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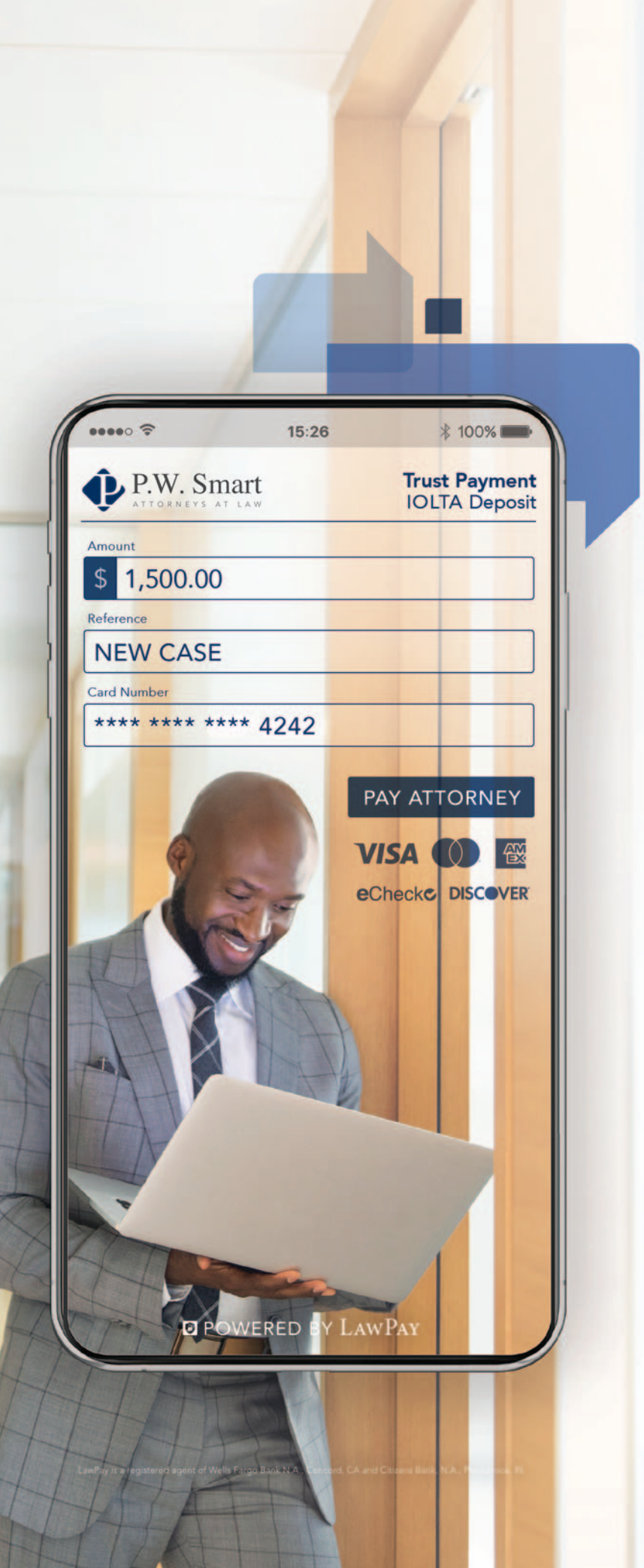
Race Matters

- Fighting Racial Bias Through Suppression Litigation
- Pretrial Release for Non-US Citizen Clients
- Implicit Racial Bias in Forensic Testimony
- Right to Appointed Counsel in Tribal Courts



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July 2021 Vol. XLV No. 6

12 Fighting Racial Bias by the Police Through Suppression Litigation

By Andre Vitale

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The police regularly target people of color by using pretextual vehicle and traffic violations — including illegal window tint, disobeying a crosswalk signal, and failure to signal — to justify the initial interaction. The goal of police officers in making targeted stops is to escalate the encounter with false allegations of the smell of marijuana or furtive movements to enable them to conduct a full-blown search. How can defense counsel make a motion to suppress evidence based upon an allegation of racial targeting?

16 Pretrial Release for Non-US Citizen Clients: One Front of the War for Racial Justice

By Amy F. Kimpel and James M. Chavez

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Amy Kimpel and James Chavez explain how to get non-U.S. citizen clients (both those with legal status and those who are undocumented) out of custody and how to keep them out. Their article will inspire you to fight for pretrial release for non-U.S. citizen clients and will provide legal ammunition for the battle.

COLUMNS

THE CHAMPION®

NACDL® Mission

NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

Publisher Kyle O'Dowd
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Associate Executive Director for Strategic Marketing Jessica Stepan
Art Director Catherine Zlomek
1660 L Street, NW, 12th Floor, Washington, DC 20036
The Champion® welcomes articles for publication. Please contact editor@nacdl.org for more information.

FEATURES

Featured Column

NACDL® Officers and Leadership

NACDL'S 16TH ANNUAL WHITE COLLAR SEMINAR & FALL BOARD MEETING

DEFENDING THE WHITE COLLAR CASE: IN & OUT OF COURT

October 6-9, 2021 • Washington, DC • Omni Shoreham Hotel

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From the President

CHRIS ADAMS

A Year in Review

I'm going to leave, baby,
Ain't gonna say goodbye.

— Bessie Smith
"Lost Your Head Blues"

When the time came for me to write my final presidential column, my thoughts turned to the 61 presidents who came before me — who they were, what challenges they faced as stewards of NACDL, and what they said in their final columns that I might be able to borrow. We stand on the shoulders of those giants.

My thoughts also turned to my friend Richard Jaffe of Birmingham. We were part of a team 20 years ago that represented Gary Drinkard in a capital retrial. Gary had been on death row in Alabama before Bryan Stevenson's office won the appeal. In the original trial, there was a body wire worn by the snitch, but the contents of the tape were inaudible. The snitch and the officer who heard the audio from another location testified that Gary confessed to the homicide and armed robbery. The FBI lab had unsuccessfully attempted to enhance the audio. Two weeks before the retrial, we received a call from the prosecutors that a local advertising company that specialized in recording AM radio ads had successfully enhanced the audio and that we would be receiving the copy shortly. My immediate reaction was terror. I quickly shifted to thinking of ways to attack and block the evidence created by the local ad company. Wise Richard Jaffe told me to take a deep breath and that he had a feeling that the tape was going to help us. As it turned out, the enhanced tape picked up enough of the conversation to show that Gary Drinkard was not confessing; rather, he was reading aloud the newspaper article about the crime at the urging of the snitch. Gary was acquitted in one hour. Where I perceived a threat, Richard saw opportunity.

With this preamble, let's discuss NACDL's year of COVID-19. COVID-19 presented an immediate and significant threat to NACDL. We rely on membership dues and CLE revenue, both of which were in jeopardy due to the virus, to fund our work. Yet NACDL treated the extraordinary challenges of the COVID year as an opportunity, and the results are amazing.

Early in the pandemic, NACDL joined with coalition partners to work on compassionate release through the Compassionate Release Clearinghouse and now through the Excessive Sentencing Project, launched earlier this year. Since April 2020, the Clearinghouse has screened nearly 5,000 applications from incarcerated individuals, filed over 1,000 compassionate release motions, and secured the freedom of 201 individuals serving sentences in federal prison. This work continues.

NACDL also led the struggle to protect the constitutional rights of the men and women we represent. NACDL's Coronavirus Resource, with hundreds of forms and resource links, has had more than 42,000 visits. This resource helped us litigate against the premature and unsafe reopening of courts and to challenge pandemic-inspired court rules that compromised the right to confrontation, fair cross section, counsel, etc. The Coronavirus Resource continues to assist us in pushing back against Zoom court and other convenience measures that undermine our clients' fundamental rights.

But NACDL did more than protect our clients' constitutional rights — NACDL stepped up to protect our clients' (and our) lives. Throughout the pandemic, NACDL spoke out about the importance of protecting defendants and defense attorneys from the perils of the virus. Once vaccines were on the horizon, NACDL called for all actors within the criminal legal system, including all individuals living and working in the nation's jails, prisons, and other detention facilities, to be prioritized in the COVID-19 vaccination process.

NACDL's phenomenal staff continued to deliver at the highest level from their remote workspaces. While most voluntary bar organizations lost members in droves in 2020, against all odds, NACDL has attracted more than 1,000 new members since the beginning of the pandemic. And participation in NACDL CLEs, which shifted to online webinars, has been record-breaking. NACDL trained 26,718 lawyers last year, triple the normal amount.

These items are but the tip of the iceberg for all NACDL's efforts and initiatives over the past year.

What did we learn about ourselves as an organization during the challenge of the pandemic? According to Warren Buffet, "It is only when the tide goes out that you learn who is swimming naked."[1] And according to author and motivational speaker John C. Maxwell, "Change is inevitable. Growth is optional."[2] The pandemic pushed us in ways that none of us would have invited. With the tremendous support of our members, the talented staff at NACDL turned challenge into opportunity and stayed focused on our shared mission so that we could not only survive but also truly thrive in the most

(Continued on page 7)

Photo by Clay Austin

NACDL LIFE MEMBER

After spending 15 years as a public defender and nonprofit lawyer, Chris Adams opened his private practice in 2007. He devotes half of his practice to defending men and women facing the death penalty in federal and state courts throughout the country. He also defends people and businesses facing allegations or investigations in federal and state courts.

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Website www.adamsbischoff.com

2021 NACDL® & Affiliate CLE Calendar

Aug 26-27	**NACDL's '23rd Annual Making the Case for Life' Capital Case Seminar** Harrah's Hotel & Casino, Las Vegas, Nevada Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Aug 26-27	***Virginia*: VACDL's Annual Meeting and 'Fall' CLE** Marriott Oceanfront Hotel, Virginia Beach, Virginia Contact: VACDL Executive Director K. Danielle Payne at 804-262-8223 or email vacdlawyers@gmail.com
Aug 27	***South Carolina*: SCACDL's Criminal Sexual Conduct CLE** The Hilton in the Vista, Columbia, South Carolina Contact: SCACDL Executive Director Kitty Sutton at 803-929-0110 or email ksutton@scacdl.org
Sept 1-3	**NACDL's 'Race Matters IV: The Intersection of Race and Criminal Justice' Seminar** The Swissotel Chicago, Chicago, Illinois Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Oct 6-8	**NACDL's Fall Board Meeting & 16th Annual White Collar Seminar** Omni Shoreham Hotel, Washington, DC Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Oct 13-16	**NACDL and NCDD's 25th Annual DUI Seminar 'DWI Means Defend With Ingenuity®'** Planet Hollywood Hotel & Casino, Las Vegas, Nevada Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Oct 13-16	**NACDL's 14th Annual 'Defending Modern Drug Cases' Seminar** Planet Hollywood Hotel & Casino, Las Vegas, Nevada Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Nov 3-6	**NACDL's 'Walking the Line: Effective Communication & Storytelling Techniques' Seminar** Omni Hotel, Nashville, Tennessee Contact: NACDL Education Manager Akvile Athanason at 202-465-7630 or email aathanason@nacdl.org. For more details, visit our meetings website at www.nacdl.org/meetings
Nov 5-6	***Georgia*: GACDL's Fall Seminar** Brasstown Valley Resort, Young Harris, Georgia Contact: GACDL Executive Director Jill Travis at 404-248-1777 or email jill@gacdl.org

By Gerald Lippert

Affiliate Special Election Notice — Call for Nominations

As a result of an unexpected vacancy on the Council of Affiliates (and NACDL Board of Directors), a special election will be held to fill the vacancy for the remainder of the current term (expiring in August 2022).

