3A(2a), “no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information.”¹¹⁷ Under G.S. 20-16.3A(a1), the pattern designated for stopping vehicles “shall not be based on a particular vehicle type” (other than commercial vehicles).¹¹⁸ These statutes limit potential discrimination in checkpoint operations.

North Carolina statutes set forth procedures for invoking the exclusionary rule and suppressing evidence for a violation of a suspect’s constitutional or statutory rights.¹¹⁹ These provisions may warrant suppression of racially discriminatory actions.¹²⁰

North Carolina statutes bearing on the trial and other aspects of a criminal case—such as G.S. 15A-1214(a), which provides that the selection of jurors from the jury pool for questioning must be random—are discussed where applicable in this manual.

1.5 Overcoming Concerns About Raising Race

Addressing issues of race in the criminal justice system is no easy task.

The one thing that is absolutely certain about the American experience is that never in our history as a people have any of us, black or white, been “neutral” on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions.¹²¹

Criminal defense attorneys face considerable obstacles when raising claims of racial bias. One writer notes that “enormous systemic, financial, and other pressures . . . make it extremely difficult . . . to raise and vindicate” such claims.¹²² Large caseloads and limited resources magnify these challenges. However, public defenders and appointed counsel must remain alert to the issues discussed in this manual, since racial and ethnic minorities are more likely to live in poverty and therefore more likely to be represented by assigned counsel. African Americans are nearly five times as likely as Whites to rely on appointed counsel.¹²³

Criminal defense attorneys have an obligation to advocate for their clients, including raising issues of race in appropriate cases. The North Carolina State Bar Rules of Professional Conduct (RPC) provide that attorneys must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”¹²⁴ The RPC state that a lawyer is “an officer of the legal system, and a public citizen having special responsibility for the quality of justice,” who “should be mindful of deficiencies in the administration of justice.”¹²⁵

Why might some attorneys not raise issues of race when race may be adversely affecting a client's case? Some factors that might cause a lawyer to refrain from raising racial issues include:

- lack of awareness that race is an issue in the case,
- concern that a judge may reject the argument,
- unfamiliarity with supporting law, required factual showing, and strategies,
- reluctance to step outside of one's comfort zone,
- concern that this strategy may affect the case in unpredictable ways, and
- the existence of contrary legal precedent or the fear of creating bad precedent

This manual is intended to equip attorneys and other court actors with the information and tools they need to address issues of race effectively and overcome concerns such as those above. The chapters that follow identify ways in which racial considerations may unlawfully affect criminal cases and provide legal support and practical strategies for addressing those issues. Some concerns, such as the potential of weakening relationships with other court actors or creating bad precedent, are outweighed by the obligation an attorney owes to an individual client. In appropriate cases, the attorney has an ethical obligation to advance all arguments that would assist the client. Failing to do so may leave constitutional and other violations unaddressed, result in an incomplete record for appellate review, constitute ineffective assistance of counsel, and deprive the client of a fair trial.

Raising issues of race where appropriate in individual cases may have an aggregate positive effect even if the claims do not always succeed. Doing so may create an environment in which “race discrimination and bias issues are openly joined on the record instead of relegated to the background.”¹²⁶ Everyone involved in the criminal justice system has a role in helping to stem racial discrimination, but defense attorneys have a particularly important voice. As recognized by the Equal Justice Initiative's report on racial discrimination in jury selection, “[t]he entire community—including prosecutors, judges, court administrators, civil rights and community groups, and elected officials—has a role to play in addressing this issue, but racial bias in the courtroom cannot be confronted effectively without vigilance and advocacy by defense lawyers.”¹²⁷ We hope this manual helps North Carolina criminal defense attorneys recognize and raise issues of race in an informed and effective manner.

¹ ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1 (2d ed. 2008) (emphasis in original), *available at* www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

² Robert M.A. Johnson, *Chair's Counsel: Racial Bias in the Criminal Justice System and Why We Should Care*, ABA CRIMINAL JUSTICE, Winter 2007 (observing that we should care about racial disparities in the criminal justice system, whatever their cause, because “lack of trust severely impacts the criminal justice system’s ability to serve and protect society”).

³ *See, e.g.*, SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA (UNC School of Government 2008), *available at* <http://defendermanuals.sog.unc.edu>.

⁴ *See, e.g.*, American Anthropological Association, AAA *Statement on Race*, 100 AMERICAN ANTHROPOLOGIST 712, 712 (1998) (observing that scientists have discovered greater genetic variation within racial groups than between them), *reproduction of statement available at* www.aaanet.org/stmts/racepp.htm; Natalie Angier, *Do Races Differ? Not Really, DNA Shows*, N.Y. TIMES, August 22, 2000 (reporting that researchers involved in sequencing human DNA declared that “there is only one race—the human race”), *available at* www.nytimes.com/library/national/science/082200sci-genetics-race.html; Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 13 (1994) (concluding that “[t]he notion that humankind can be divided along White, Black, and Yellow lines reveals the social rather than the scientific origin of race”); JACQUELINE JONES, A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA’S AMERICA, xvii (2013) (stating that “[i]n the early twenty-first century, the words ‘race,’ ‘racism,’ and ‘race relations,’ are widely used as shorthand for specific historical legacies that have nothing to do with biological determinism and everything to do with power relations”).

⁵ Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251, 258–59 (2012).

⁶ john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008); *see also* john a. powell, *How Implicit Bias and Structural Racialization Can Move Us Toward Social and Personal Healing*, in PATHWAYS TO RACIAL HEALING AND EQUITY IN THE AMERICAN SOUTH: A COMMUNITY PHILANTHROPY STRATEGY (U. of Ark. Clinton School of Public Service 2013), *available at* <http://clintonschool.uasys.edu/wp-content/uploads/2013/12/Clinton-School-Compendium-2013.pdf>.

⁷ See, e.g., William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L. J. 1 (2011); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 285–89 (2009).

⁸ powell (2008), *supra* note 6, 86 N.C. L. REV. at 795–800.

⁹ Kirwan Institute at Ohio State University, *Bibliographic Guide to Structural Racism*, available at <http://www.scribd.com/doc/49092126/Kirwan-Institute-Structural-Racism-Bibliography>.

¹⁰ Wiecek, *supra* note 7, at 6–7 (listing eight characteristics that distinguish structural racism from more traditional formulations of racism).

¹¹ NELLIS ET AL., *supra* note 1, at 7.

¹² JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN'S SERVICES, LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS (2011), available at www.law.unc.edu/documents/faculty/sroreportv2.pdf.

¹³ powell (2008), *supra* note 6, at 86 N.C. L. REV. 809 (noting the success of collaboration in other contexts).

¹⁴ Shawn C. Marsh, *The Lens of Implicit Bias*, 18 JUVENILE AND FAMILY JUSTICE TODAY 16, 16–19 (Summer 2009), available at www.ncjfcj.org/sites/default/files/the%20lens%20of%20implicit%20bias.pdf.

¹⁵ JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 6 (National Center for State Courts 2009), available at www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx.

¹⁶ Marsh, *supra* note 14, at 17.

¹⁷ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

¹⁸ Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747, 758 (1996).

¹⁹ *Calhoun v. United States*, 568 U.S. ___, 133 S.Ct. 1136, 1136 (2013) (Sotomayor, J., concurring in denial of cert.).

²⁰ Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2046 (2010) (citing laws to this effect).

²¹ Laura F. Edwards, “*The Marriage Covenant is at the Foundation of all Our Rights*”: *The Politics of Slave Marriages in North Carolina after Emancipation*, 14 LAW & HIST. REV. 81, 96 n.30 (1996) (citing laws to this effect).

²² *Miller-El v. Dretke*, 545 U.S. 231, 263–64 (2005) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 334–35 (2003)).

²³ See *Top Gun II Batson Justifications: Articulating Juror Negatives in the Race Materials Bank* at www.ncids.org (select “Training & Resources”).

²⁴ *State v. Villeda*, 165 N.C. App. 431, 432 (2004) (reviewing at length evidence that trooper’s stop of Latino driver was racially motivated and upholding trial court’s finding that trooper was not able to observe whether driver was wearing seat belt, in spite of trooper’s testimony to the contrary).

²⁵ John Powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, 20 POVERTY & RACE, no. 5 (Poverty & Race Research Action Council), 2011, at 4, available at <http://prrac.org/newsletters/sepoct2011.pdf>.

²⁶ Kang, *supra* note 15, at 1.

²⁷ PowerPoint Slides of John Powell, *Exploring the Unconscious: The Dynamics of Race and Reconciliation* at 22 (2011 Dinner of Reconciliation, John Hope Franklin Center for Reconciliation), available at www.jhfccenter.org/wp-content/uploads/2009/09/john-powell.pdf.

²⁸ Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS L.J. 1139, 1139 (2010).

²⁹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AMERICAN ECONOMIC REVIEW 991, 991–1013 (2004).

³⁰ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

³¹ Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 602, 602–11 (Eleanor E. Maccoby et al. eds., 3d ed. 1958); see also Film Documentary: A GIRL LIKE ME (Kiri Davis, Director, Reel Works Teen Filmmaking, 2006), (recreating the Clarks’ doll experiment in 2007 with similar results), available at www.mediathatmattersfest.org/films/a_girl_like_me/.

³² See Film Documentary: A GIRL LIKE ME, *supra* note 31.

³³ *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954).

³⁴ Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010).

³⁵ Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 801 (2012).

³⁶ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 847–49 (2012).

³⁷ Smith & Levinson, *supra* note 35, at 802 (emphasis in original) (citing published research).

³⁸ Kang, *supra* note 15, at 2.

³⁹ See Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

⁴⁰ See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009).

