

## Race Bias and the Importance of Consciousness for Criminal Defense Attorneys

*Andrea D. Lyon\**

### I. INTRODUCTION

When I worked at the public defender's office in Chicago, I found that stereotypes and prejudice are problems for everyone, not just the prosecution or the judiciary—although it was more acute there.<sup>1</sup> I entered the office thinking that public defenders were liberal (which is, in my mind, a good thing) and thus “good” on race issues. Not so much.

There is no person without prejudices, myself included. Let me illustrate what I mean with an anecdote. I was in my tenth year or so at the office and a supervisor in the Homicide Task Force, which is a unit that represents persons accused of homicide. When I was a line member of the unit, I carried between twenty and twenty-nine murder cases at any given time, about one-quarter to one-third of which were death penalty cases.<sup>2</sup> The Task Force was a vertical representation unit, which meant that we picked up the case and client in preliminary hearing court and traveled with him wherever he went. Most of the office, however, pro-

---

\* Andrea D. Lyon is a Clinical Professor of Law, Associate Dean for Clinical Programs, and Director of the Center for Justice in Capital Cases at DePaul University College of Law. Professor Lyon graduated from Rutgers University and from the Antioch School of Law. She worked for the Law Office of the Cook County Public Defender in many divisions and her last position there was as Chief of the Homicide Task Force, a twenty-two lawyer unit representing persons accused of homicide. In 1990, she founded the Illinois Capital Resource Center and served as its Director until joining the University of Michigan Law School faculty as an Assistant Clinical Professor in 1995. A winner of the prestigious National Legal Aid and Defense Association's Reginald Heber Smith Award for best advocate for the poor in the country, she is a nationally recognized expert in the field of death penalty defense and a frequent continuing legal education teacher throughout the country. Professor Lyon wishes to thank DePaul University College of Law senior law students Amanda Graham and Katie Kizer for their contributions to the research and writing of this Article.

1. See ANDREA D. LYON, *ANGEL OF DEATH ROW: MY LIFE AS A DEATH PENALTY DEFENSE LAWYER* chs. 4 & 5 (2010).

2. As of a year ago, Illinois no longer has a death penalty, so while my former unit still handles homicide cases, it does not handle people facing the death penalty anymore. Christopher Wills, *Illinois Death Penalty Abolished: Pat Quinn Signs Death Penalty Ban, Clears Death Row*, HUFFINGTON POST (Mar. 9, 2011), [http://www.huffingtonpost.com/2011/03/08/illinois-death-penalty-ab\\_n\\_833250.html](http://www.huffingtonpost.com/2011/03/08/illinois-death-penalty-ab_n_833250.html).

vided horizontal representation, despite efforts to implement vertical representation in all cases.<sup>3</sup> Horizontal representation means that the assistant public defenders are each assigned to a certain courtroom, and they represent all indigent folks who come into that courtroom. With such a large county and office,<sup>4</sup> any other form of organization would be difficult. But one of the problems for client relations is that by the time the client works his way up to the felony courtroom, he has been in several courtrooms<sup>5</sup> and has been represented by a number of different lawyers in the office.

This situation had occurred on the day I wish to write about. As I mentioned, I was a supervisor, but I did not supervise the lawyer I am about to describe. I will call him Paul. He was a white man in his late forties or early fifties—a career public defender. He was back in the lockup talking to a client, as was I. Behind every courtroom in the criminal courts are lockups where pretrial detainees wait until their cases are called. This particular lockup is about fifty by twenty feet, with open bars so you could approach your client and speak to him through the bars with no obstruction. There is a “privacy panel” with a toilet toward the back. It isn’t very private, and you learn to ignore it and not “see” it.