Request for Nominations:

NACDL is currently seeking nominations from its Affiliated Organizations for 1 vacancy on its Board of Directors to fill a seat that is dedicated exclusively to Affiliate Representatives. **The partial term will expire in August 2022.**

NACDL's Council of Affiliates is comprised of 4 Affiliate-elected representatives, each with a three-year term, serving as members of NACDL's Board of Directors. Because the Council of Affiliates is your voice to NACDL, it is important that NACDL's Board have energetic and outspoken representation from its Affiliates. Unlike the general election for NACDL's Board of Directors in which the membership votes, the members of the Council of Affiliates are elected by the local leadership of Affiliated Organizations and serve on NACDL's Board as representatives of all NACDL Affiliates. Additionally, the Council is tasked with coordinating information and maintaining the relationship between NACDL and its county, city, state, and international Affiliates.

If you know someone from your state organization who can effectively speak on behalf of your local interests, and those of other Affiliated Organizations, I urge you to please consider nominating that person. Each Affiliate is entitled to nominate one person from its state as a candidate.

Qualifications for Nomination:

To qualify for nomination, a candidate must be a member in good standing with both NACDL and the Affiliated Organization making the nomination. Additionally, nominees must be willing to attend all quarterly NACDL Board meetings during their tenure except in cases of illness, serious personal/professional difficulties, or official court business.

The nomination deadline is 5:00 p.m. ET, Friday, August 27, 2021. All submissions should include: (1) a letter from an Affiliate officer or executive director nominating the individual, (2) the nominee's letter of intent to run for the Affiliate Board seat, (3) a statement of qualifications written in paragraph form by the nominee not to exceed 700 words, and (4) a professional photograph. All qualified nominees will be automatically placed on the ballot.

How to Submit a Nomination:

Please submit all candidate nominations to Gerald Lippert via email to **glippert@nacdl.org.**

Join Us for the Next Council of Affiliates Meeting

All Affiliate executive directors, executive leadership, and administrators are invited to participate in the quarterly meetings of the Council of Affiliates. The Council will meet on Friday, October 8, 2021, at 2:00 p.m. ET, during NACDL's Fall Meeting in Washington, D.C. If you are involved in the leadership of your local NACDL Affiliate, we strongly encourage you to participate. For more information, contact Gerald Lippert at 202-465-7636 or glippert@nacdl.org.

Are Your Events Missing From the Affiliate CLE Calendar?

The Affiliate CLE Calendar is available for NACDL Affiliates to promote their upcoming meetings and events. If you would like your event to be listed on the calendar in *The Champion* or online at **www.NACDL.org/Meetings**, submit the event and contact information to Cori Crisfield at ccrisfield@nacdl.org. ■

About the Author

Gerald Lippert is NACDL's Associate Executive Director for Legal Education and Professional Development.

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Coming Soon in
The Champion
Understanding Bitcoin in Criminal Defense Cases
By Beth Mohr

From the President

(Continued from page 5)

stressful of years. Warren Buffet would say that NACDL had its bathing suit on. John C. Maxwell would conclude that we did more than survive a tough year — we grew.

Thank you so very much for the opportunity to be along for the ride in this memorable, eventful, and successful year. I am honored to have served you and worked with so many of you on NACDL's critical mission and vision. Like Bessie Smith, I will leave now, but I ain't gonna say goodbye. I will say I'm excited to see you in the courthouse.

Notes

1. Buffet has explained that in the good times, strong and weak organizations do well, and that it is only in the tough times that you can distinguish between the strong and weak organizations. *See* https://money.com/swimming-naked-when-the-tide-goes-out.

2. https://www.facebook.com/JohnCMaxwell/photos/i-do-know-this-about-growth-change-is-inevitable-growth-is-optional-to-grow-you-/10151620381877954. ■

A 1921 photograph of B.C. Franklin (right) and I.H. Spears (left), with secretary Effie Thompson (center), in their temporary tent office after the Tulsa Race Riot. Franklin's law office was burned down during the Tulsa massacre. He set up a tent and continued to provide legal services. Perhaps he was one of liberty's *first* champions.

Collection of the Smithsonian National Museum of African American History and Culture, Gift from Tulsa Friends and John W. and Karen R. Franklin

Racism — A Persistent Challenge That Impacts Everyone

A core aspect of NACDL's mission is to redress systemic racism. Bigotry and intolerance permeate society at every level. No one is immune. These short sketches, submitted by readers, include examples of explicit and implicit racism experienced by clients and attorneys. Perhaps these personal experiences will help improve the awareness of and sensitivity to people who face discrimination on a regular basis. If anti-racism is the cure for racism, how do we get there from here?

Mike was tall and skinny, with the face of a boy barely out of puberty. He was glad when the police officers finally arrived at his home — after all, he called them. As they pulled onto his street, Mike waved them over, signaling for them to stop and follow him. "Get down on the ground and stay down!" they immediately shouted. His child was in distress. He needed help, and time was of the essence. Mike's mind and heart were racing at warp speed. In this moment he should only have to focus on his child, but instead he knew that to get the help his child needed, he had to de-escalate the situation and make the police feel comfortable. He had to make sure the police changed their view of him from "suspect" to "father." They searched his pockets. He obliged. Once they assured themselves that he was not "the usual suspect" and that he lived at his own home, they just moved on. No apologies. As a defense attorney, I hear incredible stories, but I knew Mike's was true because I am Mike and he is me. No, I have not been through the dressing down ceremony by the police, but I have been reminded many times inside the courthouse that I am the usual suspect: "You can't sit there; sit with your family" — because I could not possibly be an attorney. Or the judge wonders aloud what I am doing in his courtroom. Like Mike, I have to make them comfortable, convince them that I am in the right place, that I belong. I believed Mike because every time I walk into the courtroom as a Black woman lawyer, I am Mike.

Jada Mayson-Osabu
Assistant Deputy Public Defender
Newark, New Jersey

The call came in around 3 a.m. and roused me from sleep. The voice on the line was unfamiliar. The appellate work I did at the time did not call for much contact with my imprisoned clients. But it was my home number.

I cannot remember his name or the nature of his appeal. I had not been on the case long. Other than the ubiquitous "K" word, I do not recall specific words from his white supremacist, anti-Semitic rant threatening my life if I was unsuccessful in handling his appeal. It was just a combination of the usual ignorant epithets I had heard all my life. Because I am a Jew. His words vaulted me past wakefulness into a heart-pounding, adrenalin-fueled state of fight or flight.

When clients expound on their luck in having a Jewish lawyer, I disabuse them of any connection between religion and results. We get along fine. But this was different — clearly a threat on my life. For my relatively new girlfriend in bed beside me, it was a rude introduction to my work.

Whatever response I had that morning two decades

ago is lost, repressed, suppressed, or something. The next day I called the appellate project responsible for my appointment, explained the circumstances, and the project appointed new appellate counsel.

Harry Zimmerman
Albuquerque, New Mexico

Alice Secody was a 14-year-old member of the Navajo Nation. On April 7, 1962, a white man came to the Secody tent, tried to assault Alice, and then murdered her. Her brother Danny Secody, 10, had a bullet behind his eye. He identified the defendant at the trial in Phoenix, Arizona. Their little sister, Melinda, saw the whole thing. I was a 28-year-old federal prosecutor in Phoenix. I saw the case as a civil rights case.

My colleagues warned me that some juries did not find the life of a Native American as valuable as that of a white person.

Navajos had suffered at the hands of outsiders for years. In 1805, slave traders from Mexico massacred more than a hundred Navajo women, children, and old men near the Canyon De Chelly. Some tribal members were forced into slavery. In 1864, the U.S. government forced them to march at gunpoint from Arizona to eastern New Mexico.

The Secody case sought to bring justice to the reservation. Prosecuting reservation cases opened my mind to how Navajos had overcome enormous hardships and made a life for their families.

The jury's tension was palpable.

"We find the defendant guilty of murder in the second degree."

Jim Brosnahan
Morrison & Foerster
San Francisco, California

"Excuse, Miss. No offense, but can you ask the judge to see if he can appoint me a different lawyer?"

The request surprised me because I had been appointed as his attorney only minutes before. I tried to reassure him that I would work hard on his case: I would investigate, file motions, and reject every plea in favor of going to trial.

Nevertheless, the client remained steadfast in his polite but adamant request for another attorney. It was apparent that this particular client's misgivings were not based in concerns about my "public defender" status, so I asked him to tell me the unvarnished truth: Why couldn't I be his lawyer?

"Because you're Black."

His response came quickly and without apology. I stared at my client, taking in his dark brown complexion, and stammered out another "Why?"

He went on to explain that he thought my being Black and the prosecutor being white might harm him. He noted, "Suppose the prosecutor's racist and as a result, she won't give you a good plea offer because she doesn't like Black people. If I have a white lawyer, then maybe I'll get a better plea."

It was a rational concern for which there was no easy or obvious solution. So I nodded and made a note to place the case back on the court's calendar.

R. Spence
Loevy & Loevy
Chicago, Illinois

It must have been 25 years ago. I was in the Philadelphia public defender's homicide unit. Every summer my partner and I had a law school intern. We were in the middle of a murder trial. Each morning when we walked to court, our intern said hello to about 15 people, while I kept my head down and worried about whatever was coming next. He was handsome, friendly, and seemed to know everyone. He was also very well-dressed, a dramatic departure from my shabby affect.

One morning I was sent to litigate a pretrial motion before a different judge. My partner stayed behind while the intern and I went to the other courtroom. We arrived before everyone else; the courtroom was shadowy, cavernous, and entirely empty. The judge came out and looked down at the defense table. "Mr. Bookman," he said with a sense of incredulity, "is your client on bail?" "No, Your Honor," I replied. I introduced my handsome, friendly, very well-dressed African American law intern. The judge turned a whiter shade of pale. I won my meritless motion.