⁴¹ Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

⁴² Kang, *supra* note 15, at 4–5.

⁴³ powell & Godsil, *supra* note 25, at 6.

⁴⁴ powell, *supra* note 27, at 23.

⁴⁵ Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 105 (2006); see also KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE (2008), available at http://faculty.washington.edu/kbeckett/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle_2008.pdf.

⁴⁶ BECKETT (2008), *supra* note 45, at 15, 59–98 (concluding that, while the racial composition of those who deliver serious drugs in Seattle, the enforcement focus on outdoor drug activity, and the enforcement focus on the downtown drug trade all contributed modestly to racial disparities in Seattle drug arrests, the focus on crack-cocaine sales constituted the largest factor contributing to disparities).

⁴⁷ BECKETT (2008), *supra* note 45, at 11.

⁴⁸ John Hinton, *Police Will Use New Methods to Set Up Traffic Checkpoints*, WINSTON-SALEM JOURNAL, Sep. 10, 2012, available at www.journalnow.com/news/local/police-will-use-new-methods-to-set-up-traffic-checkpoints/article_08f0139a-26e2-520e-9756-239a3f23950a.html.

⁴⁹ Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 758 (2012).

⁵⁰ 347 U.S. 483, 494 n.11 (1954).

⁵¹ Eva Paterson, *Litigating Implicit Bias*, 20 POVERTY & RACE, no. 5 (Poverty & Race Research Action Council) 2011, at 8, available at <http://prrac.org/newsletters/sepoct2011.pdf>.

⁵² *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (citing and considering such studies in ruling on a challenge to the alleged exclusion of certain ethnic minorities from service as foreperson on indicting grand jury), *aff'd sub nom. Chin v. Carey*, 160 F. App'x 633 (9th Cir. 2005) (unpublished).

⁵³ *Chin*, 343 F. Supp. 2d at 905–908.

⁵⁴ TONY FABELO, ET. AL., *BREAKING SCHOOLS' RULES: A STATEWIDE SURVEY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* (Council for State Gov'ts Justice Ctr. 2011), available at http://knowledgecenter.csg.org/kc/system/files/Breaking_School_Rules.pdf.

⁵⁵ NELLIS ET AL., *supra* note 1, at 11.

⁵⁶ Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 936–37 (2013) (citing various studies and scholarly articles to this effect).

⁵⁷ See, e.g., Traci Schlesinger, *The Cumulative Effects of Racial Disparity in Criminal Processing*, THE ADVOCATE, May 2008, at 22, 27–32, available at <http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf>; Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 59, 71 (2014) (noting that “[d]ecisions at the beginning of the criminal case process, such as bail decisions, can affect the entire course of the case and the ultimate punishment handed down in sentencing”; finding that “[d]efendants who were detained prior to trial received longer sentences than defendants who were released on bail”).

⁵⁸ Schlesinger, *supra* note 57, at 24.

⁵⁹ NELLIS ET AL., *supra* note 1, at 6 (reporting that African Americans account for 35% of those arrested for drug offenses but 53% of drug convictions).

⁶⁰ Robert D. Crutchfield, *Warranted Disparity? Questioning the Justification of Racial Disparity in Criminal Justice Processing*, 36 COLUM. HUMAN RIGHTS L. REV. 15, 16–22 (2004). Compare David A. Harris, *The Reality of Racial Disparity In Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROB. 71 (2003), with Heather Mac Donald, *High Incarceration Rate Of Blacks Is Function Of Crime, Not Racism*, INVESTOR’S BUSINESS DAILY, Apr. 29, 2008, available at <http://news.investors.com/042908-445638-high-incarceration-rate-of-blacks-is-function-of-crime-not-racism.htm?Ntt=incarceration&p=4>.

⁶¹ NELLIS ET AL., *supra* note 1, at 6. See also, Michael Tonry & Matthew Melewski, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, 37 CRIME AND JUSTICE, 1, 33–34 (2008).

⁶² Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2 at Table 13 (May 2000), HRW.ORG, www.hrw.org/legacy/reports/2000/usa/Table13.pdf.

⁶³ See, e.g., Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269 (noting that “crime commission rates cannot be known directly and can only be estimated”).

⁶⁴ See, e.g., Alfred Blumstein, *On the Racial Disproportionality of the U.S. States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

⁶⁵ *Uniform Crime Reports*, FEDERAL BUREAU OF INVESTIGATION, www.fbi.gov/about-us/cjis/ucr/ucr (last visited Apr. 7, 2014).

⁶⁶ *Crime in the United States, 2006*, FEDERAL BUREAU OF INVESTIGATION, <http://www2.fbi.gov/ucr/cius2006/> (last visited Apr. 9, 2014).

⁶⁷ See, e.g., Crutchfield, *supra* note 60, at 16–22.

⁶⁸ Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 684 (2000).

⁶⁹ Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers’ Arrest Decisions*, 49 CRIMINOLOGY 473, 475 (2011); FRANK R. BAUMGARTNER & DEREK EPP, NORTH CAROLINA TRAFFIC STOP STATISTICS ANALYSIS 5 (2012) (North Carolina traffic stop data indicates that racial minorities are more likely to be searched and arrested following a traffic stop than White drivers who are pulled over on the same basis), available at <https://www.ncaj.com/index.cfm?pg=NCCREDPublications>.

⁷⁰ Jennifer L. Truman & Michael R. Rand, *Criminal Victimization, 2009*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 231327, 2010, at 9 Table 12, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf>.

⁷¹ Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269.

⁷² *See Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATISTICS, www.bjs.gov/index.cfm?ty=dcdetail&iid=245.

⁷³ *See, e.g.,* Paul Knepper, *Race, Racism, and Crime Statistics*, 24 S.U. L. REV. 71, 96–98 (1996).

⁷⁴ Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 5, at 269.

⁷⁵ Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 274 (2010).

⁷⁶ *United States v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005).

⁷⁷ *United States v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994), *rev'd* 34 F.3d 709 (8th Cir.1994).

⁷⁸ *Clary*, 846 F. Supp. at 783–84.

⁷⁹ Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?*, 276 JOURNAL OF AM. MED. ASS'N 1580 (1996).

⁸⁰ *See* Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010).

⁸¹ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994 85 Table 6.11; BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 112 Table 7.16.

⁸² BARBARA S. MEIERHOEFER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED 20 (1992), *available at* [www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/\\$file/geneffmm.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf).

⁸³ U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, Table 34 (2010), UNITED STATES SENTENCING COMMISSION, www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm.

⁸⁴ Erica Goode, *Incarceration Rates for Blacks Have Fallen Sharply, Report Shows*, N.Y. TIMES, Feb. 27, 2013, available at www.nytimes.com/2013/02/28/us/incarceration-rates-for-blacks-dropped-report-shows.html?_r=0.

⁸⁵ Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 373, 391–392 (2012).

⁸⁶ See Jeffrey B. Welty, *North Carolina’s Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2013/07 (UNC School of Government, Aug. 2013), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf>; see also Jamie Markham, *Changes to the Habitual Felon Law*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Nov. 10, 2011), <http://nccriminallaw.sog.unc.edu/?p=3042>; see also G.S. 14-7.25 through G.S. 14-7.31 (providing that, in the case of felony breaking and entering, the habitual status may attach upon the commission of a second breaking and entering offense).

⁸⁷ North Carolina Advocates for Justice (NCAJ) Task Force on Racial and Ethnic Bias Executive Summary, available at www.ncaj.com/index.cfm?pg=NCCREDPublications.

⁸⁸ Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211 (2011) (discussing racial impact statement requirements in Minnesota, Iowa, and Connecticut); 2013 Or. Laws, Ch. 600, available at https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013orLaw0600.pdf.

⁸⁹ See, e.g., John Lyon, *Arkansas Legislature: Proposal Would Require Racial Impact Statements For Some Bills*, TIMES RECORD ONLINE EDITION, March 4, 2013, available at <http://swtimes.com/sections/news/politics/arkansas-legislature-proposal-would-require-racial-impact-statements-some>.

⁹⁰ London, *supra* note 88, at 212.

⁹¹ *Caldwell v. Texas*, 137 U.S. 692, 697 (1891).

⁹² J. Harvey Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 945 (1975).

⁹³ *Whren v. United States*, 517 U.S. 806 (1996).

⁹⁴ *United States v. Armstrong*, 517 U.S. 456 (1996).

⁹⁵ *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

⁹⁶ *Peters v. Kiff*, 407 U.S. 493 (1972).

⁹⁷ *State v. Cofield*, 320 N.C. 297 (1987).

⁹⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁹⁹ *United States v. Smart*, 518 F.3d 800, 804 n.1 (10th Cir. 2008).

¹⁰⁰ *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159 (1983).

¹⁰¹ *Whren v. United States*, 517 U.S. 806, 813 (1996); *see also State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution).

¹⁰² *See infra* § 2.3A, Equal Protection Claims May Strengthen Fourth Amendment Challenges.

¹⁰³ *See infra* § 2.6C, Challenging Checkpoints as Racially Discriminatory.

¹⁰⁴ *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *State v. McNeill*, 326 N.C. 712 (1990).

¹⁰⁵ *See Duren v. Missouri*, 439 U.S. 357 (1979).

¹⁰⁶ *Eason v. Spence*, 232 N.C. 579, 584 (1950).

¹⁰⁷ *See State v. Wright*, 274 N.C. 380 (1968).

¹⁰⁸ *See State v. Cofield*, 320 N.C. 297 (1987).

¹⁰⁹ *McNeill*, 326 N.C. 712.

¹¹⁰ *See* G.S. 114-10.01.