On this day, I was trying to speak to my client again about the motions we were filing and reporting to him about an investigation. Since these lockups are not very private—there can be as many as thirty or forty men back there (usually all are men of color)—I told my client that we would discuss everything more when I came to see him at the jail later that week. But I could hardly even say that much because Paul was yelling at his client nearby. From what I could gather, this client had been arrested later than his codefendant. Paul had worked out what he believed was an advantageous plea for the codefendant. I am sure it was a good plea deal, but he was meeting this client for the first time and was trying to strong-arm him into taking the deal, as it was apparently a package for either both codefendants or neither. Paul called him stupid. He used pejorative terms such as “mope” and “ignorant gangbanger.” He

---

3. See ROGER PRZYBYLSKI ET AL., TRENDS AND ISSUES, 1997: ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY 77 (1997).

4. “The Office of the Cook County Public Defender is the second largest public defender’s office in the nation, with more than 500 attorneys providing indigent defense service in the largest county in the State.” *State of Illinois Capital Punishment Commission Members*, ILL. DEP’T OF CORR., [http://www.idoc.state.il.us/ccp/ccp/member\\_info.html](http://www.idoc.state.il.us/ccp/ccp/member_info.html) (last visited Jan. 4, 2012).

5. The defendant probably appeared in bond court, made one or more appearances in preliminary hearing court where he may have been represented by a different public defender each time, and also appeared in arraignment court. It is unlikely that he has been visited by a lawyer at the jail if he is detained (and most indigent clients cannot make bond), so the defendant often appears in the felony courtroom between three to six weeks later, and with only in-court representation.

told the client that he—the client—could “do six [years] standing on his head.” And worse.

I was pretty sure that Paul would never have spoken to a white eighteen- or nineteen-year-old young man in the same demeaning way. They were both yelling at each other, and the entire lockup was listening. I doubt that the interaction was a product of Paul’s conscious thought, but it is this unconscious bias that is so difficult to address and therefore is the focus of this Article.

I was not Paul’s supervisor, but I asked him to step out of the lockup with me. I wanted to tell him that he was being disrespectful and that even if this was the best deal for the client, the client had no confidence in Paul, and he was making it impossible for the client to maintain any sort of pride and accept it by fronting him off like that. I did not want to do the same to Paul though, so that is why I asked him to step out with me. He turned to me and snapped that he was busy. I told him so was I, and then proceeded to say everything I intended, plus I added, “Paul, this man is the reason you *have* a job. Show him some damn respect.” He was furious with me, and I made a permanent enemy that day.

Later that week, I recounted this incident at a supervisors’ meeting and suggested that we do something about the office and what I perceived to be racial attitudes coupled with the burnout that this work engenders. I said, “We all have prejudices—me too—but as public defenders, we should try to at least know that and discount for it in some way.” I asked my colleagues if they thought that Paul would have perceived this young man as being able to do six years “standing on his head” if he had been white, middle-class, and from a suburb. My comments were dismissed as being overly sensitive (read: *female*), and the meeting proceeded to other matters. I looked around the room and realized that there were only one or two women or people of color in our ranks. Maybe that was the problem.

After the meeting, one of the African-American supervisors told me that I “had done it now.” I asked him what he meant. “It’s one thing if I speak about race,” he replied. “It’s viewed as self-interest. But if you do it, it is viewed as betrayal.” When I went out to my car that night, both front tires had been slashed. I will never know for sure if it was related to what I said in that meeting, but I have my suspicions.

Despite the repercussions I suffered for voicing concerns about racial biases in the work of public defenders, I will continue to advocate that, as defense lawyers, we must be conscious of our own racial biases, especially when interacting with our own clients and when selecting a jury through voir dire. We must not take a “color-blind” approach to our representation because it is in the very recognition of color that we can

recognize our own biases and ensure that they do not inhibit our ability to represent our clients.

This Article will proceed with a discussion of race bias and will examine who in the criminal justice system has such biases. These concepts will provide a backdrop to the next Part, where I will turn to an analysis about the need for criminal defense lawyers to be conscious of race bias. I focus on two specific circumstances in which awareness of one's own racial bias is imperative: interacting with clients and voir dire. But first, we must come to an understanding about the nature of race bias itself.