That intern is now a highly successful lawyer in Philadelphia.

Marc Bookman
Atlantic Center for
Capital Representation
Philadelphia, Pennsylvania

Capital voir dire in Liberty County, Georgia. The judge, court staff, clerks, court reporters, prosecutors, and defense counsel — everyone in the well of the courtroom except the defendant Mr. Simmons — were white. Mr. Simmons was African American. The large, ceremonial courtroom was packed with approximately 100 prospective jurors. My stumbling attempts to voir dire on race were not going well. The judge helped me out.

The Court: Let me ask you this. Ladies and gentlemen, do any of you — if any of you have any racial bias against the defendant or anything of that nature, please come up here and tell me about it at this time. If you do, I'll excuse you.

(No response from the jury panel.)

Matthew Rubenstein
Capital Resource Counsel Project
Portland, Oregon

Hot and sticky. That John threw her out onto the street like the trash that Sylvia thought she was. But this was nothing new for Sylvia. She had been doing this for six years, and Johns had been abusing her all that time. There were some good ones, but also some really terrible ones. But she had no other options. She was stuck in this vicious cycle of supporting her drug habit. Sylvia knew she needed to call the police — she was battered and bleeding — but she hesitated. She did not want it to end like it did the last time. Nonetheless, she called, and quickly, flashing blue and white lights appeared. Lt. Reingold stepped out of his squad car and looked down at her on the pavement. "Can you please help me? I think I need medical attention." Lt. Reingold looked unforgiving, disgusted even. "Place your hands behind your back, Sylvia. You know the drill," he barked. Sylvia realized that calling had been a mistake, but at least she would not be on the street alone…

Ashley Deschamp
Capital Conflict Office
Baton Rouge, Louisiana

Many years ago, the first minority federal judge, Mexican American Alfredo Marquez, was appointed in Southern Arizona. I represented a young Hispanic fellow who was stopped on I-10 with a trunk full of marijuana. I challenged the stop, arguing that the agent did not have a reasonable suspicion that the client was engaged in criminal activity.

At the hearing, the agent testified that his attention was drawn to the client because he was in an area frequented by drug traffickers, appeared to be Hispanic, and did not look at the agent's car when the agent pulled alongside. The agent's suspicions were heightened because the client was wearing scruffy clothes and was driving an older American car with a large

trunk. The car's rear end was riding low as if it was heavily loaded and a piece of plastic was sticking out of the trunk.

As soon as the questioning was completed, and without hearing argument, Judge Marquez barked, "Under those facts, you could have stopped *me!* The motion to suppress is granted."

The prosecution did not appeal.

* * *

One Friday evening, I received a call from the United Arab Emirates Embassy. A UAE citizen attending the University of Arizona had been arrested for illegally buying firearms. I saw the client at the federal lockup. He told me he wanted to be a "good American," so he bought a rifle and shotgun at Walmart and planned to learn to hunt. The clerk said the purchase was legal as long as the client was here on a student visa and bought a hunting license. He was and he did.

The 9/11 attacks occurred weeks later. According to the client, "After that, I wasn't going to be an Arab walking around with a gun." He put the firearms in his closet and forgot about them.

A year had passed. The client and his cousins went to a movie. As they drove away from the midtown theater, five police cars surrounded them and screeched to a halt. Officers jumped out, pointed guns at the boys, and forced them face-down on the pavement. They were dragged away in handcuffs.

The Walmart clerk's advice was accurate. Regardless, the client had to spend the weekend in jail before the charges were dismissed. No one from the government apologized. They didn't seem to think they had done anything wrong.

Natman Schaye
Arizona Capital Representation Project

In the spring of 1999, John Balentine faced three counts of capital murder in Amarillo, Texas. The State charged him with the murder of three white teenagers with whom he had a running dispute that included the use of racial epithets and threats.

The court appointed two local attorneys to represent him. Lead counsel had little to no capital defense experience and the second attorney, who handled the penalty phase, had spent the entirety of his career prosecuting capital cases as the elected district attorney of a nearby county.

During the course of the trial, Mr. Balentine was the only person of color in the courtroom. An all-white jury heard the case; the defense attorneys were white; the prosecuting attorneys were white; and the judge was white.

During the penalty phase, as the State presented a witness to testify to an earlier prior bad act by Mr. Balentine, one of the lawyers sitting at defense table with Mr. Balentine wrote a note to the other that said: "Can you spell justifiable lynching?" Can you imagine?

Mr. Balentine is on death row in Texas.

* * *

In 2001, Leroy Antonio Thomas, known as "Wayne," filed a postconviction petition challenging his conviction for first-degree murder. The basis of Wayne's challenge was his trial counsel's failure to interview the only eyewitness to the murder.

The eyewitness provided an affidavit stating that Wayne was not the man who committed the murder on her front porch.

One year later, the Commonwealth responded. It argued that trial counsel had no duty to interview the eyewitness because, in her statement to police, she said "that the person who shot [the victim] was 'a Black guy and he was wearing a red scarf on his head.' Since defendant is a Black male, this description fits him." Thus, no harm done.

The postconviction court, adopting the racist logic of the Commonwealth, dismissed Wayne's petition. The court found no prejudice because the witness would have been "confronted with her prior statement" — identifying the assailant as Black — and would have "done more harm than good."

By the time the appellate court remanded the case back to the postconviction court for an evidentiary hearing, the eyewitness had died. The court later ruled her affidavit inadmissible because she was "unavailable."

James Moreno
Federal Public Defender

My description is a compilation of episodes:

One day I was sitting with a Black colleague in the front row of the court, both of us in suits, and the court officer told me that my client had to sit in the back of the courtroom with the rest of the defendants.

* * *

As I walked with a Black judge to his chambers, a court officer came up on us from behind. He asked me who I was walking with, notwithstanding that it was a longstanding judge and court officer from the same building.

* * *

While walking through the jail, following my client to the counsel area, a corrections officer slammed my client in the head and into the bars. He did not see me. The officer felt no remorse about his unprovoked assault — until I screamed at him. Then he was shunted off by a captain and they bought lunch for my client. I was insistent about filing assault charges against the officer, but my client said, "It would be better for me if you didn't."

* * *

I tried a terrorism case that involved a de-activated Stinger anti-aircraft missile. Two white women from the audience walked into the well during a break and picked up the missile. The U.S. Marshal guarding the missile merely told the women to put down the missile and leave the area. Had my client's Black family done the same, someone would have been shot.

* * *

My wife (a white attorney) was sitting in a courtroom waiting for me, and a Black court officer (ignoring her presence because "why would she care?") walked up to my Black client and threatened him without provocation. As he walked away, he called out to no one in particular, "Fuc**n' mutt!"

* * *

One day I was sitting in my car waiting for a colleague. In front of my car, two officers pulled over an old Mercedes for no clear reason. I watched as the officers took the two Black males out of the car, patted them down, and made them sit on the hood. One officer had his hand on his gun, and the second officer tossed the car for 10 minutes. When he found nothing, I heard the first officer say, "No hard feelings, boys? Have a good day." The officers smiled and walked away. I watched the two young men pick up their belongings and put them back into the car.

These are just the normal, everyday actions that range from indignities to criminal assaults and threats, by white and Black officers alike. There are hundreds of examples like this in my 30 years of practicing — no one is immune from it. Every time a judge, court officer, lawyer, clerk, or corrections officer thinks he has a reliable ear, he says something disparaging about a person of color. The point is that it is normalized, and our clients even expect it. It is so normal that the racists do not care who sees or hears them. One can come up with examples for women in the court system. They are dismissed and threatened in their own way. The treatment is similar but different, and it is usually by the same people.

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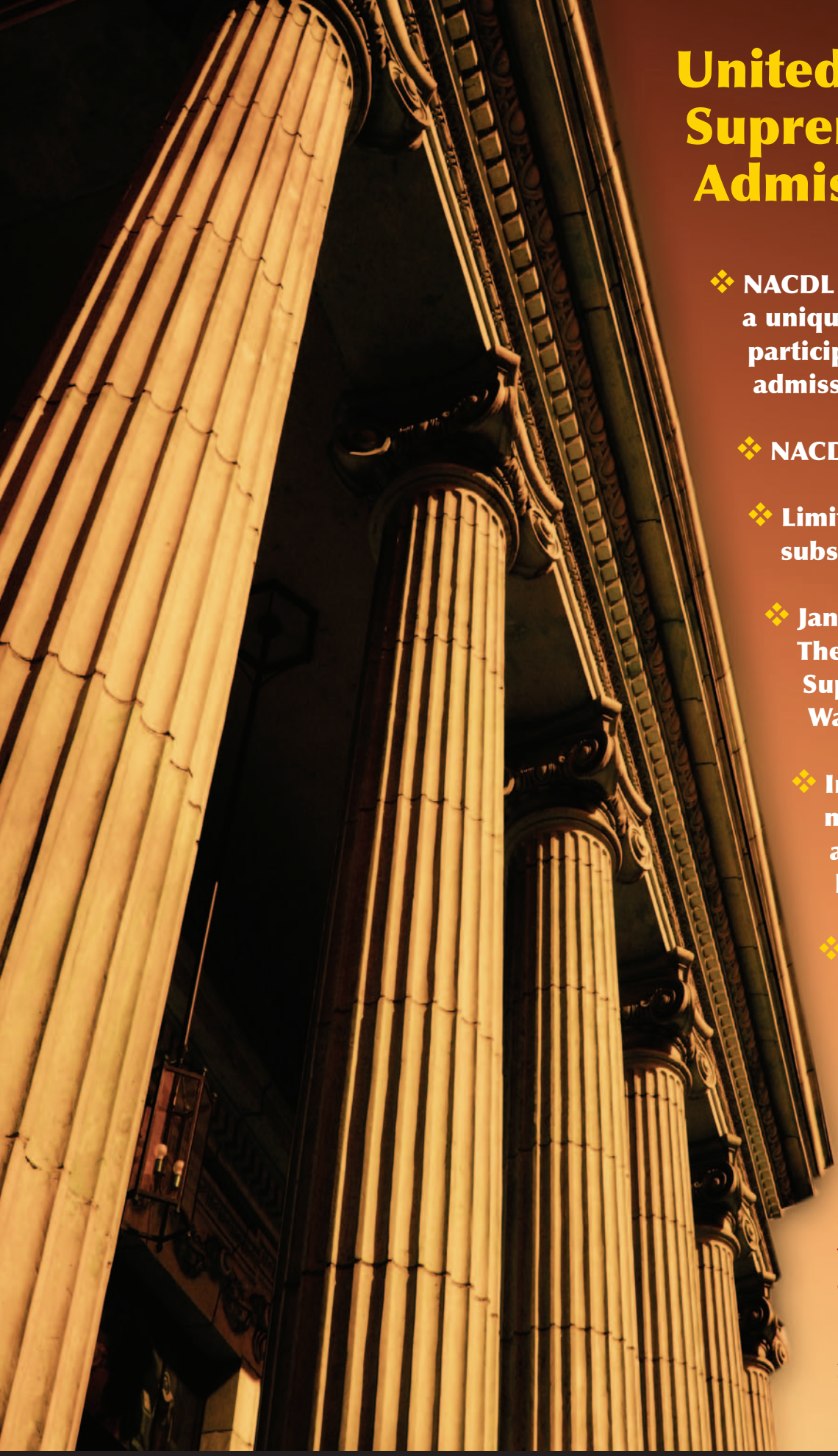

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Fighting Racial Bias by the Police Through Suppression Litigation

Every day, criminal defense lawyers see the negative impact of racial bias in the criminal court system. It can be seen in every decision, starting with police encounters and continuing to discrepancies in sentencing. People of color are far more likely to be stopped and arrested than white people.[1] Police target enforcement and surveillance efforts in communities in which people of color are most concentrated, causing minority communities to unfairly be classified as "high crime areas."