¹¹¹ *Id.*; *see also infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

¹¹² *See* G.S. 15A-279(d); G.S. 7A-451(b)(2).

¹¹³ *See* G.S. 15A-284.52(b)(14)

¹¹⁴ The Innocence Project, *The Role of Race in Misidentification*, INNOCENCE BLOG (Aug. 11, 2008), www.innocenceproject.org/Content/The_role_of_race_in_misidentification.php.

¹¹⁵ G.S. 15A-211(d) (effective for offenses committed on or after December 1, 2011).

¹¹⁶ G.S. 20-16.3A(d).

¹¹⁷ G.S. 20-16.3A(2a).

¹¹⁸ G.S. 20-16.3A(a1).

¹¹⁹ See G.S. 15A-971 through G.S. 15A-980.

¹²⁰ See, e.g., *State v. Cooper*, 186 N.C. App. 100 (2007) (evidence from warrantless search should have been suppressed where officer's knowledge that a Black male had committed armed robbery did not, without more, constitute reasonable suspicion of criminal activity justifying a "Terry" stop).

¹²¹ Norman C. Amaker, *The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 6–7 (1995).

¹²² Robin Walker Sterling, *Raising Race*, THE CHAMPION, April 2011, at 24, 26.

¹²³ See CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* 14 (2009).

¹²⁴ NORTH CAROLINA RULES OF PROF'L CONDUCT R. 1.3.1 (Diligence), *available at* www.ncbar.com/rules/rpcsearch.asp.

¹²⁵ NORTH CAROLINA RULES OF PROF'L CONDUCT R. 0.1.1, 0.1.6 (Preamble).

¹²⁶ Sterling, *supra* note 122, at 26.

¹²⁷ EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010), *available at* www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

Name It and Claim It: Implicit Bias

Civil Session

Erika Wilson

Thomas Willis Lambeth Distinguished Chair in
Public Policy at the University of North Carolina at
Chapel Hill School of Law

CLE Outline

Subject: Civil Lawyering and Race

Description: My portion of the presentation will focus on the ways in which race impacts civil lawyering process. The presentation will focus on how race influences professional identity, and how race influences civil case strategies in a broad range of civil areas including bankruptcy, housing, and employment.

Outline:

- I. Intro – The Construction of Race and Why It Matters
- II. Race and Professional Identity Formation
 - a. Intergroup Theory
 - b. Implicit Bias
 - c. Social Dominance Theory
- III. Race and Civil Lawyering Strategies: Some Examples from the field
 - a. Bankruptcy – how race influences the type of bankruptcy filed
 - b. Employment – the tendency towards universalist claims rather than race specific claims
 - c. Housing - how race shapes the claims lawyers see

2005

White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law

Russell G. Pearce

Fordham University School of Law

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WHITE LAWYERING: RETHINKING RACE, LAWYER IDENTITY, AND RULE OF LAW

Russell G. Pearce*

The triumph of what might be termed the standard version of the professional project would, I believe, be the creation, by virtue of professional education, of almost purely fungible members of the respective professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.

- Sanford Levinson¹

I am one-of-a-kind as a person—as is everyone who reads this chapter. I am also a member of the white racial group—as everyone who reads this chapter is a member of a racial group. I am male—as everyone who reads this chapter has a gender-group membership. In these three psychological conditions, we all participate. Even if I were to try to escape my racial—or gender—group memberships, members of my own and other racial and gender groups would treat me as if I were a member of my groups.

- Clayton P. Alderfer²

This Essay will explore what it means to be a white person in the legal profession³ and how recognition of whiteness as racial identity⁴

* Professor of Law, Fordham University School of Law; Co-Director, Louis Stein Center for Law and Ethics. I would like to thank Clay Alderfer, Regina Austin, Noran Camp, Clark Cunningham, Sheila Foster, Brian Glick, Jennifer Gordon, Bruce Green, Isabelle Gunning, Craig Gurian, Robin Lenhardt, Robert Smith, David Thomas, Paul Tremblay, and Amy Uelmen for their comments. I would also like to thank my research assistant Jadhira Rivera for her wise counsel and excellent work.

1. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1578-79 (1993).

2. Clayton P. Alderfer, *A White Man's Perspective on the Unconscious Processes Within Black-White Relations in the United States*, in Human Diversity: Perspectives on People in Context 201, 202 (Edison J. Trickett et al. eds., 1994).

3. Although this Essay focuses on whiteness, it makes no claims—and indeed rejects the notions—that race is the only significant identity in lawyering or that racial identity does not intersect and interact with other identities. See *infra* Parts II, IV. A number of scholars have discussed how nonracial identities influence lawyering. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculating on a Woman's Lawyering Process*, 1 Berkeley Women's L.J. 39, 45-58 (1985) (gender); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 Case W. Res. L. Rev. 127 (2004) (religion); William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48

requires a dramatic rethinking of professional norms. As white people, we too often view racial issues as belonging to people of color.⁵ We tend to do that in one of two ways. Some whites believe that race generally does not matter except in the rare case of an intentional racist. Other whites view whites generally as racists and look to people of color to tell them how to understand issues of race. This Essay rejects both of these approaches. The Essay argues that for white lawyers, as well as lawyers of color, increased “competence [in] dealing with racial matters” and “speak[ing] openly, frankly, and professionally about relations”⁶ is necessary both to competent client representation and equal justice under law.

Hastings L.J. 1101 (1997) (sexual orientation). For a discussion of intersectionality, see, for example, Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 Mich. J. Race & L. 285 (2001); Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 Stan. L. Rev. 1183 (1991); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars As Cultural Warriors*, 75 Denv. U. L. Rev. 1409 (1998). Many commentators have previously written on racial identity and lawyering, either generally, see, e.g., Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* 241-327 (2001); Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 Stan. L. Rev. 1807 (1993); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373 (2002), or from the perspective of lawyers of color, see, e.g., Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 Colum. J. Gender & L. 387, 410 (1996); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502 (1998). Fewer commentators have examined the issue through the lens of the white lawyer. See, e.g., Harrison & Montoya, *supra*, at 410; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219, 232 (2002).

4. There is an extensive literature on whiteness. See, e.g., *Critical White Studies: Looking Behind the Mirror* (Richard Delgado & Jean Stefancic eds., 1997) [hereinafter *Critical White Studies*]; Ian F. Haney López, *White by Law: The Legal Construction of Race* (1996); Stephanie M. Wildman, *Privilege Revealed: How Invisible Preference Undermines America* (1996); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L.J. 2009 (1995); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, *Creation Spirituality*, Jan.-Feb. 1992, at 33.

5. See *infra* Part III.A.

6. Alderfer, *supra* note 2, at 218. Organizational theorist Clayton Alderfer finds this framing more useful than liberal use of the term “racist.” He argues that [t]he number of individuals who are deeply and profoundly racist characterologically is small in comparison to the amount of collective racism most of us participate in a good deal of the time. Moreover, labeling an individual serves mainly as a defensive function for the labeler and, if the

Applying the insights of intergroup theory, the Essay suggests that whether they view themselves as color-blind or racist, white lawyers understandably have a tendency to treat whiteness as a neutral norm or baseline, and not a racial identity, and tend to view racial issues as belonging primarily to people of color, whether lawyers or clients.⁷ This approach is consistent with, and reinforces, the prevailing professional norm that lawyers should “bleach out” their racial, as well as their other personal, identities.⁸

As this Essay explains, this unfortunate symbiosis of whiteness and professionalism undermines the work of lawyers both in their representation of clients and in their systemic efforts to promote the rule of law.⁹ The latest research in the field of organizational behavior suggests that the assumption of lawyer neutrality so central to lawyer professionalism is not only wrong descriptively, but that it also undermines the very goals it seeks to promote. In particular the pathbreaking research of Robin Ely and David Thomas demonstrates that in a diverse society and legal profession an integration-and-learning perspective that openly acknowledges and manages racial identity would far better promote excellent client representation and equal justice under law than the currently dominant commitment to color blindness.¹⁰

I. INTERGROUP THEORY

Intergroup theory offers a way to “understand, explain, and predict relations between groups . . . in organizations.”¹¹ It suggests that group identities, such as racial identity, influence conduct in organizations.¹² The organizations comprising the legal system

expression is made directly to the individual, heightens resistance to learning by that person and by anyone who may observe the event.

Id. Alderfer instead advocates a “formulation emphasiz[ing] greater understanding and improved skill rather than blame.” *Id.*

7. *See infra* Parts II, III.

8. *See infra* Part III.

9. *See infra* Parts III, IV.

10. *See infra* Part IV.

11. Clayton P. Alderfer, *Problems of Changing White Males' Behavior and Beliefs Concerning Race Relations*, in *Change in Organizations* 122, 137 (Paul Goodman & Assocs. eds., 1982). Intergroup theory defines a group as

a collection of individuals (1) who have significantly interdependent relations with each other, (2) who perceive themselves to be a group by reliably distinguishing members from nonmembers, (3) whose group identity is recognized by nonmembers, (4) who, as group members acting alone or in concert, have significantly interdependent relations with other groups, and (5) whose roles in groups are therefore a function of expectations from themselves, from other group members, and from nongroup members.

Alderfer, *supra* note 2, at 222.

12. Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 *Cardozo L. Rev.* 1613, 1632 (1993); *see* Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational*

include the system itself, as well as constituent organizations such as law schools, law firms, courts, bar groups, and the profession as a whole.¹³ Within these organizations, individuals "are shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant degree, and the groups with whom others associate them—whether or not they wish such an association."¹⁴ The two major groups in organizations are "identity groups and organization groups."¹⁵

As I noted in an earlier article, "[p]rofessional socialization as a lawyer is an organizational group identification."¹⁶ Membership in organizational groups is "based on task, function and hierarchy."¹⁷ Persons in organizational groups share "similar primary tasks, participate in comparable work experiences and, as a result, tend to develop common organizational views."¹⁸ Being a member of the lawyer organizational group "involves similar tasks, comparable experiences, and comparable organizational views. Among the factors that make law a particularly powerful group experience is the shared three years of law school, often at a young age, combined with a long and often continuous membership in the profession."¹⁹

While all lawyers are members of the lawyer organizational group, that group further divides into other organizational groups, such as partners and associates, or litigators and judges.

Identity group membership, such as race, derives from identities external to the organization. As a general matter, "[m]embers of identity groups share common biological characteristics, participate in equivalent historical experiences and, as a result, tend to develop similar world views."²⁰ Identity group membership is sufficiently powerful that it influences conduct within organizations.²¹ Its power

Behavior, in *International Review of Industrial and Organizational Psychology* 1, 6-7 (Cary L. Cooper & Ivan T. Robertson eds., 1988).

13. I have previously applied intergroup theory to the role of religious identity in the legal system. See Pearce, *supra* note 12, at 1631-34.

14. Alderfer & Thomas, *supra* note 12, at 7.

15. David A. Thomas & Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, in *Handbook of Career Theory* 133, 145 (Michael B. Arthur et al. eds., 1989). The original source for this theory is Clayton P. Alderfer & Ken K. Smith, *Studying Intergroup Relations Embedded in Organizations*, 27 *Admin. Sci. Q.* 35, 38 (1982).

16. Pearce, *supra* note 12, at 1633.

17. *Id.* at 1632.

18. Thomas & Alderfer, *supra* note 15, at 145.

19. Pearce, *supra* note 12, at 1633.

20. Thomas & Alderfer, *supra* note 15, at 145. Although not directly relevant to this Essay's analysis of racial identity, I have previously argued that biological characteristics are not necessary to the creation of an identity group. For example, "a religious identity group, such as Jews," can share "'equivalent historical experiences' leading to 'similar world views'" without sharing biological characteristics. Pearce, *supra* note 12, at 1632 n.122.

21. Pearce, *supra* note 12, at 1632.

derives from its pervasive role in an individual's life. Identity group membership often begins at birth and continues throughout an individual's life "or, as in the case of age, changes as the result of natural development."²² While powerful, organizational group memberships generally develop later than identity groups and "can change as people enter and leave organizations" or shift their role within organizations.²³

According to intergroup theory, "individuals and organizations are constantly attempting, consciously and unconsciously, to manage potential conflicts arising from the interface between identity and organization group memberships."²⁴ As Clayton P. Alderfer has noted, "[r]elations among identity groups and among organizational groups are shaped by how these groups and their representatives are embedded in the organization and also by how the organization is embedded in its environment."²⁵ Embeddedness is congruent "where power relations at a particular level within an organization are similar to those at other levels of the organization, or in society as a whole," and incongruent where they are not.²⁶ Incongruent embeddedness causes increased strain for the individual and the organization.²⁷

II. DRAWING A PICTURE OF THE WHITE LAWYER

In 1991, I was part of a team that created an intergroup theory exercise for the first-year class at the University of Pennsylvania Law School.²⁸ I use a version of this exercise in my ethics seminar as a way to begin a unit on lawyer identity and justice. The students' task is to work in identity groups to create a picture²⁹ describing their identity group's experience as law students.³⁰

To facilitate the formation of identity groups, the exercise starts by dividing the students into four race- and gender-based groups: women

22. Thomas & Alderfer, *supra* note 15, at 145.

23. *Id.*

24. *Id.*

25. Alderfer, *supra* note 11, at 142.

26. Pearce, *supra* note 12, at 1633 (citing Alderfer & Thomas, *supra* note 12, at 15-16).

27. Alderfer & Thomas, *supra* note 12, at 15-16.

28. The authors of the group were a four-person mixed-race and -gender team led by Professor David Thomas of Harvard Business School. The other members of the team were Professor Robin J. Ely of Harvard Business School, Professor Elaine Yakura of Michigan State University School of Labor and Industrial Relations, and me. The original exercise was a four-hour unit on diversity in the legal profession.

29. Students often object to drawing a picture, as did I originally as the only legal academic among the authors of the exercise. The rationale for drawing a picture, as well as for focusing on the student's personal experiences, is that law students are verbally talented people who are adept at using verbal strategies to avoid connecting their personal feelings to their intellectual inquiries. My experience has been that my first reaction was wrong and that the exercise of drawing a picture leads to extraordinarily valuable results.

30. This should include work experiences during law school.

of color, men of color, white women, and white men.³¹ The basis for this division is the hypothesis that for most students, their race and gender are the most salient identities. I then suggest that the students consider dividing their groups further according to other identities that result in significantly different experiences. These identities could include the various subgroups within the people of color group, including Asian, Black, or Latino; as well as identities found in all groups, such as sexual orientation, class, disability, and whether the student went directly from college to law school.³² When the identity groups complete their pictures, they post them on the wall and describe them. The class discussion begins with the role of identity group differences in the law school experience and moves to the role of these differences in the legal system and their implications for the rule of law.³³

For this Essay, I have essentially done what I have often asked my students to do. My picture of the law school offers a collage of views. To illustrate the ease I feel as a white person in a position of authority in a predominantly white institution, I would draw a picture of myself discussing the question of whether to invite students to call them by their first name in class with colleagues who are white women and people of color—I do and they do not. This ease sometimes makes me miss ways in which issues of race and gender influence my work. As I draw this picture, I realize that in recent years, I have become so complacent that I have not spent time thinking about how having a white man as the facilitator influences the students and me, and I am considering returning to a past practice of inviting faculty of color into the conversation with the students.

My picture will also identify how some students—usually but not always white—will reject identifying themselves on the basis of race and how some students—usually but not always students of color—will indicate that race is a significant part of their experience as law students. Students of color, but never yet a white student, will describe the experience, while working during the summer, of having lawyers mistake them for secretaries or messengers.

I would draw a similar picture of my Housing Rights Clinic. When the white students—or I—wear a suit and go to court to teach the Housing Rights Clinic, the first assumption of court personnel is that we are lawyers. Almost every year, we will have an incident where

31. Not all students readily fit themselves into one of these four groups. Mixed-race students have asked to create their own group and Arab-American students have struggled with their identity.

32. While the students in the first-year class at Penn readily divided themselves into subgroups, most students in my seminar decide to stay together and reflect their diversity in their picture. I believe this occurs because the smaller number of students in the seminar makes it difficult for students both to separate into subgroups and to find colleagues with whom to share the exercise.

33. These classes are both pedagogically valuable and emotionally difficult.

court personnel or opposing lawyers assume that a student of color is a party and not a legal representative.

These relations in the legal system mirror, in turn, relations in society as a whole. I would depict what I think of as well-dressed white man's privilege—the ability often (though less often since 9/11) to walk confidently past a security guard without being questioned, in contrast to friends of color who have had the opposite experience of more intense scrutiny. I would add to the societal section a picture of the judge of color who tells how white people assume he is a doorman when he holds a door for them as a courtesy.

My picture is informed both by my personal experience and by the literature on race relations. As a general descriptive matter, white people are the dominant racial group in legal organizations. They represent 83.2% of judges,³⁴ 89.2% of lawyers,³⁵ and 79.5% of law students,³⁶ percentages which exceed the 75.1% of the American population that is white.³⁷ In elite legal jobs, the white domination is even greater. Whites represent almost 98% of partners in the 100 top law firms.³⁸

As the dominant racial group, whites can view ourselves as having no particular racial identity. An African-American friend recently described his impression that newspaper stories describing lawyers usually identified the race of lawyers of color but mentioned no race for white lawyers. As a member of the dominant group in the legal profession, the white lawyer is the norm.³⁹ With regard at least to our race, we start by looking around the room and feeling like we belong, as is so often the experience of white students, particularly the men, in my seminar who do not see race as a useful way to discuss their experience. We feel comfortable with authority. Accordingly, I do

34. Am. Bar Ass'n, Statistics about Minorities in the Profession from the 2000 Census, at <http://www.abanet.org/minorities/links/2000census.html> (last visited Feb. 21, 2005).

35. *Id.*

36. Am. Bar Ass'n, Statistics of J.D. Degrees Awarded from 1984-2002, at <http://www.abanet.org/legaled/statistics/jd.html> (last visited Feb. 21, 2005).

37. U.S. Census Bureau, USA: People Quickfacts, at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Feb. 22, 2005).

38. Harvey Berkman, *Past Struggles Echo as Clinton Makes a Pitch for Pro Bono Work*, Nat'l L.J., Aug. 2, 1999, at A8. David B. Wilkins and G. Mitu Gulati have provided a comprehensive analysis of this phenomenon with regard to black lawyers. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal. L. Rev. 493, 496 (1996) (noting that "[a]lthough the number of black students graduating from law schools has increased significantly in recent decades, blacks still make up a very small minority of the lawyers working in large corporate firms (emphasis omitted)).