## II. JIM CROW IS GONE,<sup>6</sup> SO WHY ALL THIS TALK OF RACE BIAS?

This Part will explore the foundational concepts behind racial bias in the criminal justice system. It will first clarify the definition of racial bias and how it manifests both explicitly and implicitly in our lives. Next, this Part will discuss who in the criminal justice system has racial bias—prosecutors, judges, and defense lawyers alike.

### A. What Is Racial Bias?

Although overt racism is still palpable in today's world, unconscious racism and biases often play a role in our everyday decisions. Racial biases might cause us to "treat members of different racial groups disparately."<sup>7</sup> There are two different types of bias: explicit and implicit.<sup>8</sup> Explicit bias refers to the kinds of bias that people knowingly express and sometimes embrace.<sup>9</sup> This type of bias has prompted many procedural safeguards in the criminal justice system. In *Batson v. Kentucky*, for example, the United States Supreme Court held that when the defense believes the prosecution is exercising peremptory challenges on the basis of racial discrimination, the defense is permitted to object.<sup>10</sup> If the trial judge finds a prima facie case of racially motivated peremptory strikes, the prosecution must then provide "race-neutral" reasons for the exclusions.<sup>11</sup> This safeguard is meant to discourage the explicit bias expressed when a prosecutor removes people of color from the jury simply because of their race.<sup>12</sup> While explicit bias like this does exist within the criminal

---

6. While overt and codified racism is gone, racism is not. See generally Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107 (2004).

7. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2044 (2011).

8. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

9. *Id.*

10. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

11. *Id.* at 97.

12. *Id.* at 99.

justice system and is potentially the reason for some racial disparities, it is not the only culprit.<sup>13</sup>

Implicit bias is also to blame, yet it is less visible. Usually, implicit bias is so subtle or ingrained that those who hold the bias are not aware of it.<sup>14</sup> Implicit biases are especially difficult to discuss because even when we are in touch with them, we are unlikely to admit to or address our own implicit racial biases.<sup>15</sup> This is challenging when addressing racial disparities in the criminal justice system<sup>16</sup> because “[o]nce activated, implicit stereotypes and attitudes can negatively influence individuals’ judgments and behaviors toward racial minorities in ways that they are unaware of and largely unable to control.”<sup>17</sup> Biases can influence one’s interpretation of benign behavior, causing one to read identical behaviors differently based on the race of the actor.<sup>18</sup>

Moreover, studies have shown that we engage in “race loyalty,” assuming the best in people who match our race because of our desire to see our race (and ourselves) positively:

[A] decision maker is engaged in what [researchers] call a form of “racial loyalty” in which “he attributes the more positive stereotype of the white person” as superior, more qualified (despite the same credentials), more intelligent, more deserving and more hard-working in order “to avoid attributing negative characteristics to white people and himself.” To avoid lowering his own self-image, the racially identifying decision-maker must elevate the white applicant over the black applicant. This loyalty to other white people

---

13. Rachlinski et al., *supra* note 8, at 1196 (“[R]esearchers have found a marked decline in explicit bias over time, even as disparities in outcomes persist.”); see also *Batson*, 476 U.S. at 88.

14. Rachlinski et al., *supra* note 8, at 1196.

15. *Id.* As defined by Dovidio & Gaertner, “[M]ost whites also develop some negative feelings toward or beliefs about blacks, of which they are unaware or which they try to dissociate from their nonprejudiced self-images.” J. F. Dovidio & S. L. Gaertner, *Aversive Racism*, 36 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 4 (2004), *quoted in* Hart Blanton & James Jaccard, *Unconscious Racism: A Concept in Pursuit of a Measure*, 34 *ANN. REV. SOC.* 277, 278 (2008); see also JOE R. FEAGIN ET AL., *WHITE RACISM* 186–217 (2d ed. 2001) (Studies show that most whites deny they are racially prejudiced despite empirical evidence revealing widespread racial discrimination against African-Americans.); Frank M. McClellan, *Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 *TEMP. L. REV.* 351, 352 (2005) (“[W]hile race consciousness remains a dominant feature of the American social fabric in the 21st century, few individuals refuse to acknowledge that their words or conduct may reflect a racial bias.”).