The negative effect of discrimination does not end on the streets. White people are granted desk appearance tickets at a higher rate than people of color. A person of color is more likely to be detained after arraignment. Bails set for those detained are higher for people of color than white defendants. Prosecutors make probationary offers to white defendants at a greater rate than to people of color. When recommending jail sentences, prosecutors offer white defendants less time in jail than they offer people of color. Judges hand down harsher and longer sentences to similarly situated defendants of color than white defendants. There is not one single area of the criminal prosecution system in which people of color are not negatively impacted by racial bias. Sadly, the negative effect of bias can also be found in the actions and decisions of defense lawyers.[2]

If the defense community understands that racial bias is systemic in criminal courts, why hasn't more been done to end it? Anyone who has tried to talk to prosecutors and judges about the need to make changes has witnessed a complete refusal to accept reality. What has been witnessed in the wake of the murders of George Floyd and Breonna Taylor at the hands of the police is a microcosm of what has historically occurred for decades in the effort to address systemic racism in the courts. Prosecutors and judges make statements about reform, only to make little to no attempt to support any fundamental effort to effect positive change. If the players in the system refuse to accept the truth about what is happening to clients of color, then in the words of the late, great Jeff Adachi, "If the system won't indict cops, then [criminal defense lawyers] must indict the system."

Criminal defense is a fundamental part of today's civil rights movement.[3] Defense lawyers are on the front lines of this battle. Since the system will not change on its own, the criminal defense community must create a movement that fights to tear down the pillars of racial injustice in the courts. This movement cannot be effective if only a minority of defense lawyers join. All must be part of this movement. It must be the mission of the criminal defense community to fight against the racial bias clients face during every step of the process. Racial bias harms clients of color. It is therefore unethical for criminal defense lawyers not to address race in their cases, exposing its effects on those human decisions that negatively impact clients.[4]

The police regularly target people of color using pretextual vehicle and traffic violations, including dis-

BY ANDRE VITALE

obeying a crosswalk signal, illegal window tint,[5] no bell on bike,[6] failure to signal,[7] and obstructed view,[8] to justify their initial interaction. The goal of the police in making targeted stops is to escalate the encounter with false allegations of the smell of marijuana or furtive movements to enable them to conduct a full blown search. The challenge faced in seeking to suppress evidence seized during these encounters is that under *Whren v. United States,*[9] the subjective intent of an officer does not matter, provided there is a legally valid, objective basis for the stop.

The *Whren* Fallacy

Whren is used to argue an officer's subjective intent in making a stop is not relevant in determining the legality of a search. Prosecutors claim that provided there is a legally objective basis to justify the stop, any resulting seizure of contraband is valid. This argument is partially correct.

In *Whren*, undercover officers observed an SUV with a temporary license tag being driven by a youthful individual. The vehicle was parked at a stop sign in a "high crime area."[10] As the officers made a U–turn, the SUV pulled away from the curb without signaling, driving away at an "unreasonable speed."[11] After making a stop, the officers saw Michael Whren holding two plastic bags of narcotics.[12]

The defense challenged the stop as pretext. While admitting the officer had probable cause, the defense claimed the drugs should be suppressed because the officers' true basis for stopping the SUV was their subjective belief the occupants possessed narcotics.[13] The defense asserted that a mere traffic violation should not amount to probable cause to stop the motor vehicle.[14]

In a unanimous decision, the Supreme Court rejected the defense argument. The Court ruled the stop was justified because the observed vehicle and traffic violations provided the undercover officers probable cause to make the stop. The Court ruled that the officers' subjective intent could not be considered in determining whether the stop and search violated the Fourth Amendment.[15]

Prosecutors argue *Whren* stands for the precedent that subjective intent can never be considered when seeking to suppress evidence. This argument is not valid. *Whren*'s holding is limited to challenges based upon alleged violations of the Fourth Amendment. The *Whren* Court specifically stated the subjective intent of the officer could be relevant in seeking to challenging an officer's actions. Writing the opinion of the Court, Justice Scalia stated:

> We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. *We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.* **...** Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[16]

The Supreme Court left open the ability to challenge the actions of the police based upon a claim that an officer's subjective motivation in conducting a stop was based upon racial targeting.

Proper Basis to Challenge

If a challenge cannot be made under the Fourth Amendment, how can a motion to suppress evidence based upon an allegation of racial targeting be made? The answer: This challenge should be based upon an alleged violation of the Fourteenth Amendment of the U.S. Constitution. The Supreme Court in *Whren* endorsed using the Equal Protection Clause to challenge racially motivated actions by the police, stating: "The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[17] The ability to challenge racial targeting of individuals by the police under the Fourteenth Amendment is limited to actions that proceed in State court.

Procedure

Step One:
The defense must present evidence that raises an inference the law was applied in a racially discriminatory manner.

The first step in making a challenge based upon a claimed violation of the Equal Protection Clause is to present evidence that raises an inference the officer's actions were based upon a discriminatory enforcement of the law. When challenging an officer's actions as a violation of Equal Protection, it is important to cite both the Fourteenth Amendment as well as the particular State's Equal Protection provision.[18] Many States afford greater protection under their Equal Protection Clause than that afforded by the Fourteenth Amendment.

The most persuasive manner in which to raise the inference is to present evidence establishing that the officer making the stop has historically applied the law in a discriminatory manner.[19] The most common manner in which to raise an inference of discriminatory enforcement is through the use of statistics. However, the inference can also be raised by presenting any data or information that demonstrates similarly situated people were treated differently or the particular officer has a pattern of targeting people of color for stops, searches, or the use of force.[20] For example, video evidence that compares the way police treat white people with the way police treat people of color can raise the inference of discriminatory application. In addition, affidavits from people in the community familiar with a particular officer's history of biased actions can raise the inference as well.

If defense counsel uses statistics, the focus should be on the particular officer. However, a challenge can be made based upon statistics relevant to the entire police force.[21] This latter approach should be accompanied by evidence that shows the officers were trained to target minorities or that a culture of racial targeting exists in the force in general.[22] Training and culture can be established through the introduction of written training materials or testimony of officers familiar with the force's culture.

Statistical evidence of discrimination can be developed using the department's own records. In a case involving a person stopped for jaywalking, arrest reports in which the discovery of contraband was started by a stop for jaywalking should be subpoenaed. In addition, the defense should obtain reports from police interactions that did not lead to an arrest.[23] Further, traffic tickets for individuals charged with jaywalking should be collected.[24] With these records, a comparison can be made regarding the number of stops of individuals by race. Information that the police stopped African Americans for jaywalking 35 percent of the time, while they make up only 10 percent of the population, would successfully raise the inference the law is being enforced in a racially selective manner. Further, evidence showing that people of color were searched at a greater frequency than white people (either as a result of an escalated encounter or pursuant to a consent search) would raise an inference of racial targeting.

Every step of the police interaction should be analyzed. The frequency of stops, frisks, requests to search, and arrest should be compared. Statistics show police officers discriminate against people of color in every phase of their interaction. African Americans behind the wheel are 20 percent more likely to be stopped than white drivers.[25] However, stop decisions are not where racial disparity ends. The police search people of color at a far greater frequency than white people. African American drivers are three times more likely to be searched following a routine traffic stop than white drivers.[26] Police are far more likely to claim a person of color made "furtive movements," "acted nervously," or "avoided eye contact," which they use to escalate a pretext stop to a *Terry* search. It is important to subpoena the stopping officer's arrest reports to see if the officer frequently uses the same claims to justify searches of people of color in contrast to his or her interactions with white people. When comparing an officer's interactions with white people to the officer's interactions with people of color, many times a review of these records will reveal common language in the officer's reports that is used to justify the escalation of an encounter with persons of color.

The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

It is unknown whether claims of furtive movements or avoiding eye contact are the product of intentional misrepresentation or an officer's implicit bias. In challenging police actions as racially motivated, the cause does not matter, only the effect. That effect is that the police stop and search people of color at a far greater rate than white people. One statistic that definitively shows the bias of the police involves consent searches. African American and Latino drivers are two and one-half times more likely to be asked to submit to a consent search than white drivers.[27] No nonbiased reason explains this disparity. Selective enforcement is based upon the false assumption by the police that people of color commit crimes at a higher rate than white people.

Police claim increased targeting of people of color is justified because they are more likely to possess contraband. These claims are patently false.[28] While white people use drugs at the same or greater frequency,[29] people of color are six times more likely to be stopped. Analysis of "hit rates"[30] shows that white people who are stopped are found to possess contraband more than people of color.[31]

Step Two: The burden shifts to the prosecution to produce evidence that the stop or search was race neutral.

Once the inference of discriminatory enforcement is raised, the burden shifts to the prosecution.[32] To rebut the inference, the prosecution must present objective evidence the police action was not racially motivated. This burden cannot be met merely by arguing the officer was legally justified to make the stop.[33] The inference will not be rebutted by presenting testimony the stop was not racially motivated. Instead, the prosecution must present objective evidence that overcomes all reasonable inferences and proves the stop was not racially motivated in any manner.[34] Even if the stop was only partially motivated by race, the prosecution cannot overcome the inference.

Step Three: Move to suppress the discriminatorily seized evidence.

If the prosecution fails to rebut the inference, the proper action is not to move to dismiss the charges, because it does not strike at the heart of the action. Rather, the proper sanction for a successful claim of selective enforcement is to suppress the evidence seized.