39. See, e.g., Wildman, *supra* note 4, at 14-20; Flagg, *supra* note 4, at 2013; McIntosh, *supra* note 4, at 33-34.

not worry that my students will challenge my authority when I invite them to call me by my first name.⁴⁰

Another aspect of viewing ourselves as having no particular racial identity is seeing issues of race as that of people of color and not of white people.⁴¹ I represent this phenomenon in my picture through my white students who do not see themselves as having a white identity and who object to exploring issues of race. Clayton P. Alderfer has observed that “[w]hite people do not easily discuss race relations. For most whites, the range of feelings goes from uncomfortable to severely uncomfortable.”⁴² He finds that whites’ “most common behavioral pattern is avoiding the issue, if at all possible. When that response is not feasible, the next line of defense is to deny the presence of racial dynamics.”⁴³

The experience of law students and lawyers of color is quite different. As a minority group in the legal profession, they have “no choice except to learn about white culture if they are to survive.”⁴⁴ When people of color look around the room, they know they are not the dominant culture and do not necessarily assume the same fit and the same authority. Enhancing this effect is the congruence of white dominance in the legal profession with white dominance in a society where whites have a greater share of wealth and power.⁴⁵ When white lawyers, judges, and court personnel assume my students of color are tenants and not legal representatives, or assume a summer associate of color is a member of the support staff, they are applying generalizations about race relations congruent with the relative distribution of racial power found in society in general.⁴⁶ The incongruence of the authority position of being a lawyer, or of having a position of authority within the legal profession, complicates the organizational tasks of lawyers of color.

While race makes a significant difference in our experiences as lawyers, intergroup theory reminds us that it is not determinative.⁴⁷

40. I have to admit, though, that I believe I am alone even among my white male colleagues in inviting students to call me by my first name although a number of faculty call students by their first name.

41. See, e.g., Harrison & Montoya, *supra* note 3, at 410; see also *infra* Part III.A.

42. Alderfer, *supra* note 2, at 217.

43. *Id.*

44. Alderfer, *supra* note 11, at 144.

45. See, e.g., Andrew Hacker, Two Nations: Black and White, Separate, Hostile, and Unequal (1995); CNN.com, *Wealth Gap Seen As Top Civil Rights Issue: Blacks Lag in Stock Market Investments, Home Ownership*, at <http://www.cnn.com/2005/US/01/17/wealth.gap.ap/index.html> (Jan. 17, 2005) (noting that “black families as a whole had only 10 cents in wealth for every dollar white families had”).

46. For a more detailed description of experiences of lawyers of color, see Peggy C. Davis, *Law as Microaggression*, 98 Yale L.J. 1559 (1989), and for academics of color, see Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 Chi.-Kent L. Rev. 331 (1992).

47. See Alderfer, *supra* note 2, at 202-03.

These experiences, like those relevant to organizational groups and other identity groups to which we belong, provide us with data. How we manage that data—whether we acknowledge it consciously and how we respond to it—is a matter of choice on both an individual and group level.⁴⁸ One way I choose to manage my white identity is to acknowledge and discuss issues of race with my students and colleagues and, indeed, to write this Essay as a way of communicating with a broader group of legal academics, lawyers, and law students. Although this Essay represents a preliminary account of the white experience in the legal profession, this part offers at least two conclusions: White racial identity exists and whites tend to avoid acknowledging their identity.

III. THE SYMBIOSIS OF WHITENESS AND PROFESSIONALISM UNDERMINES WHITE LAWYERS' WORK

Despite the persistence of racial identity group influences, white lawyers tend to deny the influence of their racial identity group on their work as lawyers. When professionalism's ideological commitment to color blindness reinforces this tendency, the resulting symbiosis undermines the capacity of white lawyers to represent clients to the best of their ability.

A. *The Symbiosis of Whiteness and Professionalism*

A dominant value common to the organizational identity of lawyers is professionalism's commitment to the color blindness of lawyers' conduct.⁴⁹ In Sandy Levinson's famous formulation, professional socialization "bleaches out" racial differences among lawyers, as well as other individual characteristics.⁵⁰ Under this view, all lawyers should be—and in most instances are—fungible. Not only should race play no role in how a lawyer approaches her work, but with few exceptions it will play no role. White lawyers who follow the

48. *See id.*

49. An interesting illustration of this phenomenon is found in a study of the lawyers in the Civil Division of the Legal Aid Society. Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 Buff. Pub. Int. L.J. 1 (2000). Although white lawyers and lawyers of color differed markedly as to whether race was a factor in representation and whether "clients take the race of their attorney into account," a majority of lawyers of all races agreed that they personally did not "take the race of their client into consideration." *Id.* at 33-45, 53. Accordingly, with regard to how they understood their own thought processes, lawyers of all races shared a commitment to color blindness derived from membership in the lawyer organizational group that apparently trumped differences based on membership in different racial identity groups.

50. Levinson, *supra* note 1, at 1578-79; *see* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 Am. B. Found. Res. J. 613, 616-18 (1986); Wilkins, *supra* note 3, 1503-06, 1514-50.

dominant approach will actually believe that this is an accurate account and that they themselves are neutral as to race. Accordingly, they will reject the notion that they should examine the influence of their white identity on their lawyering.

Of course, in doing so, they are reinforcing their general tendency as white people to avoid issues of race. While a small minority of whites embrace their white racial identity, with both its positive and negative aspects,⁵¹ most whites tend to see themselves as the neutral norm, rather than as a particular racial identity.⁵² Race is for people of color.

Some whites with this perspective will view law practice, like society, as essentially color-blind.⁵³ In this world, racial influence is rare, generally extending only to those few whites who are openly racist. Accordingly, when people of color raise issues of race, they “play the race card”⁵⁴ and create phony issues to promote their own interests.

Other whites with a similar understanding of racial dynamics may reach an opposite conclusion. They believe that white racism is a significant societal problem. White people, lacking a proper claim to racial identity and colluding in white racial dominance, have little to offer on racial issues. Under this view, people of color have—and whites lack—the ability to understand, or to engage in productive discussions regarding, race. White people should defer to people of color who are experts on race.⁵⁵

51. Alderfer, *supra* note 2, at 220-21.

52. *Id.* at 217-21; *see supra* note 39.

53. *See* Alderfer, *supra* note 2, at 217.

54. A famous example of this approach is found in the critique of Johnnie Cochran “playing the race card” in the O.J. Simpson trial. *See* Jeffrey Rosen, *The Bloods and the Crisis: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, New Republic, Dec. 9, 1996, at 27, 41-42. For responses to this critique, *see* Frank I. Michelman, Foreword: “Racialism” and Reason, 95 Mich. L. Rev. 723, 735 (1997); Margaret M. Russell, *Representing Race: Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straightjacket of Legal Practice*, 95 Mich. L. Rev. 766, 788-94 (1997); Wilkins, *supra* note 3, at 1514-50; David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 Mich. L. Rev. 795 (1997).

55. *See, e.g.*, Alderfer, *supra* note 2, at 219-20 (describing white “true-believer antiracism”); *Treason to Whiteness Is Loyalty to Humanity: An Interview with Noel Ignatiev of Race Traitor Magazine*, in *Critical White Studies*, *supra* note 4, at 607, 609 (asserting that “[b]lackness means total, implacable, and relentless opposition to that system. To the extent so-called whites oppose the race line, repudiate their own race privileges, and jeopardize their own standing in the white race, they can be said to have washed away their whiteness and taken in some blackness”); Peter Halewood, *White Men Can Jump: But Must Try a Little Harder*, in *Critical White Studies*, *supra* note 4, at 627, 628 (asserting that the notion that white scholars can proceed with “a feminist or anti-racist” analysis is “fundamentally flawed” and that white scholars should instead study “[a] particular form of subordination . . . from those who actually live that perspective rather than attempting to master it in the abstract”); Harrison & Montoya, *supra* note 3, at 410 (observing that “[a]t first, . . . I thought no one was

Professionalism's "bleaching out" approach and these tendencies of white people mutually reinforce certain conduct. They discourage white lawyers from acknowledging that their race is an influence and from exploring the extent to which their white identity plays a role in their work settings. They further discourage white lawyers from engaging in dialogue regarding issues of race with each other, as well as with people of color. In a diverse legal system, where white lawyers work with colleagues, adversaries, judges, clients, and witnesses of color, the potential negative impact of these practices on a lawyer's work is quite significant.

B. How the Symbiosis Undermines Lawyer's Work: An Illustration

White law professor Clark Cunningham has provided an extraordinarily thoughtful and nuanced analysis of the representation he and two white students provided an African-American man facing a misdemeanor charge of disturbing the peace arising from a traffic stop.⁵⁶ The police officer had described the African-American client as having told the police he had been stopped "'because he was black'" and the Judge "described [the] client as 'hollering racism.'"⁵⁷ Nonetheless, even though Cunningham suspected that "what happened . . . was a 'racial incident,' . . . as a lawyer [he] did not talk about 'the case' that way, and therefore [he] ceased to think in terms of racial issues"⁵⁸ Accordingly, Cunningham and the students did not discuss with their client, or argue to the court, that the treatment of their client had a racial dimension.⁵⁹ After the prosecution dismissed the case, the client angrily assailed Cunningham and the students for patronizing him and treating him the same way that other white authority figures did.⁶⁰

Cunningham attributes the failure to address the racial aspects of the case to two factors. First, the client never raised the claim with his white lawyers. Cunningham suggests that his African-American client

interested in hearing what I termed my 'white or Anglo angst,' but, among other things,] . . . by only seeing myself as white and privileged and Margaret as an oppressed person of color, I essentialized her and forced her to do most of the work"). Whites are not alone in taking this position. See, e.g., Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, Clearinghouse Rev., Special Issue 1993, at 311, 312-14.

56. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298 (1992). This article has been the subject of extensive commentary. See, e.g., Anthony V. Alfieri, *Stances*, 77 Cornell L. Rev. 1233 (1992); Harrison & Montoya, *supra* note 3, at 420-21; Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345 (1997); Silver, *supra* note 3.