16. Rachlinski et al., *supra* note 8, at 1196.

17. Richardson, *supra* note 7, at 2043.

18. *Id.*

occurs in order to fulfill the individual's quest for a positive self-image.<sup>19</sup>

This research alone shows the importance for all people, especially those in the criminal justice system, to understand racial bias and how it affects the conduct and opinions of the beholder.

### B. Who Has Racial Bias?

No one is immune from racial bias. Researchers have found that most people, even those who embrace nondiscrimination norms, hold implicit biases.<sup>20</sup> In fact, research shows that people from all racial backgrounds “have implicit biases in the form of stereotypes and prejudices that can negatively and nonconsciously affect [their] behavior.”<sup>21</sup> Thus, implicit bias is not just a problem for white people—people of all colors have racial bias, even biases toward people that look like them.<sup>22</sup> Even those within marginalized groups have biases against one another because they internalize the majority's stereotypes.<sup>23</sup>

Legal actors are not exempt from racial bias. Numerous studies have detected racial bias among police officers, prosecutors, and judges. One study showed that police officers, like the general public, have a bias that “often assumes young black men are more dangerous or aggressive than others.”<sup>24</sup> Applying these implicit biases to prosecutors, they often assume that nonwhite jurors will be bad for their case if the defendant is also nonwhite. This bias is even institutionalized in some prosecutors' offices, where prosecutors are instructed to come up with race-neutral explanations for striking black jurors to avoid *Batson* challenges.<sup>25</sup> This tactic is rooted in the race-biased assumption that black jurors will identify with black defendants.

---

19. Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN. L. REV. 1077, 1086 (2008) (quoting Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 82–83 (2006)).

20. Rachlinski et al., *supra* note 8, at 1196; Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 803 (2012); Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 664–65 (2012) [hereinafter *Task Force Report*].

21. Richardson, *supra* note 7, at 2039. This bias often assumes young black men are more dangerous or aggressive than others.

22. *Id.*

23. Smith, *supra* note 19, at 1087.

24. Richardson, *supra* note 7, at 2039.

25. *Miller-El v. Dretke*, 545 U.S. 231, 253 (2005) (“Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected.”).

Even judges—legal actors who are supposed to remain the most unbiased and egalitarian actors in the legal system—possess racial biases:

Judges in particular want to believe that they can be fair to everyone and perform their duties in a colorblind manner. However, judges are not immune from the same racial biases affecting most Americans. In light of this reality, efforts to identify and mitigate or eliminate racial bias on the part of a judge or an attorney pose unique problems.<sup>26</sup>

In another study, researchers completed a multipart analysis involving a large sample of trial judges from around the country.<sup>27</sup> Researchers found that “judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.”<sup>28</sup> While these findings are disheartening, they also lend hope to the idea that these biases are not invisible or immutable. Actors in the legal system can acknowledge some of their biases and overcome them.

During my years of trial experience, I have encountered firsthand the biases of these legal actors. But I have also observed racial biases in myself and other defense lawyers, and it usually comes with either a lack of awareness or a resistance to addressing these biases. As shown in the literature above, little has been written or discussed about the racial biases of defense lawyers, and how those biases could negatively affect our clients if we do not acknowledge and monitor them. This Article aims to begin filling the gap in the discourse and to make a case for why acknowledging and controlling racial biases is especially imperative for criminal defense lawyers.