Prosecutors incorrectly argue suppression only applies to violations of the Fourth Amendment and not the Fourteenth Amendment. This argument is not valid.[35] The Exclusionary Rule is not found anywhere in the Constitution. Rather, it is a judicially created remedy, designed to protect constitutional safeguards.[36] The purpose underlying the Exclusionary Rule is to deter impermissible behavior by the government and maintain integrity in the judicial system. These purposes apply equally, if not

more, to cases in which evidence is seized as a result of racially discriminatory enforcement of the law.[37]

Conclusion

The police stop, search, and arrest people of color in a discriminatory manner. Their decisions are the result of bias (both implicit and explicit), the training they receive, and the biased culture in law enforcement. Systemic racism in the criminal courts must end. It is the ethical and moral duty of criminal defense lawyers to be part of the movement to change this racist system. Criminal defense lawyers should challenge the discriminatory actions of the police under the Fourteenth Amendment, which will change the focus from objective bases for police actions to their subjective intent.

Notes

1. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020) (analysis of approximately 95 million stops nationwide found that "[r]elative to their share of the residential population, … [B]lack drivers were, on average, stopped more often than white drivers," and that Black drivers comprised a smaller share of drivers stopped at night when it is harder for officers to detect race, "suggest[ing] [B]lack drivers were stopped during daylight hours in part because of their race").

2. L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

3. Jonathan Rapping, *Building a New Generation of Public Defenders*, TEDX ATLANTA (May 2015).

4. Abbe Smith, *Nice Work If You Can Get It: Ethical Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523 (1998).

5. N.Y. VEH. & TRAF. § 375 (12-a).

6. N.Y. VEH. & TRAF. § 1236.

7. N.Y. VEH. & TRAF. § 1163.

8. N.Y. VEH. & TRAF. § 1213.

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

10. *Id.* at 808.

11. *Id.*

12. *Id.* at 808–809.

13. *Id.* at 810.

14. *Id.*

15. *Id.* at 819 ("[W]e think there is no realistic alternative to the traditional common law rule that probable cause justifies a search and seizure. Here the district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible.").

16. *Id.* at 813.

17. *Id.*

18. U.S. CONST. amend. XIV (*No state shall* make *or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*) (emphasis added).

19. *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990).

20. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); *Commonwealth v. Wilbur W.*, 479 Mass. 397, 409 (2018).

21. *Commonwealth v. Lora*, 451 Mass. 425 (Mass. 2008); *State v. Soto*, 324 N.J. Super. 66 (N.J. Super. Ct. App. Div. 1996).

22. *Soto*, *supra* note 21.

23. The names of these records differ for police agencies. In Rochester, New York, for example, they were called Field Information Forms (FIF).

24. The difficulty with traffic tickets is that in many jurisdictions the race of the accused is not recorded, and it will require additional work to develop that information.

25. 4 NATURE HUM. BEHAV. 736.

26. Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops; The Case for an Equal Protection Exclusionary Rule*, 71 U. COL. L. REV. 255, 275 (Winter 2000). A study conducted in Erie, Pennsylvania, revealed that while drivers accounted for 67 percent of people stopped, they only amounted to 37 percent of drivers who were searched. Thomas Gamble et al., ANALYSIS OF POLICE STOPS AND SEARCHES, CITY OF ERIE, PA, at 28, note 89 (2002).

27. Eamon Kelly, *Race, Cars and Consent: Re-evaluating No-Suspicion Consent Searches*, 2 DEPAUL J. SOC. JUST. 253 (2009).

28. Kia Makarechi, *What the Data Really Says About Police Racial Bias*, VANITY FAIR (July 14, 2016).

29. Eric Schlosser, *The Prison Industrial Complex*, ATLANTIC MONTHLY, December 1998, at 51.

30. Hit rates are the percentage of people found in possession of contraband when police search them either pursuant to a *Terry* stop or a consent search. These statistics do not include individuals searched incident to arrest, inventory searches, or when police search an individual pursuant to a warrant.

31. Walter, *supra* note 26; David Harris, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); *State v. Carty*, 790 A.2d 903 (N.J. 2002).

32. *Commonwealth v. Lora*, 451 Mass. 425, 438 (Mass. 2008).

33. *Commonwealth v. Long*, slip op. at 28 (Mass. Sept. 17, 2020).

34. *Id.*

35. *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997).

36. *United States v. Leon*, 486 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338 (1974); *Mapp v. Ohio*, 367 U.S. 643 (1961).

37. *State v. Segars*, 172 N.J. 481, 493 (2001).

About the Author

Andre Vitale is the First Assistant Deputy Public Defender and Trial Chief, Hudson Trial Region, at the NJ Office of the Public Defender. He has tried 97 cases to verdict and has expertise in homicide and sex cases.

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Pretrial Release for Non-US Citizen Clients:

One Front of the War for Racial Justice

BY AMY F. KIMPEL AND JAMES M. CHAVEZ

Introduction

Before the hearing, the prosecutor called to ask if I was planning on "stipping to detention." I was not. "But your client is an alien," the prosecutor replied. I pointed out that my client was still entitled to a detention hearing and pretrial release. "But he'll lose, and it is just a waste of the court's time." The prosecutor was wrong.

Noncitizenship status makes an uphill battle for freedom steeper, but not impossible. The system is stacked against poor people and poor people of color charged with crimes. But when a poor client of color is a non-U.S. citizen (non-USC), there are additional barriers to release — like immigration detainers and the anti-immigrant bias of judges and prosecutors. That is why it is vital defense attorneys fight just as hard for their non-USC clients as their USC clients.

This article explains how to get non-USC clients (both those with legal status and those who are undocumented) out of custody and how to keep them out. First, it lays out data and case law showing that non-USC clients are entitled to pretrial release. Second, it talks about the impact of Immigration and Customs Enforcement (ICE) detainers. Third, it provides practice tips and success stories from defender offices that vigorously advocated for pretrial release for non-USC clients.

Why This Is Racial Justice Work

If lawyers fail to fight for pretrial release for non-USC clients, that disproportionally impacts clients of color. Defense lawyers simply cannot achieve racial justice in the context of pretrial release if they leave out non-USC clients. The U.S. immigrant population is more racially and ethnically diverse than the nonimmigrant population. More than half of immigrants identify as nonwhite, and 44 percent are Hispanic or Latinx.[1] Ten percent of Black people in the U.S. are foreign-born, up from just 3 percent in 1989.[2] Black and Latinx immigrants often live in overpoliced neighborhoods where they are more likely to be stopped,[3] arrested, and then funneled into what advocates call the "prison-to-deportation pipeline."[4] Non-USCs are more likely to be detained pretrial than their USC counterparts, and these disparities exacerbate racial disparities in pretrial detention rates.[5]

Addressing pretrial release for non-USCs is taking on increasing urgency because state and federal governments are arresting and prosecuting more non-USCs than ever before. To be clear, this is not because non-USCs commit more crime than citizens; felony crime rates appear to be lower for non-USCs.[6] And undocumented immigrants tend to have lower felony crime rates than both documented immigrants and USCs.[7]

The uptick in arrests and prosecutions of non-USCs is driven by two factors. First, immigrants make up a growing share of the U.S. population. In 1970, only 4.8

percent of the U.S. population was foreign born (an all-time low).[8] In the past 50 years, that rate has tripled to 13.7 percent of the population, meaning that 44.8 million people now living in the U.S. were born in another country.[9] When it comes to the undocumented immigrant population, there has been even swifter growth with the number of undocumented immigrants tripling from 3.5 million in 1990 to 10.5 million in 2017.[10] Despite slight declines since peaking at 12.2 million in 2007, undocumented immigrants still make up 3.2% of the U.S. population and about a quarter of all immigrants.[11]

The second driver of the uptick is a massive increase in the prosecution of immigration crimes in federal court. In 1998, 63 percent of federal arrests were of USCs. But by 2018, 64 percent of federal arrests were of non-USCs.[12] Of those federally prosecuted in 2018, 57 percent were USCs and 43 percent were non-USCs, driven in large part by increased immigration prosecution rates under Presidents Obama and Trump.[13]

Against this backdrop of increasing prosecutions of immigrants, the picture when it comes to pretrial release for non-USCs is bleak. Non-USCs do not get released pretrial as often as USCs.[14] In federal court, the share of people being detained pretrial increases as immigration prosecutions increase.[15] This causes huge disparities in the pretrial detention rates for Latinx people accused of crimes.[16] Defense practitioners often resign themselves to defeat and do not bother to advocate for bail. Judges categorically assume flight risk and deny pretrial release.

But this assumption that non-USCs are at increased risk of flight is just that — an assumption (perhaps based on bias and xenophobia) not borne out by the empirical evidence. Data suggests that non-USCs and those with foreign ties are no more likely to flee than their USC counterparts.[17] This makes sense because non-USCs often have strong community ties to the United States — even when they lack legal status. About two-thirds of undocumented immigrants have been in the United States for over 10 years.[18] Immigrants have "enrolled in degree programs, started businesses, purchased homes, and [] married and had children" in the United States.[19] These ties, rather than categorical assumptions about immigrants, are more predictive of risk of flight, and that is the crux of why non-USC clients are entitled to individualized determination of pretrial release.

When the non-USC share of the defendant population increases and defense practitioners acquiesce to the pretrial detention of non-USC clients, detention becomes the norm. Defenders must fight against that norm — for non-USC and USC clients alike.

How a Client's Citizenship Status Impacts the Consideration for Release

Judges and prosecutors are quick to conclude that because a person accused of a crime is a non-USC the person cannot or should not be released pretrial, but that is not the case. Generally, there are two permissible reasons to detain the accused pretrial: risk to public safety, and risk of flight or non-appearance.[20] On both measures, data suggests that non-USCs should be released pretrial at least as often as USCs.