57. Cunningham, *supra* note 56, at 1370.

58. *Id.* at 1370-71; see also *id.* at 1325-26, 1368.

59. Interestingly, even though they did not discuss with their clients whether the incident was a racial one, they did ask whether the officers were white. *Id.* at 1323.

60. *Id.* at 1329-30.

might not have believed he could share with his white lawyers the view he expressed after the completion of the case—that the white lawyers would have been just as skeptical as other white authority figures were.⁶¹ Second, Cunningham and his students did not reach the racial issue because as lawyers they turned first to readily available “race neutral” defenses.⁶²

What Cunningham does not explore is the possibility that race influenced his own conduct and that of his students. Perhaps as whites and lawyers, they began assuming the norm that race is not a factor. Therefore, they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client. Indeed, their expectation that the African-American client would raise issues of race if they existed suggests that the white lawyers might have applied the assumption that race is an issue for people of color and not for whites.

The lawyers’ white identity could also have attributed to their failure to follow up on specific evidence indicating that they should explore how racial identities influenced the case. Here, the police report revealed that the African-American client had suggested that his race was a factor in his stop. When the white judge described the charge against the African-American defendant as an “attitude”⁶³ charge, he may very well have been signaling that the charge resulted from the defendant’s inappropriate and racially based response to the police officers. Even though Cunningham as a progressive white person had an “impression” that the incident was racial, he may not have pursued this intuition⁶⁴ because the embeddedness of the authority relationship with his client was consistent with that of the white police officer and judge. After the case ended, the African-American client certainly noted that this was his perception—that the white lawyers had treated him in the same paternalistic way as the other white authority figures.

Last, Cunningham’s explanation that the white lawyers naturally turned to a race-neutral strategy represents a symbiosis of whiteness and of professional values. The professional ideal that lawyers and law should be neutral provides support for preferring a race-neutral strategy if readily available, as in this case. It also supports the tendency of whites to avoid confronting racial issues. In this way, whiteness and professional values are mutually reinforcing.

This example is but one illustration of how the symbiosis of whiteness and professionalism undermines white lawyers’ ability to provide their clients with optimal representation. Of course, as intergroup theory suggests, quality lawyering requires attention to

61. *Id.* at 1378.

62. *Id.* at 1371, 1377.

63. *Id.*

64. *See supra* note 58 and accompanying text.

race on the part of all lawyers, not just white lawyers, and in all situations, not just cross-racial ones. The dominant professional paradigm of “bleaching out” race (and other differences) is wrong both as a matter of description and as a matter of maximizing the effectiveness of a lawyer’s work.

IV. RETHINKING THE CONSTRUCTION OF PROFESSIONAL IDENTITY AND RULE OF LAW

Two central goals lawyers share through their organizational group identity as members of the legal profession are commitment as an individual or firm to excellence in representing clients, and commitment as a community to maintaining a legal system that adheres to the rule of law. In order for lawyers to improve their ability individually and communally to attain these goals, the legal profession should discard the bleaching out assumption in favor of an integration-and-learning perspective that acknowledges the influence of identity group affiliations on lawyers’ work.⁶⁵

A. *The Integration-and-Learning Approach Works Better Than a Color-Blind Model*

In two recent studies, leading organizational scholars Robin Ely and David Thomas have demonstrated that the “integration-and-learning” paradigm is more effective in achieving organizational goals than the “discrimination-and-fairness” model currently dominant in the legal profession.⁶⁶ In the integration-and-learning approach, members of a work force “are receptive to the notion that racial differences may underlie team members’ expectations, norms, and assumptions about

65. David Wilkins has eloquently argued that a lawyer can possibly reconcile race consciousness with prevailing professional norms. Wilkins, *supra* note 3, at 1567-94. Even if it were possible for most lawyers to “[l]earn[] to [l]ive in the [c]ontradictions,” *id.* at 1569, as Wilkins urges, (and I am skeptical that it is), this Essay deals with a slightly different question—not whether consciousness of racial identity is permissible under professional norms but whether it is preferable in order to achieve professional goals. Wilkins seeks to delineate the moral obligations of black lawyers and to preserve a commitment to social justice amidst “market-based diversity arguments.” David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv. L. Rev. 1548 (2004); see also David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 Geo. J. Legal Ethics 855 (1998) [hereinafter David B. Wilkins, *Do Clients Have Ethical Obligations?*]; Wilkins, *supra* note 3.

66. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 Admin. Sci. Q. 229, 260-65 (2001) [hereinafter, Ely & Thomas, *Cultural Diversity*]; Robin J. Ely & David A. Thomas, *Team Learning and the Racial Diversity-Performance Link* 23-35 (2004) [hereinafter Ely & Thomas, *Team Learning*] (Harvard Business School Working Paper No. 05-026) (on file with author). David Wilkins has noted the importance of their work to lawyering. See, e.g., David B. Wilkins, *Do Clients Have Ethical Obligations?*, *supra* note 65, at 861-67; Wilkins, *supra* note 3, at 1592.

work and that these differences are worth exploring as a source of insights into how the group might improve its effectiveness.”⁶⁷ Co-workers “openly acknowledge and negotiate their differences in service of their goals.”⁶⁸

In contrast, in the discrimination-and-fairness approach, such as the “bleaching out” paradigm dominant in the legal profession,⁶⁹ “cultural diversity is a mechanism for eliminating racial injustice, and . . . is of no use in furthering the group’s work.”⁷⁰ Under this paradigm, “group members aspire to be color blind” and confine “discourse about race . . . to the possibility of racial biases in the group.”⁷¹

Ely and Thomas found significant advantages for the integration-and-learning approach.⁷² In one study, they examined organizations employing competing models. The integration-and-learning workplace benefited from “cross-cultural exposure and learning and . . . work processes designed to facilitate constructive intergroup conflict and exploration of diverse views”; while the discrimination-and-fairness workplace displayed “low morale of employees, lack of cross-cultural learning, and the inability of employees of color to bring all relevant skills and insights to bear on work.”⁷³ In the integration-and-learning model, “all employees fe[lt] fully respected and valued for their competence and contributions”; this is in contrast to the discrimination-and-fairness workplace, where “[e]mployees of color

67. Ely & Thomas, Team Learning, *supra* note 66, at 9. Applying intergroup theory, the integration-and-learning perspective recognizes the continuing influence of identity group membership and “assume[es] that cultural differences, such as those stemming from race, are useful to the group because they give rise to different life experiences, knowledge, and insights.” *Id.*

68. *Id.*

69. See Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 584 (1999) (observing that “bleaching out” is the Ely and Thomas “discrimination-and-fairness” paradigm).

70. Ely & Thomas, Team Learning, *supra* note 66, at 11.

71. *Id.* at 12. Ely and Thomas also explore a third perspective—“access-and-legitimacy.” *Id.* at 11. Like the discrimination-and-fairness approach, the access-and-legitimacy model “assum[es] that cultural differences have limited value or are irrelevant to the group’s work.” *Id.* This model promotes “cultural diversity . . . insofar as it enables the organization to match market segments to parts of its workforce as a way to gain access and appear legitimate to those market segments.” *Id.* Organizations following this model “do not incorporate the cultural competencies of their members into their core functions but, instead, define circumscribed roles for racial minorities that limit their contributions to market-interfacing functions.” *Id.* This Essay will not examine this model in detail because it does not reflect the dominant approach of legal professionalism and because Ely and Thomas found it less effective than the integration-and-learning model. See Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261 tbl.3; Ely & Thomas, Team Learning, *supra* note 66, at 8-9. Nonetheless, it may very well be that some law firms apply this model in selecting lawyers of color to appeal to clients, adversaries, or juries of color, or that the selection procedures for judges might apply the model to selecting judges for communities of color.

72. See Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261.

73. *Id.* at 261 tbl.3.

fe[It] disrespected and devalued.”⁷⁴ Similarly, “racial identity at work” in the integration-and-learning model was “a source of value for people of color, a resource for learning and teaching, [and] a source of privilege for whites to acknowledge,” while in the discrimination-and-fairness model, racial identity was a “[s]ource of powerlessness for people of color [and a] source of apprehension for whites.”⁷⁵

Although race-related conflicts occurred in both organizations, under the integration-and-learning model, members of different identity groups perceived themselves as having “equal power and status” and “open[ly] discuss[ed] differences and conflict.”⁷⁶ In contrast, under the discrimination-and-fairness model, Ely and Thomas found “[i]ntractable race-related conflict stemming from entrenched . . . status and power imbalances; [with] no open discussion of conflict or differences.”⁷⁷

In another landmark study, Ely and Thomas compared the performance of more than “275 retail branches of a bank.”⁷⁸ They found that the integration-and-learning branches “significantly outperformed” the discrimination-and-fairness branches in key work performance criteria—“in new sales revenue and in total performance.”⁷⁹ Moreover, “racial diversity was negatively associated with all three performance measures in branches” with a color-blind approach, and “positively associated with them in branches with a positive racial learning environment.”⁸⁰

B. Applying the Integration-and-Learning Model to Legal Practice

The answer for the legal profession is to replace the “bleaching out” model, a discrimination-and-fairness approach, with an integration-and-learning strategy. As a preliminary step in this direction, this Essay will offer a framework for applying the teaching of Ely and Thomas to client representation and rule of law.

1. Integration-and-Learning in Client Representation

The integration-and-learning approach requires reflection and discussion in all aspects of client representation. As lawyers increase their “competence [in] dealing with racial matters,”⁸¹ they should consider how their identity group, as well as the identity groups of

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Ely & Thomas, Team Learning, *supra* note 66, at 25.

79. *Id.* at 23.

80. *Id.* at 25.