### III. DEFENSE ATTORNEY BIAS: YES, IT IS A MORAL MATTER, AND A PRACTICAL ONE AS WELL

As a defense attorney myself, I feel a responsibility to discuss and acknowledge our biases—if not for our own sake, then for the sake of our clients. This Part aims to discuss the biases we carry as defense at-

---

26. McClellan, *supra* note 15, at 352; *see also* Debra Cassens Moss, *Judge Says He's Sorry*, A.B.A. J., Oct. 1, 1987, at 21 (discussing Judge Arthur Cieslik, who made inappropriate comments to women and minorities, including saying that “women should not be lawyers”). I practiced in front of Judge Cieslik and was on the receiving end of some of his sexist comments. He also made racist comments in the Derrick Morgan case, which engendered *People v. Morgan*, 568 N.E.2d 755 (Ill. 1991), *rev'd*, 504 U.S. 719 (1992). Among some of his comments, he called the two black lawyers “laughing boy” and “smiling boy,” and suggested fumigating chambers after the two lawyers had been there.

27. Rachlinski et al., *supra* note 8, at 1195.

28. *Id.*

torneys and average people, specifically the biases we exhibit when interacting with our own clients and when selecting a jury.

*A. Defense Attorneys Also Have Bias, Even When Most  
Clients Are People of Color*

In light of the existing research that shows the power of our internal biases,<sup>29</sup> it is only natural that defense lawyers are not exempt from bias. The difficulty is that these biases are not necessarily salient,<sup>30</sup> and we are often unaware that we have them at all. I am certain that the lawyer I called Paul did not and would not see his actions as having any racial component. I imagine he did not even see them as wrong because he “knew what was best for the defendant,” even if the defendant did not. His legal advice may have been correct, but his way of communicating with his client was ineffective, and the moral implications of his conduct were suspect at best.

Our clients rely on us for advice, and we should give it to them. But we must also realize that major decisions belong to the client.<sup>31</sup> Our best advice will be ignored if we cannot communicate with our clients, and this reality requires us to give respect as well as demand it. It also means that we have to understand that we may not see our clients clearly.

We defense lawyers must be conscious of our own racial biases, or else our clients will suffer. As Lois Heaney stated:

[T]he myth of “color blindness,” like all other efforts to deny the fact and effect of prejudice, bias and oppression, works only to the benefit of those who are not the object of prejudice. Denying the existence of racism . . . does nothing to correct its effects inside or outside the courtroom, but rather undermines and jeopardizes the credibility of the justice system, and serves to compound harm to our clients.<sup>32</sup>

I will discuss this issue both with respect to the attorney-client relationship and how it affects the process of jury selection. Through these two

---

29. See, e.g., Rachlinski et al. *supra* note 8, at 1196; Smith & Levinson, *supra* note 20; *Task Force Report*, *supra* note 20.

30. See generally Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009) (discussing bias salience).

31. The client gets to decide whether to testify, whether to request a jury, and what to plead. See MODEL RULES OF PROF’L CONDUCT R. 1.2 (2011) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

32. Lois Heaney, *The Case for Meaningful Voir Dire on Race and Sexual Orientation Bias*, 3 CAL. ST. B. CRIM. L.J. (2001), available at <http://www.njp.com/articles/CaseForMeaningfulVoir%20Dire.pdf>.

examples, I will illustrate how we must address racial biases to ensure they do not hurt our clients or our clients' cases.

*B. Defense Attorney Bias When Interacting with Clients*

One example of how racial bias can interfere with client communication comes, again, from my own experience. One thing that is a part of criminal defense work—indeed, all criminal law—is salty language. I have heard it, have used it myself, and have had it used toward me. Nonetheless, no one likes being yelled at or sworn at. On one particular occasion, I represented a young man in a death penalty case. He was about twenty, African-American, and a member of a gang. I went to the jail to discuss some decisions we needed to make and their consequences. We were in Division One of Cook County Jail, in what used to be the law library but is now denuded of books and serves as the room for attorney-client visits. It is in the basement, always damp, and the tables are like picnic tables with attached seats. I explained my client's options and my assessment of the consequences of the two directions in which we could proceed. Suddenly, he started swearing at me and raising his voice. "Fuck a consequence! I don't give a damn about no fucking consequence. Fuck You!"<sup>33</sup> I tried to continue the conversation, but that only made it worse. Finally, I had had enough and I left.