As mentioned above, non-USCs tend to commit crimes at rates lower than the USC population. Similarly, no evidence suggests than non-USCs or those with foreign ties are at greater risk of non-appearance in court or are more likely to flee.[21] In fact, people released on bond who are charged with immigration crimes (who are more likely to be non-USCs) perform better on pretrial release than those charged with property, drug, violent, or weapons offenses.[22] Finally, contrary to conventional wisdom, non-USCs are released pretrial every day (albeit at lesser rates than USCs) — for example, in federal court 41.5 percent of immigrants with legal status are released.[23]

Generally, courts can consider citizenship, immigration status, and ties to foreign countries in determining risk of flight because these facts are implicitly part of the permissible "community ties" analysis involved in most pretrial release schemes.[24] Some states, like Illinois, South Carolina, and Tennessee, explicitly require the judge to consider whether the accused has lawful immigration status or is currently subject to deportation as one of many enumerated factors in the pretrial release determination process.[25] Other states have gone further, enacting statutes that create presumptions of detention or mandatory detention for non-USCs who lack legal status in the United States. But in Arizona, Oklahoma, and Missouri, laws creating presumptions or mandatory detention for non-USCs have been struck down by courts for being unconstitutional.[26] Likewise, Virginia recently repealed a law that had created a presumption of detention for people charged with certain crimes who were in the United States unlawfully.[27]

Several states have statutory protections for non-USCs accused of crimes. For example, Oregon law prohibits judges from inquiring into the immigration status of those charged with crimes, and Hawaii law requires judges to inform people accused of crimes of their right not to disclose their immigration status during arraignment.[28] New York, California, and Washington passed laws prohibiting courthouse arrests by ICE without judicial warrants, and court systems in Oregon, New Jersey, and Albuquerque issued orders limiting ICE enforcement in courthouses.[29] ICE often did not honor these state laws and orders under the Trump administration, but recently the Biden administration issued guidance to ICE substantially limiting the use of courthouse arrests.[30]

Overall, lawful statutory schemes for pretrial release allow consideration of citizenship and immigration status either explicitly as a listed factor to be considered, or implicitly as part of the community ties analysis. But prosecutors will sometimes try to turn citizenship and immigration status into multiple factors weighing against pretrial release — noting that an undocumented non-USC client has no right to "enter, remain, or work" in the United States. Push back against arguments like this that double or triple count a client's immigration status against them. Then list the positive community ties the client has and the reasons the client is invested in staying in the United States and in the community where the criminal case is occurring, such as length of time residing there, family ties, education, or membership in a religious institution in the community. Point out any paths to lawful status in order to highlight that the client has a reason to stay and fight both the criminal and immigration cases — particularly if the client is an asylum seeker who fears returning to his or her home country.

The Impact of ICE Detainers

But what if a client is deportable? If the client is undocumented, has an expired visa, or has criminal convictions that can trigger deportation, the client may be dealing not just with a criminal case, but with the threat or reality of an "ICE detainer." An ICE detainer is a *request* from ICE (a division of the Department of Homeland Security) that the jail holding the client permit ICE to

assume custody after the client has been released. The ICE detainer allows ICE to decide whether to initiate immigration proceedings and possibly hold the client in immigration custody as it processes the client for deportation.[31] To be clear, an ICE detainer is no guarantee that a person will be deported. ICE detainers are issued by ICE agents, not judges or government attorneys.[32] And as one court explained, "decisions relating to the removal of non-citizens are highly discretionary and involve complex legal issues, making the risk of deportation extremely difficult to predict."[33] That is why the ICE detainer form itself states that the detainer "should not impact decisions about the alien's bail[.]"[34]

The assumption that non-US citizen clients are at increased risk of flight is just that — an assumption (perhaps based on bias and xenophobia) not borne out by the empirical evidence.

Despite this, prosecutors often ask judges to deny pretrial release based on ICE detainers. Prosecutors argue that because a person accused of a crime is deportable or has an ICE detainer lodged against him, that the person presents an increased risk of non-appearance because there is a chance the U.S. government will detain and deport him if he is released. Basically, the prosecutor is asking the judge to obstruct the deportation to make sure the criminal case happens before the person accused is deported.[35] It also means the prosecutor is asking the judge to deny pretrial release based on something entirely outside the person's control — and this seems intuitively unfair. The traditional understanding of flight risk in the pretrial release context has a volitional component. Pretrial release is not denied to old and infirmed people charged with crimes just because they may miss court due to death or hospitalization. But how have courts treated these arguments?

In Federal Court

The Federal Bail Reform Act (BRA) allows for a brief initial detention to notify ICE when a non-USC is charged in federal court so that ICE can lodge a detainer.[36] But other than that, the BRA treats USCs and non-USCs the same and applies the same factors to be considered in determining whether they pose a risk of flight or dangerousness warranting pretrial detention.[37] Federal courts have overwhelmingly held that the risk of non-appearance in the BRA context must have an "element of volition" and cannot be solely based on the "specter" of deportation.[38] Courts generally conclude risk of flight should not include the risk that ICE will involuntarily remove the defendant.[39] Likewise, courts have rejected the suggestion that an ICE detainer creates a rebuttable presumption that a defendant presents an unreasonable risk of flight.[40] Though there is some older contrary district court authority, those cases are based on an assumption that ICE will certainly detain and deport the defendant prior to the conclusion of the criminal case — which is rarely the case.[41] Moreover, more recent cases in those same districts (or even by the same judges) have followed the weight of federal authority and declined to detain a defendant solely because of an ICE detainer or risk of deportation.[42] That is not to say that the risk of deportation cannot factor into the court's analysis. Courts can consider that a person accused of a crime may be less likely to stay in the country and fight a criminal case if he or she can self-deport and avoid prison time — particularly when it seems inevitable that the person will lose both the criminal and immigration cases.

Once a person accused of a crime has been released on pretrial release in federal court, ICE has two options. It can detain the person and proceed with the deportation process, permanently jeopardizing the criminal case if the deportation happens before the criminal case resolves. Or it can release the person and allow the criminal case to proceed with the defendant on bond. What it cannot do is hold a person in immigration custody to circumvent release under the BRA while also delaying deportation.[43] This means that the Department of Justice (DOJ) must prioritize the criminal or immigration case. Unless the criminal case can conclude before the person is deported, DOJ cannot have its cake and eat it too. If the U.S. government deports a person accused of a federal crime outside the jurisdiction of the United States, the court will likely dismiss the criminal charges based on the violation of the person's due process rights.[44]

Some non-USCs charged with federal crimes have asked federal courts to enjoin ICE from detaining, transporting, or deporting them once they are released on criminal bond. They argue that the BRA conflicts with the Immigration and Naturalization Act and preempts it. They note that if ICE detains them in an immigration detention facility far from the court or deports them out of the country, they will not be able to attend court appearances, which may interfere with speedy trial or other due process rights. Similarly, immigration detention or deportation can impair a non-USC client's ability to communicate with counsel in a violation of the client's Sixth Amendment rights. But courts are generally unwilling to enjoin ICE actions and have rejected the argument that the BRA preempts the Immigration and Naturalization Act.[45] Courts seem more comfortable dismissing cases once the person accused has been deported than preventing the deportation in the first place.

In State Court

But what about state courts considering pretrial release for clients subject to ICE detainers? Unsurprisingly, there is less consensus than in the federal courts because the state statutory schemes governing pretrial release are not uniform. For example, Florida requires law enforcement to notify the court considering pretrial release when a person accused of a crime is subject to an ICE detainer,[46] while Oregon law forbids a court from inquiring into the accused's immigration status at all.[47] There is also less appellate case law because the appellate practice in many state courts is not as robust as in the federal court system. And there are information gaps. Federal authorities have more access to information about a client's immigration status, and federal prosecutors have more insight into the decision-making of ICE officials and at least a nominal ability to coordinate with them. State officials are often operating in the dark. Finally, because of the federal supremacy clause, federal immigration officials typically are not bound by state court orders and that creates some additional complications.

Once a person is released pretrial in a state court criminal case, ICE is faced

with the same set of options as in the federal context. Like in the federal context, state courts have not been willing to prevent ICE from deporting people charged with state crimes.[48] One key difference is that the state prosecutor is not part of the same "government" as ICE, so judges are less willing to fault the prosecutor for a deportation of the person charged with the crime. Because of this, the criminal case will often be put in warrant status rather than dismissed post-deportation. If a client returns to the United States, the case will still be pending.

Recently, the New Jersey Supreme Court grappled with the question of how an ICE detainer (or the likelihood of one) impacts risk of flight analysis in a consolidated appeal, *State v. Lopez-Carerra*, which presents the most comprehensive treatment of this issue by a state appellate court to date.[49] The New Jersey Supreme Court persuasively explained that though the court can consider immigration status, immigration status alone is not dispositive of risk of flight or non-appearance in court.[50] Moreover, the New Jersey high court held that the pretrial release statute "authorize[s] pretrial detention when there is clear and convincing evidence that individual defendants pose a serious risk of non-appearance based on their own conduct, not the acts of third parties like ICE."[51]

The advocates in *Lopez-Carrera* teed up these issues deftly. New Jersey, like many states, uses a pretrial risk assessment with scores for risk of flight and risk to public safety. Despite scores that indicated the defendants were low-risk and recommended release, the prosecutors argued that the defendants should be detained due to the risk that they would be deported by ICE before they could be criminally prosecuted. Defense counsel narrowed the issue to the sole fact of the ICE detainer and minimized other unhelpful facts about the defendants and their cases — forcing laser-like focus on whether the risk of non-appearance included risks based on the actions of third parties. Helpful amicus briefs by immigration practitioners and the ACLU laid out the complexities of immigration law and educated the court on ICE detainers — highlighting the uncertainty about whether an ICE detainer will lead to eventual deportation. The amicus briefs allowed the New Jersey high court to push back against the false narrative of the state prosecutors that ICE had no choice but to deport the defendants if they were released. The opinion concludes with the court "urg[ing] ICE officials to work with prosecutors to allow pending criminal charges to be resolved."[52] The litigation in *Lopez-Carrera* provides a great template for defense attorneys working in other states, particularly other states where risk assessment tools are used.

Success Stories From the Field

The recent battle against Operation Streamline in San Diego's federal courts is another powerful example of how fighting for pretrial release for non-USCs can change lives and change the criminal legal system. Operation Streamline is a joint initiative of the Department of Homeland Security and Department of Justice in the United States, started in 2005, that adopts a "zero-tolerance" approach to unauthorized border-crossing by criminally prosecuting border-crossers at high rates.

In July 2018, the Trump administration implemented Operation Streamline in the Southern District of California for the first time.[53] What this meant for the federal courts in San Diego was that hundreds of non-USCs arrested crossing the border, including asylum seekers, were criminally prosecuted every week.[54] Often on the same day as their arrest, these non-USCs were arraigned, pleaded guilty, and were sentenced (usually to time served).[55] Many non-USCs caught up in Operation Streamline were arrested with their young children.[56] These children were separated from their parents because their parents were held in pretrial detention rather than being granted pretrial release.