81. Alderfer, *supra* note 2, at 218.

others with whom they are working, influences their relationships with colleagues, clients, adversaries, and court personnel. Lawyers should then, with their colleagues and clients, make explicit that issues of race are open for discussion and “speak openly, frankly, and professionally about relations.”⁸² With this framework, lawyers will learn much more from their colleagues and clients, who in turn will learn much more from them.⁸³ As Ely and Thomas demonstrate, this framework will result in lawyers treating—and being perceived as treating—each other and their clients with more respect, moving beyond erroneous assumptions to more accurate analysis and more effective strategies, and working more successfully as a team with colleagues.⁸⁴

Ely and Thomas remind us that these strategies do not avoid conflict. Rather, they offer a more effective way to manage conflicts that are likely to occur or to exist even without open acknowledgement. As Ely and Thomas advise managers, lawyers should seek to maintain the trust necessary to implementing the integration-and-learning approach “by demonstrat[ing] commitment to the process and . . . by setting a tone of honest discourse, by acknowledging tensions, and by resolving them sensitively and swiftly.”⁸⁵

If the white lawyers had applied this approach in the case study described above, they would have acted quite differently. First, they would have asked themselves whether their white identity influenced how they perceived and were perceived by their African-American client, the white police officer, and the white judge. Second, from the beginning of the relationship and continuing throughout, they would have invited their client to engage with them openly on issues of race. Had they done so, they might have recognized the racial issues in the case themselves, have learned of those implications from their client, and have examined those issues in cooperation with their client. They most likely would not have missed the racial tension with their client, which existed throughout the representation but was only revealed by the client after the case was over.

While resembling some of the approaches in the literature on “cross-cultural lawyering,”⁸⁶ this approach has a different emphasis.

82. *Id.*

83. For an example of such learning, see Harrison & Montoya, *supra* note 3, at 410. See also Wilkins, *supra* note 3, at 1592 (asserting that “[t]o the extent that black lawyers help to open up a dialogue about the role of race and other forms of contingent identity on professional practice, they will have performed an important service for their own workplaces and for the profession as a whole”).

84. Cf. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Harv. Bus. Rev., Sept.-Oct. 1996, at 79, 89.

85. *Id.* at 90.

86. See, e.g., Koh Peters, *supra* note 3; Bryant, *supra* note 3; Silver, *supra* note 3; Tremblay, *supra* note 3.

Like cross-cultural lawyering, it rejects color-blindness and encourages self-reflection.⁸⁷ Like the better work on cross-cultural lawyering, it rejects the notions that cross-cultural lawyering is exclusively an issue for white lawyers or in cross-cultural situations.⁸⁸ Nonetheless, as a matter of emphasis, this rejection is much clearer under an integration-and-learning approach that views all lawyers and all clients as members of both organizational and identity groups at all times.⁸⁹

In one respect, though, the integration-and-learning approach is irreconcilable with cross-cultural lawyering. Where cross-cultural lawyering seeks a “non-judgmental approach towards yourself and client,”⁹⁰ the integration-and-learning approach rejects this goal as a form of unrealistic and counterproductive color blindness or culture-blindness. It instead requires informed judgments, together with “open[], frank[], and professional[]” exchanges regarding those judgments.⁹¹ These very different goals also result in a different emphasis with regard to learning. While both approaches value learning of all types, cross-cultural strategies place a greater relative emphasis on learning about different cultural styles, while the integration-and-learning model places a greater relative emphasis on learning between and among lawyers and clients themselves during their relationships.⁹²

2. Rethinking Rule of Law

Intergroup theory also requires rethinking the connection between “bleaching out” and rule of law. As discussed above, the term “bleaching out,” a term with obvious racial resonance,⁹³ describes professionalism’s commitment that all lawyers are fungible⁹⁴ and therefore free of influence from aspects of the self external to organizational group identity, including race as well as gender, religion, and other identity group characteristics.⁹⁵ The organizational

87. See, e.g., Bryant, *supra* note 3, at 37, 56; Tremblay, *supra* note 3, at 383.

88. See, e.g., Koh Peters, *supra* note 3, at 251; Bryant, *supra* note 3, at 52-53, 57.

89. See *supra* Part I.

90. Bryant, *supra* note 3, at 49. To be fair, Koh Peters and Bryant argue for “nonjudgmentalism” as a way to reduce defensiveness as a lawyer becomes aware of her own biases and not as grounds for ignoring bias altogether. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59. Nonetheless, as a strategy, it does counsel an “accepting” approach to recognizing biases and does not clearly demand judgments regarding those biases once they are acknowledged. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59.

91. Koh Peters, *supra* note 3, at 251; Alderfer, *supra* note 2, at 218.

92. Compare Bryant, *supra* note 3, at 40-48, and Tremblay, *supra* note 3, at 380-81, with *supra* text accompanying notes 69-85.

93. Levinson, *supra* note 1, at 1578-79; Pearce, *supra* note 12, at 1628-29; Wilkins, *supra* note 3, at 1506-07.

94. Levinson, *supra* note 1, at 1578-79.

95. *Id.*

group value of professionalism requires that race and other aspects of the self "become irrelevant to defining one's capacities as a lawyer."⁹⁶

This conception, in turn, derives from the mutually reinforcing perspectives of role morality and rule of law. Professional role morality presumes that "the professional's conduct is governed by the morality dictated by the profession and not from outside the profession."⁹⁷

The dominant conception of rule of law makes the command of role morality even stronger for lawyers than for other professionals. Under this view, "[r]ule of law implies that the quality of lawyering and of justice an individual receives does not depend on the group identity of the lawyer or judge."⁹⁸ This conception "posits that the clash of opposing views before a neutral fact finder is the best way to ascertain truth and justice."⁹⁹ For the system to work properly, "all parties [must] receive equal representation" and for that to happen, lawyers must "function as extreme partisans who should not bring their own [identity] to bear on their representation."¹⁰⁰

The theory of organizational behavior implicit in the "bleaching out" paradigm runs directly counter to intergroup theory. The professional socialization of organizational group affiliation within the legal profession denies the very existence of identity groups. But, as intergroup theory reminds us, demanding the exclusion of identity group influence from the classroom, courtroom, and law firm will not make it so.¹⁰¹ Individuals within organizations have both organizational group and identity group affiliations. No matter the organizational values, identity group influences persist.

Moreover, as an empirical matter, Ely and Thomas's findings demonstrate that "bleaching out" paradigms are less effective in promoting organizational goals than a perspective that acknowledges the persistence of identity group influences. They found, for example, that a color-blind approach tends to perpetuate imbalances and injustices between identity groups that exist within society as a whole and fails to encourage people to achieve the highest functioning in pursuing common goals.¹⁰² In contrast, the integration-and-learning

96. *Id.* at 1579.

97. Pearce & Uelmen, *supra* note 3, at 143; *see also* Wilkins, *supra* note 3, at 1503. This is true not only of lawyers but also of professionals generally. *See, e.g.*, Alderfer, *supra* note 2, at 210-13.

98. Pearce, *supra* note 12, at 1629.

99. Pearce & Uelmen, *supra* note 3, at 143.

100. *Id.*

101. *See, e.g.*, Robert T. Carter & Ellen Gesmer, *Applying Racial Identity Theory to the Legal System: The Case of Family Law*, in *Racial Identity Theory: Applications to Individual, Group, and Organizational Interventions* 219 (C. Thompson & R. Carter eds., 1997).

102. Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261; *see also* Carter & Gesmer, *supra* note 101, at 219-30.

approach results both in a more equal distribution of “power and status” and a more effective strategy for achieving organizational goals.

The potential implications for the legal profession are profound. If our organizational goal is equal justice under law, an integration-and-learning approach will more likely have greater success than the dominant “bleaching out” paradigm. As Martha Minow has observed, in a world where differences matter, “a commitment to equality—to treating like[] [cases alike under the rule of law,]—will be caught in a contradiction.”¹⁰³ She, like Ely and Thomas, argues that “you cannot avoid trouble through ignoring difference; you cannot find a solution in neutrality.”¹⁰⁴ The task for the legal profession is to promote equal justice in the best way in light of the persistence of group identities.

This effort has yet to be made on any significant scale. Existing efforts to promote equality, such as judicial commissions on the status of racial minorities, continue to work within the limited confines of the “bleaching out” paradigm. The task for the future is for the legal profession to replace “bleaching out” with the goal of creating an integration-and-learning community for lawyers, so that we can join to explore the potential for rule of law in light of how we are all different from one another, and yet how we are all the same in sharing the goal of equal justice under law.

CONCLUSION

As intergroup theory teaches us, race provides data essential to understanding and managing organizational goals. To be a responsible and constructive member of legal organizations, a white lawyer must therefore acknowledge that whiteness is a racial identity and not a background norm. This acknowledgement, in turn, has two major implications. First, in assessing the legal workplace and legal system, a white lawyer (like all lawyers) must assess the role race plays and engage in learning with people of all races to determine how best to further organizational goals in light of racial differences. Second, the persistent influence of identity group membership in legal organizations requires, on both practical and theoretical grounds, discarding the dominant “bleaching out” approach to professionalism and rule of law in favor of an integration-and-learning approach to representing clients and creating a community that recognizes racial identity as a strength and not a failing.

103. Martha Minow, *Making All the Difference: Intrusion, Exclusion, and American Law* 374 (1990).

104. *Id.* at 374-75.