Shortly after that encounter, I attended a lecture about developmental disabilities. I learned that one of the ways someone with a developmental disability compensates for not being able to understand is to act tough to cover it. I realized that I had not been seeing "an angry black man." I had been seeing someone with developmental disabilities who was covering it up. Many people mistakenly believe that one can merely *look* at a person and tell that he is disabled.<sup>34</sup> In fact, there is an expectation that developmentally disabled people look like someone with Down Syndrome or have other facial indicia of their malady, even though most often this is not the case.<sup>35</sup>

I saw the stereotype, and instead of asking myself why my client was angry and trying to understand his reaction, I got angry too. After I understood this, I learned to introduce only one new idea to this client at a time because that was all he could process. And the next time I had a

---

33. I referred to this incident, albeit in much less detail, in a previous article, *But He Doesn't Look Retarded: Challenges to Jury Selection in the Capital Case for the Mentally Retarded Client Not Excluded Under Atkins v. Virginia*, 57 DEPAUL L. REV. 701, 712 (2008).

34. Shrutti S. B. Desai, *Effective Capital Representation of the Mentally Retarded Defendant*, 13 CAP. DEF. J. 251, 266–67 (2001).

35. Michael L. Perlin, "Life is in Mirrors, Death Disappears": *Giving Life to Atkins*, 33 N.M. L. REV. 315, 334–35 (2003).

client yell at me in that way, I said, “Whoa, whoa. What did I say just now that didn’t make sense to you?”

The work defense lawyers do is difficult and emotionally draining. There are many ways to handle stress, and not all of them are healthy.<sup>36</sup> One of them is humor. We all tell jokes in stressful situations, even at tragic situations or funerals. Humor relieves stress.<sup>37</sup> But those jokes can also become a way to dehumanize our clients or the victims of crime, and they get in our way as advocates. If we do not see our clients as people worth voting for, how on earth will a jury?

This insight leads me to another personal example that does not make me proud. I represented a deeply religious man, a fanatic even. He had crosses tattooed on him; he quoted from the Bible all the time, seemed unable to follow a logical conversation, often looked about the room, and appeared to be listening to something I could not hear or see (although, in retrospect, it might have been how he would stop to think). Overall, he seemed a bit crazy to me. One day, I came back to my office from the jail, frustrated with our inability to communicate. In that meeting, I had needed to tell him some hard truths about our ability to fight his case, but he did not want to listen. We needed to make some decisions, and he did not want to make them. So, he refused to make them, and then outright refused to talk to me any further about it, knocking on the door to be taken back to his cell. “I will leave this in God’s hands,” he said as he left. I was angry and told my office partner and some other public defenders who were around that I had “no problem with leaving things in God’s hands, but damn it, couldn’t God file an appearance [as counsel of record] so I could withdraw?”

Everyone, including me, laughed. My comment was funny, and it relieved tension at the time, but it also showed that I had not listened to my client. I saw his religiosity as an impediment to communication, but if I had seen him as a person instead of a symbol of the “crazy religious client,” I would have realized much sooner that he wanted *spiritual* advice, not legal advice. Eventually, I figured it out and got a friend of mine, Sister Miriam Wilson,<sup>38</sup> to speak with him. And I had to ask myself whether my own secular biases prevented me from helping him

---

36. Alcoholism is a common problem in the legal profession. See, e.g., Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 739 (1999). Some programs are even aimed to help attorneys stop their drinking habits. See, e.g., LAWYERS’ ASSISTANCE PROGRAM, <http://illinoislap.org/about-lap> (last visited Feb. 5, 2012).