Federal Defenders of San Diego, Inc. teamed up with The Bail Project[57] (a nonprofit that posts bail for people accused of crimes) to fight back.[58] Attorneys advocated in court to get bail set for their Operation Streamline clients. The Bail Project paid the bail. But, instead of releasing these non-USCs, federal authorities deported these individuals and dismissed their cases.[59] Seven hundred people avoided criminal convictions by exercising their right to bail.[60]

Eventually, DOJ grew tired of charging cases only to later dismiss them. So, it changed course and started releasing those individuals being prosecuted as part of Operation Streamline. The vast majority (74 percent) of these non-USC clients showed up to their court hearings.[61] This appearance rate of non-USC clients was better than the overall appearance rate for misdemeanant defendants in the same courthouse in the same year.[62]

Posting bail allowed many more clients to fight their cases. Previously, clients would plead to time-served deals

rather than waiting in jail for at least a month before their cases could be brought to trial. Many individuals prosecuted by Operation Streamline won their trials. And of those who lost at trial, many had their convictions reversed by the Ninth Circuit due to charging errors.[63]

Practice Tips

Here are some practice tips for litigating pretrial release for non-USC clients:

- *Contact the local public defender's office to see if it has an in-house* Padilla*/immigration expert.* The expert may have insight into collaboration between local authorities and ICE and tips on how to avoid immigration detention and detection.

- *Advise clients not to disclose their immigration status if they do not have to.* Many times, law enforcement will figure out a client lacks U.S. citizenship during an arrest based on the client's identification or booking information. But sometimes the client can avoid the authorities learning of their immigrant status, putting the issue out of the court's consideration. Remember, clients have a right not to disclose their undocumented status under the Fifth Amendment (and obviously, counsel cannot disclose it without their permission and a waiver of confidentiality). If the judge asks about citizenship to be able to advise about immigration consequences or consular rights, make sure to assert the client's right not to give this information and ask that all clients be advised rather than having to disclose citizenship status of individual clients.

- *Be proactive about ICE detainers.* Ask the jail for a copy of the ICE detainer. Ask the jail to decline the ICE detainer. Ask ICE to lift the detainer. Point out the immigration enforcement priorities and explain why the client does not fit them. Consider partnering with an immigration attorney to represent the client in the immigration case.[64] If the client does not have an ICE detainer yet, try to get the client released before one is lodged.

- *Participate in pretrial risk assessment screening interviews.* Because citizenship is not predictive of risk of flight, it is usually not a factor in pretrial risk assessment tools. But often pretrial services officers do not run risk assessments on non-USCs because they do not think they bail out or do not think it is worth the time and effort to interview non-USCs.[65] Try to ensure that non-USC clients are included in pretrial risk screening (preferably after they have been advised about their Fifth Amendment right to decline to answer questions that may incriminate them). Alternately, if defense lawyers have access to the pretrial screening questions, they can run the risk assessment themselves.

- *Use pretrial risk scores, the client's community ties, and data to argue for pretrial release.* Use a client's pretrial risk score and the data mentioned in this article to advocate for release. Highlight the client's community ties — most immigrants have lived in the United States for more than 10 years and have significant ties here through school, employment, and family. Make sure the judge knows that.

- *Challenge statutes and case law that disfavor non-USCs.* Statutory schemes that single out or target non-USCs are ripe for Equal Protection Clause challenges. Lay the record for the criminal appeal and try to find partners who can challenge the statute in a companion civil suit. Narrow the issues and force judges and prosecutors to be explicit about why they are detaining non-USC clients — make the argument that the client should not be detained based on the conduct of third-party actors like ICE.

- *Be prepared for logistical hurdles.* Working with non-USC clients will present some logistical hurdles. Bail companies may charge more for a bond. It may be difficult to find sureties who have legal status. Counsel may need to work on getting the client bailed out of immigration detention after he or she has been released. Counsel may or may not be able to get the client custody credit for time spent in immigration custody. If the client is deported, the prosecutor may move to forfeit bond, but there are good arguments and precedent for avoiding bond forfeiture.[66]

- *Make a record of how ICE violates the client's rights and ask for dismissal.* If a client is released and then detained by ICE, make a record of how ICE is violating the client's rights in the criminal case. If ICE moves the client to a facility far away, make a record about how that interferes with the client's rights to speedy trial, counsel, and due process. If the client is deported pending trial, ask for a dismissal with prejudice based on these rights violations.

Conclusion

Clients who are released pretrial have better case outcomes. When non-USC clients are allowed to languish in custody, it doesn't just impact whether they get pretrial release — it impacts whether they plead guilty, how long they spend locked up, and how long their sentence is if convicted. Failing non-USC clients in the pretrial release context also contributes to racial disparities in the criminal legal system and contributes to cultural acceptance of pretrial detention for all people charged with crimes. Obtaining release for non-USC clients who are facing the triple bias of being foreign-born, non-white, and charged with a crime is no

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easy task. But, as the examples in New Jersey and San Diego demonstrate, when advocates fight for pretrial release for non-USC clients, the battle can be won.

Notes

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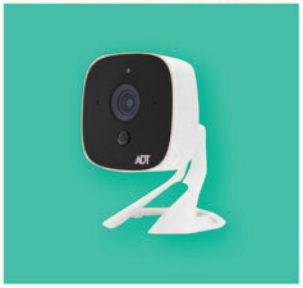

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43. *United States v. Soriano Nunez*, 928 F.3d 240, 245 (3d Cir. 2019); *United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019).

44. *See, e.g., United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128 (M.D. Fla. 2015) (dismissing without prejudice for due process violations based on defendant's deportation); *United States v. Munoz-Garcia*, 455 F. Supp. 3d 915 (D. Ariz. 2020) (dismissing with prejudice for violations of Speedy Trial Act and right to counsel based on defendant's deportation).

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The Role of Implicit Racial Bias in Forensic Testimony

Introduction

Since the murders of George Floyd and Breonna Taylor, conversations around racial bias in the criminal justice system have accelerated. Much of the focus has turned to police reform. The potential for racial bias, however, does not end with the initial stop, search, and arrest. Rather, it can be found throughout the criminal justice system, and forensic testimony is one area that does not get nearly enough attention when it comes to implicit racial bias.

Lawyers, judges, and jurors often approach scientific sounding evidence with a predisposition to accept the expert's conclusions, without a critical eye. Experts for the government are often presumed to be neutral and objective witnesses who report the science with no stake in the outcome.

Government experts, however, are susceptible to bias, including implicit racial bias, just like everyone else. These experts who testify in criminal cases may not be reporting "neutral science"; the testimony may be contaminated by implicit racial bias that has colored their conclusions.

Pattern matching methods[1] — for example, analysis of firearms and toolmark impressions, bloodstains, latent prints, hairs, and footwear and tire impression analysis — are especially problematic. These methods are inherently subjective, meaning that they rely heavily on the examiner's individual judgment rather than any objective standard. Even though the examiner may be analyzing, for example, a bullet from a crime scene, that examiner may also be given "task irrelevant information," such as the name, race, and background of the lead suspect. Knowing that information can predispose the examiner to believe that the bullet was fired from that suspect's gun, leading to a result-driven opinion about whether the marks on the bullet "match" the marks on test fires from the gun. The human eye will see what it wants to see, and, because there are no objective standards by which to measure the marks, the examiner's conclusions may reflect bias in favor of guilt rather than a true determination that the marks are, in fact, the same in appearance or sufficient in number.

Implicit racial bias in forensic testimony cannot be ignored as a primary driver of injustice. This article discusses implicit racial bias, how it can impact forensic testimony, and what can be done about it.

The Presumption of Guilt

The existence of implicit bias is not reasonably subject to debate.[2] The impact on the criminal justice system is, likewise, beyond debate.[3] More than 25 years ago, in *Georgia v. McCollum*, Justice O'Connor wrote in dissent that "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt and innocence."[4] Even before that,

BY JANIS C. PURACAL

Justice Brennan, in a dissent in *Turner v. Murray*, acknowledged that it is "incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised."[5] Decades later, in 2017, Justice Appel of the Iowa Supreme Court quoted Justices O'Connor and Brennan in a special concurrence recognizing that "we have a long way to go in ensuring fairness to racial minorities in our criminal justice system."[6] Justice Appel discussed the scientific and academic literature on implicit bias and urged the use of jury instructions to address implicit bias in criminal cases.[7]

Despite the research on implicit bias and the recognition that a disproportionate number of black and brown people are adversely impacted by the criminal justice system,[8] studies "find evidence that race continues to influence individuals' decisionmaking and behavior" within the system.[9]

The unfounded and malevolent association of dark skin with criminality underlies many of the inequities that are pervasive in the justice system.[10] The system is built on the presumption of innocence, which has blinded us to the alternate reality — that there exists an implicit presumption of guilt for some of those who come before it.[11]

Research has documented the presumption of guilt facing people of color.[12] That presumption comes from decades of dehumanization through false narratives that portray people of color as dangerous, uneducated, and menacing.[13] This presumption of guilt implicitly shifts the burden to the individual to prove that he or she ***is not*** any or all of those things.

But the presumption is not always intentional or perceptible, and that makes the burden to expose and rebut it a constantly moving target.

The Research Behind Implicit Racial Bias

Researchers have extensively documented the science of implicit bias (also known as unconscious bias), and courts have commented on the "growing body of social science [that] recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias."[14] Implicit biases are "attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it."[15]

Implicit bias is to be contrasted with "explicit bias," which describes

How I Ended Up Here

By Janis C. Puracal

I was a third-year lawyer in Seattle when my older brother, Jason, was wrongfully convicted. He spent nearly two years being slowly starved in a Nicaraguan prison.

He was charged, and ultimately, convicted of international drug trafficking, money laundering, and organized crime. There was no evidence of drugs — not even a single gram was found on Jason's person or in his truck, home, or office. Bank records confirmed that there were no illegal transfers of money, and the 10 other individuals arrested with him all confirmed that they had never met him.

Despite the lack of evidence, Jason was convicted and sentenced to 22 years in La Modelo, the maximum-security prison just outside Managua that is known for rampant human rights violations, including extreme overcrowding, unsanitary conditions, and a lack of food and medical care.[1] Twenty-two years in that place is a death sentence.

When Jason was arrested, I was a practicing civil litigator at a big firm in Seattle. I had no experience in criminal law, no experience in Nicaraguan law, and spoke no Spanish. But I was not going to let my brother die in that prison.

My family and I assembled a team that spanned three states and two countries. We had a defense team in Nicaragua, international human rights lawyers in Washington D.C., public relations in California, and innocence lawyers in Seattle and San Diego. We knew that the only way to save Jason was to create public pressure through the involvement of the U.S. government and media.

Anyone who reviewed the case could see that Jason was innocent. After all, it was a drug case with no drugs. And yet, I was breaking under the burden to prove that Jason was not a drug dealer — not just in the courtroom, but also with the U.S. legislators, government officials, and communities whose help I needed in advocating for his release. Jason's dark brown skin,[2] long curly black hair, and tattoos made him look like the stereotypical image of what our society has been taught to think that a drug dealer would look like, and that stereotype caused palpable hesitation among many of the people to whom I reached out for help.