Notes & Observations

Choosing Wellness for your Mind, Body, and Best Life as an Attorney

April Harris-Britt, PhD

Owner of AHB Center for Behavioral Health and Wellness

CHOOSING WELLNESS FOR YOUR MIND, BODY, AND BEST LIFE AS AN ATTORNEY

APRIL HARRIS-BRITT, PH.D.
NC BAR ASSOCIATION


1

LEARNING OBJECTIVES :

- To recognize the effects of unmanaged stress.
- To gain knowledge about the symptoms and different types of anxiety and depression.
- To identify methods of self care.
- To be aware of options for mental health treatment.

2

IT'S A BEAUTIFUL LIFE. AND.....



Constant problem-solving for others

Enjoy confrontation

Balance empathy with facts and objective detachment

Skilled in the art of disagreement

3

IT'S A BEAUTIFUL LIFE. AND.....



Long hours

Relaxing means you miss an opportunity, knowledge, or a client

High-demand clients

Client satisfaction can be unpredictable

4

IT'S A BEAUTIFUL LIFE. AND.....



Constant competition and conflict with your peer community


Competition within a practice or to maintain a practice

Economic struggles because of fluctuations in caseload or economy

5

WHAT ABOUT YOU?


- Given the additional stressors that lawyers face, has anyone asked you about your health?
- How are YOU coping as a lawyer and how are YOU doing?



6

COMMON REACTIONS TO STRESS

- Worries about future
 - "What happens if I mess up this case?"
- Negative thoughts that affect your ability to cope
 - "I just don't care anymore"
- Irritability
 - "Leave me alone!"



7

COMMON REACTIONS TO STRESS

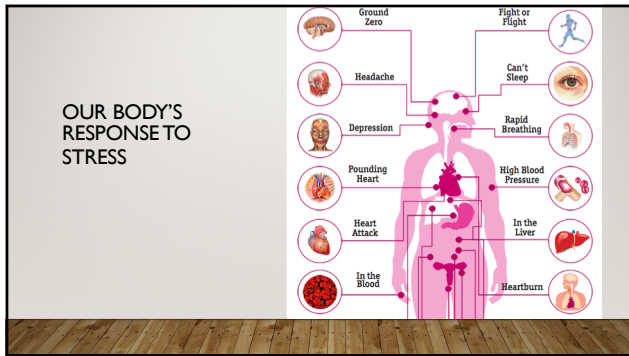
- Denial
 - "I will slow down, I just need to get this one thing done"
- Anger and frustration
 -when a cooler head would prevail.
- Social withdrawal
 - "I don't care about visiting my friends or family anymore"

8

COMMON REACTIONS TO STRESS

- Exhaustion
 - "I'm too tired for this"
- Sleeplessness due to never-ending concerns
 - "What if something goes wrong?"
- Lack of concentration
 - "I was so busy, I forgot my appointment"
- Personal health concerns
 - "I can't remember the last time I felt really good."

9



10

EFFECTS ON YOUR BODY

- Weightloss/ gain
- Migraines
- Chronic Inflammation
- Cardiovascular problems (e.g., hypertension, arrhythmia)
- Worsens other conditions (cholesterol, diabetes)

11

EFFECTS ON YOUR MIND

- Most people think that feelings come first, but our thoughts actually influence our feelings
 - Something bad will happen.
 - It's my fault.

Anxiety

- I can't ask for help.
- I'm not good enough.

Depression

12

ANXIETY

- Feeling of apprehension or fear. The source of this uneasiness is not always clear or recognized, which can add to the distress.
- Estimates that about 19% of Attorneys struggle with an anxiety disorder.
- Highly treatable but only 1/3 of those who suffer receive treatment
- Highly comorbid with depression

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COMMON TYPES OF ANXIETY DISORDERS

- Panic Disorder
- Generalized Anxiety Disorder
- Obsessive-Compulsive Disorder

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PANIC DISORDER

- Abrupt onset of an episode of intense fear or discomfort, when there is no sudden danger or apparent cause; a sudden feeling of overwhelming anxiety and fear
- Unpredictable and peak within 10 minutes,
- Can happen anywhere and at anytime, even during periods of relaxation.

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SYMPTOMS OF PANIC DISORDER

- The need to escape
- Palpitations
- Sweating
- Feeling of danger
- Fear of dying
- Shortness of breath
- Choking feeling
- Nausea or upset stomach
- Trembling or shaking
- Numbness or tingling sensation
- Feeling dizzy, lightheaded, or faint

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GENERALIZED ANXIETY DISORDER

- Excessive uncontrollable worry about everyday things, which affects daily functioning and produces somatic symptoms.
- Focus can shift on issues like career, finances, health, social...
- The intensity, duration, and frequency of worry are disproportionate to issue

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SYMPTOMS OF GENERALIZED ANXIETY DISORDER

- Twitching/trembling
- Muscle tension
- Headaches
- Sweating
- Dry mouth
- Difficulty swallowing
- Dizziness
- Irritability
- Decreased sleep
- Sexual problems

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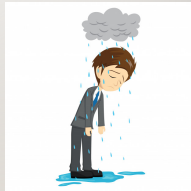
ATTORNEYS AND DEPRESSION

- Attorneys have the highest rates of depression (28%) of any profession, compared to the general public (6.7%).
- 21-36% of attorneys will have alcohol or substance abuse problem vs. 10% of general population.

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COMMON TYPES OF DEPRESSION

- Major Depression
- Dysthymia
- Bipolar Disorder
- Seasonal Affective Disorder (SAD)



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SYMPTOMS OF DEPRESSION

- Sadness, numbness, or irritability
- Change in sleeping patterns: sleeping too much or insomnia
- Fatigue/lack of energy/lethargy
- Weight loss or gain
- Unexpected headaches, pains, backaches
- Decreased/Loss of sex drive
- Decreased/Loss of enjoyment of things

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MAJOR DEPRESSION

- May begin suddenly, possibly from a trigger
- Can continue for many months or years
- Possible to have only one episode of Major Depression
 - More common for it to occur several times during a person's life.

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DYSTHYMIA

- Mildly depressed for years
- Low energy/Fatigue/sluggishness
- Feeling empty
- Insomnia
- Social withdrawal
- Functions fairly well but relationships suffer over time



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BIPOLAR DISORDER

- Alternating periods of depression and periods of mania (an extreme high).
- Symptoms of mania may include:
 - Less need for sleep
 - Overconfidence
 - Racing thoughts
 - Reckless behavior
 - Increased energy
 - Mood changes are usually gradual, but can be sudden

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SEASON AFFECTIVE DISORDER

A depression that results from changes in the season. Most cases begin in the fall or winter, or when there is a decrease in sunlight. Seasonal Affective Disorder begins and ends at about the same periods each year.



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EFFECTS OF DEPRESSION AND ANXIETY

- Impacts the way a person functions
 - Socially
 - At work/school
 - Personally




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SUICIDE

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FACTS



- One of the leading causes of death in the world
- There are many more “unsuccessful” attempts
- Lawyers rank between 1st and 5th when the proportion of suicides in that profession is compared to suicides in all other occupations.

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TRIGGERS

- Immediate stressors
 - Loss of a loved one
 - Loss of a job
- Long term stressors:
 - Social isolation
 - Serious illness
 - Occupational stress
 - Steady increase in sadness or hopelessness

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BE INTENTIONAL.....TAKING ACTION

- The Power of Self-Care
- The Power of Coping
- The Power of Seeking Help.



30

DEVELOP YOUR SELF-CARE PLAN

- Sleep
- Exercise/physical activity
- Diet
- Play (see Handout)

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COPING....WHAT DOES THAT REALLY MEAN?

- Problem-Focused Coping:
 - Taking action to change your relationship to the stressor
 - Communication skills, anger management
- Emotion-Focused Coping:
 - Reducing emotional distress
 - Journaling, Prayer, Meditation, Social Support, Mindfulness, Breathing Exercises, Visualization, Acceptance

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COPING....WHAT DOES THAT REALLY MEAN?

- Meaning-Focused Coping:
 - Drawing on your personal beliefs, values and goals to motivate and sustain well-being
 - Positive Reframing, Benefit Finding, Benefit Reminding, Reordering Priorities, Adapting Goals
- Social-Focused Coping:
 - Seeking emotional support and practical support from family, friends, and your network

33

SEEKING HELP: TREATMENT

- Approximately 80% of people who receive treatment improve
- Therapy
- Medication
- Alternative Treatments
- Holistic Treatments



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THERAPY

- Can help gain understanding or insight into problems and work on solving them.
- Can examine and change patterns of behavior and negative thoughts that may contribute to depression or anxiety.
- Interpersonal therapy works to change relationships that affect depression and anxiety

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MEDICATION FOR DEPRESSION AND ANXIETY:

- Antidepressant medication - generally SSRI's - helps by increasing the level of serotonin in the brain.
- Often take 3-5 weeks to become fully effective, but improvement can often experienced within the first week.
- Work well
- They are non-habit forming.

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ALTERNATIVE TREATMENTS FOR TREATMENT RESISTANT DEPRESSION

- Electroconvulsive Therapy (ECT)
- Transcranial Magnetic Stimulation (TMS)
- Ketamine Treatments



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HOLISTIC TREATMENTS FOR DEPRESSION AND ANXIETY


- Acupuncture
- Executive or Adult Wellness Programs



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BE INTENTIONAL.....TAKING ACTION


- Avoid extra stress and big changes
- Reduce/eliminate alcohol/drugs
- See a doctor for a complete check up.



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YOU HAVE THE POWER TO CHOOSE


- To choose what is important and what is not...
- To let go of things outside your control....
- That you will not operate in a default mode....
- That you will respond instead of react....
- That you will take care of yourself.



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CONTACT INFORMATION

- April Harris-Britt, Ph.D.
- ahb@ahbpsych.com



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