37. See Patty Wooten, *Humor an Antidote for Stress*, 10 HOLISTIC NURSING PRAC. 49, 49–55 (1996).

38. Sister Miriam was a prison chaplain at the Cook County Jail for many years and worked tirelessly against the death penalty until her own death ten years ago.

sooner.<sup>39</sup> Or, might I have seen it sooner if my client shared my demographic background—in other words, if he had been white and Jewish? I cannot know for sure, but I suspect the answer is yes. My biases got in the way of seeing what my client needed, and while this bias was only tangentially related to race, race was not absent.

### C. Defense Attorney Bias During Jury Selection and Voir Dire

Another area in which our bias as defense attorneys can be especially harmful is during voir dire and jury selection. Voir dire is when our clients exercise their Sixth Amendment right to question potential jurors before trial.<sup>40</sup> This right allows them the chance to weed out individuals who may hinder a fair trial.<sup>41</sup> Defense lawyers should generally look for responses and attitudes that might “affect a juror’s ability impartially to evaluate the credibility of testimony or to draw inferences only from evidence presented at trial [that] are racial and ethnic prejudices.”<sup>42</sup> Consequently, most scholarly research focuses on how attorneys can detect racial bias among jurors.<sup>43</sup> The importance of the inquiry during voir dire is self-evident. But aside from discussing explicit racism in the context of *Batson* challenges,<sup>44</sup> legal scholars rarely analyze the internal racial biases that lawyers exhibit during jury selection. Scholars tend to overlook decisions of defense attorneys particularly because we tend to have nonwhite clients, and because of that, falsely assume that we are less likely to have racial bias.<sup>45</sup>

---

39. See generally Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1993–94); see also Geoffrey Fatah, *Man Cites Religious Bias in Murder Trial*, DESERET NEWS, Feb. 3, 2008, <http://www.deseretnews.com/article/695249773/Man-cites-religious-bias-in-murder-trial.html>.

40. See Nancy Lewis Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 965 (1982).

41. *Id.* at 959.

42. *Id.*

43. *Id.* at 959–60 (discussing “the importance of racial inquiry on voir dire as a method for identifying jurors who should be excused because of their inability to separate racial attitudes from the determination of the defendant’s guilt”); see also Heaney, *supra* note 32.

44. See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.” (citations omitted)).

45. This is true of everyone; we want to assume that we are not biased. See Smith, *supra* note 19, at 1081 (“According to Freudian psychoanalytic theory, the human mind protects itself from the discomfort of guilt by refusing to recognize those ideas that conflict with what the individual has learned are good or just. So when the individual ‘experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.’” (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987))).

In order to place this issue in context, it is important to discuss the process of jury selection itself.<sup>46</sup> Jury selection is a process of elimination whereby a group of potential jurors are called for jury duty, and then questioned and seated, excused for cause, or excused by a peremptory challenge by either side. Generally, a juror challenged for cause has a relationship with a party or witness, has some personal experience that would cause him to be unfair, or is otherwise legally unable to sit. Determining whether a juror must be removed for cause often requires some skills that are not necessarily comfortable for many (if not most) attorneys.

As one commentator writes, “Jury selection has three main goals: (1) to elicit information from jurors, (2) to educate jurors on the defense case and defuse the prosecutor’s case, and (3) to establish a relationship between the jurors and the defense attorney and his [or her] client.”<sup>47</sup> To further these goals, the single most important thing a lawyer can do is to listen. Some psychologists refer to this skill as “attending behavior,” which includes demonstrating a relaxed attentive posture, holding eye contact, and engaging in “verbal following.”<sup>48</sup> Jury selection requires that the attorney ask the juror questions about the issues in the case in order to figure out what the juror thinks and feels, and to decide whether that juror can hear the case or not.

Instead of using attending behavior to listen to potential jurors, defense lawyers often rely on basic and generalized stereotypes when they pick juries. That is, they make assumptions based on jurors’ race, class, gender, and other shorthand traits. Admittedly, to some extent, we must rely on demographic data such as a person’s neighborhood, language, or background to determine how they think and feel as decision-makers. But because *all* people—lawyers, judges, and potential jurors alike—have internal racial biases,<sup>49</sup> when there is black defendant, prosecutors and defense attorneys assume that a black juror will be more sympathetic to the defense. In the many voir dire examinations I have done, opposing counsel almost always assumed that the defense wanted to keep the black jurors if our client was black. Such an approach, however, does not

---

46. I am drawing on some of my earlier writing for this Part, in particular *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1653–61 (2004).

47. Cathy E. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case*, SELECTED MATERIALS ON TRIAL PRACTICE, NATIONAL CRIMINAL DEFENSE COLLEGE MANUAL, HOUSTON, TEXAS, 55 (1977). See generally Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116 (1980).

48. Verbal following is when one listens to exactly what the other person is saying and responds to it, rather than introducing a new topic. DAVID R. EVANS ET AL., *ESSENTIAL INTERVIEWING: A PROGRAMMED APPROACH TO EFFECTIVE COMMUNICATION* 25, 31 (8th ed. 2011).

49. See Rachlinski et al., *supra* note 8, at 1196.

acknowledge the many differences among black people in their views of crime and criminal justice, and ignores the fact that black people are more often the victims of crime than whites.

To some extent, we must rely on the demographic data we can get our hands on. But stereotypes are dangerous. Perhaps because of the pressure of having to see a number of potential jurors in too short a time, many lawyers rely upon so-called “hunches” and consequently jump to conclusions about that juror, which have little or no basis in fact. Many of us, for example, have a temptation to classify people according to physical appearance. We may jump to the conclusion that the man with the square jaw is a person with great determination, or that the person with red hair has a hot temper, or that the individual with close-set eyes is not to be trusted. We all know, of course, that such conclusions have not the slightest validity. We are similarly trapped by our racial assumptions—that a black juror is good for a black defendant or that a Mexican juror will identify with a Puerto Rican defendant.

If we are using this process of elimination based on stereotypes, jurors will know it. And then we cannot get angry if the jurors return the favor by making the assumption that our young male minority client is guilty, a gang member, or otherwise dangerous and not deserving of respect.

#### IV. CONCLUSION

In articles about seemingly intractable problems like racial bias,<sup>50</sup> there is always a conclusion about what needs to be done, in which the author usually proposes more education. I am certainly in favor of more education, but I do not believe that it is merely education that is needed here. I think our focus as advocates is to develop a willingness to be introspective, to face our own biases, and, as advocates, to put the client first. After all, as was evident on that day in the lockup with Paul, we are able to do this work only because of our clients. And we are all human. This means we are imperfect. But as legal advocates, it is our duty to recognize our imperfections and work to ensure that they do not harm our clients. We must continuously strive to recognize our own consciousness so that everything we do is in their best interest. To borrow

---

50. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (noting that “the Baldus study indicates a discrepancy that appears to correlate with race” but that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system”). The *McCleskey* case is infamous for the Court’s outright refusal to take action regarding any of the racial disparities shown through the Baldus study in Georgia. Most chillingly, the Court decided that acting on McCleskey’s argument and Baldus’s research would “throw into serious question the principles that underlie our entire criminal justice system.” *Id.* at 315.

from the late Michael Jackson, we need to start with the man (or the woman) in the mirror.<sup>51</sup>

---

51. From the middle of the song: "I'm starting with the man in the mirror/I'm asking him to change his ways/And no message could have been any clearer/If you want to make the world a better place/Take a look at yourself, and then make a change." MICHAEL JACKSON, *Man in the Mirror*, on BAD (Epic 1987).