I spent the first six months of Jason's case spinning my wheels. Each time I presented the case to U.S. officials (as well as to U.S.-based media outlets), I could see the skepticism in their eyes. They needed affirmative proof of innocence; the lack of any evidence of guilt was not enough.

I learned over time that, as a person of color, Jason bore an unspoken burden of proof. I downplayed our ethnic background. We never mentioned Jason's race in the media or in meetings with officials. We spent hours culling through family photographs to find pictures of Jason that would be "acceptable" for social media. We worked hard to hide Jason's long curly black hair and tattoos. But we couldn't hide his brown skin. And with that brown skin came a presumption of guilt.

That presumption was not something that I could see, hear, or touch, but it became a critical issue that I needed to understand in order to serve my brother as my client and figure out how to reach decisionmakers. There are no easy answers here, and I do not have a "trick" to share. It was a simple realization that broke my heart.

My brother's story had a happy ending. Jason was exonerated in September 2012, and he returned home to the United States. He walked out of prison with nothing but the clothes on his back and his prison-issued flip flops, and he has since gone to graduate school and started a company that owns several patents on a bio-based epoxy resin for sustainable materials. I am proud to share that he has worked hard to rebuild a life for himself, his wife, and their two sons.

Many other people of color are not so fortunate. Their nightmares in the U.S. criminal justice system continue, day after day, and even across generations.

Notes

1. United States Department of State, Country Reports on Human Rights Practices for 2012, at 4, https://2009-2017.state.gov/documents/organization/204677.pdf.
2. My family is of South Indian descent. ■

beliefs that are consciously endorsed such that the actor is aware of taking an action for a particular reason.[16] Historically, conventional wisdom dictated that human behavior was largely under conscious control.[17] Social scientists have since developed an extensive body of research that supports the opposite conclusion.[18] The science behind implicit bias confirms that "actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."[19]

Social scientists have studied implicit bias over several decades and through various measures and research paradigms.[20] The findings "fit well with other research on brain functioning and human judgment."[21] The data from these studies confirms that "implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behavior."[22]

The predictive value of implicit bias is important.[23] Implicit bias is equally as destructive as explicit bias[24] and arguably more difficult to address because the research confirms that implicit biases may contradict firmly held conscious beliefs.[25] The fact that implicit biases can still impact a person's behavior even when adverse to the person's conscious or stated beliefs should make everyone pause and appreciate the real-world consequences of implicit biases in the criminal justice system. "[E]vidence that implicit attitudes produce discriminatory behavior is already substantial and will continue to accumulate."[26]

Implicit bias related to race is built into the country's culture and its criminal justice system. Biases against people of color are long-standing and deep-seated, but, beginning in the 1980s, the U.S. government doubled-down with myths and stereotypes beyond the already discriminatory practices.[27] Racial profiling, mandatory minimums, stop-and-frisk, disparities in crack versus cocaine sentencing, and the ideas of the "super predator" and "crack babies" come easily to mind. The system is still unraveling myth from reality, but these concepts are deep-seated and woven into our culture in ways that impact even the day-to-day for people of color.

Indeed, studies have repeatedly demonstrated that the color of a person's skin has subconscious effects on "people's memory for who was holding a deadly razor in a subway scene (Allport & Postman, 1947), people's evaluation of ambiguously aggressive behavior (Devine, 1989; Duncan, 1976; Sagar & Schofield, 1980), people's decision to categorize non-weapons as weapons (Payne, 2001), the speed at which people decide to shoot someone holding a weapon (Correll et al., 2002), and the probability that they will shoot at all (Correll et al., 2002; Greenwald et al., 2003)."[28]

Psychologist Anthony Greenwald explains that implicit bias "shapes conscious thought, which in turn guides judgments and decisions."[29] For example, "[w]hen a Black person does something that is open to alternative interpretations, like reaching into a pocket or a car's glove compartment, many people — not just police officers — may think first that it's possibly dangerous. But that wouldn't happen in viewing a white person do exactly the same action."[30]

Much of the current research is focused on the distinction between individuals who are white and those who are Black.[31] Research confirms that the association of dark skin with criminality "appears to be automatic (*i.e.*, not subject to intentional control)."[32]

The Role of Forensic Evidence in Perpetuating the Presumption of Guilt

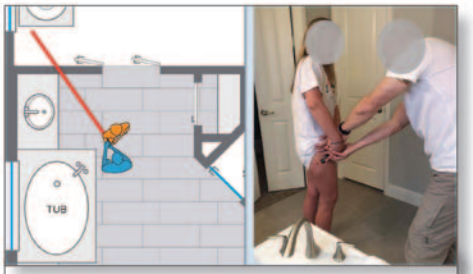
Understanding racial bias in forensic testimony is crucial. "CSI" and television shows like it create false expectations about forensic evidence. That fallacy may extend further than anyone understands. Most jurors can appreciate that it is at least possible for a police officer to act in a manner that may be fueled by racial bias. But most jurors do not understand that scientific-sounding opinions may not be scientific at all and may, instead, reflect implicit racial bias. Research has repeatedly recognized that juries will place great weight on scientific-sounding evidence, disregarding all other evidence to the contrary.[33] By the time we get to the start of jury deliberations on the fate of a person of color in a case involving subjective forensic evidence, there may be multiple layers of bias at play *and* the stamp of "scientific approval" from a lab. The odds are insurmountable at that point.

The illusion of "science" has long-been used to justify the intentional subjugation of people of color.[34] The same intentionality may not always be present in forensic testimony, but the criminal justice system is relying no less on pseudo-science to justify the same result. Even though one may intend otherwise, implicit racial bias works its way into the system through forensic opinions.

Historically, those opinions had often been expressed as definitive (in absolute terms) with low, or even zero, error rates, leading many to believe that forensic methods were infallible. Over the past 10 to 15 years, however, there has been a growing skepticism about the presumed efficacy of some forensic sciences, including pattern matching methods.[35] Leading scientists around the country have started to weigh in and expose the weaknesses in certain forensic methods, including a lack of scientific validation,[36] the absence of objective standards,[37] and data from validation studies that has been manipulated to drive error rates down and give the false impression that the methods are near perfect.[38]

Faulty or misleading forensic evidence has contributed to nearly half of the known DNA exonerations and at least one-quarter of all exonerations to date.[39] Insights into the fallibility of forensic methods are rapidly evolving. In the meantime, the deeply held belief that forensic evidence is objective and impartial has led many people down the primrose path to believing that the addition of forensic evidence to a case will cure any bias that may have contaminated the initial suspicion and arrest.

Bias in forensics, however, is well-documented.[40] For example, the PCAST Report from 2016 recognized that errors in pattern-matching methods arise, in part, because "in certain settings, humans (1) may tend naturally to focus on similarities between samples and discount differences and (2) may also be influenced by extraneous information and external pressures about a case."[41] As another example, leading researchers recently released a study on cognitive bias in forensic pathology, a community that had (like many forensic practitioners) long denied that bias could impact their decision making.[42] The authors found that forensic pathologists who took part in the study "*were noticeably affected by medically irrelevant contextual information* (information that should not have any bearing on the decision)."[43]



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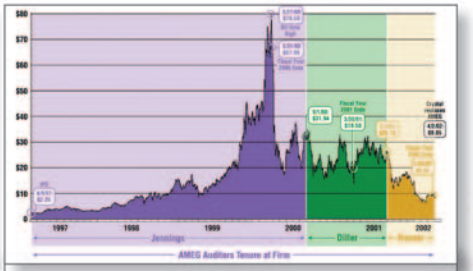

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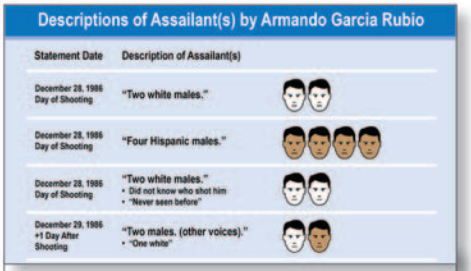

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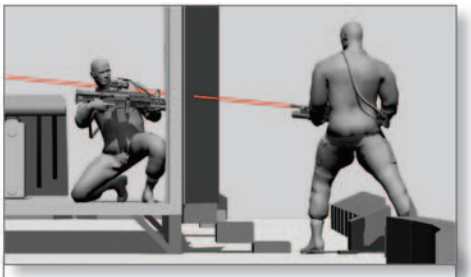

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There are at least two key concerns about the impact of implicit racial bias on forensic testimony.

First, when the forensic testimony is faulty (whether overstated or just plain wrong), reliance on it opens the door to convictions based solely on racial bias. If the initial suspicion was fueled by the color of the suspect's skin (whether intentionally or unintentionally), the misleading forensic evidence does nothing to confirm the suspicion, but it does have the power to cloak the prosecutor's case in "science" by giving it the appearance of objectivity. If we strip away the misleading forensic evidence, we will certainly find cases where an individual is facing years in prison for no other reason than because he or she looks like what society, or an individual police officer, thinks a dangerous criminal would look like.

Second, analyst discretion in the process itself opens the door to bias, which affects the outcomes of forensic testing. As discussed above, many commonly used forensic methods are subjective, meaning they depend largely on human judgment. The more human judgment involved, the more subjective a method becomes. And with human judgment comes the risk of bias and error. Think of it on a spectrum. At one end of the spectrum are purely objective methods, like weighing an object on a digital scale. At the other end of the spectrum are purely subjective methods, like weighing an object in one's hand. As we move toward the subjective end of the spectrum, we see more human judgment involved, which increases the risk that the examiner's opinion will be tainted by bias and error. Knowing the race of the suspect at the outset can trigger bias that skews the analyst's conclusions toward guilt, even unintentionally.

Making a Change

Race is "psychologically salient."[44] By virtue of how implicit bias works, "'race cards' are always present and having an effect, even when they are face down or still in the deck."[45] The impact of race is ubiquitous.

Still, change is slow to come. In some areas, change is lagging because the path forward is not clear.[46]

In other areas, change is lagging because, although people can see the problem in theory, they cannot see the problem in their own space. Attorneys tend to believe that the problem exists for some "other" person — not in this city, not in this lab, not in this case. Social scientists have written about the "bias blind spot" that leads people to believe "that others are biased but we ourselves are not."[47] But implicit biases are pervasive, meaning that "everyone possesses them, even people with avowed commitments to impartiality such as judges."[48] And prosecutors. And police. And forensic examiners. And jurors. And, yes, defense attorneys. It affects each person and is beyond one's conscious understanding and control.[49] Scientists have explored the factors that make self-reports of neutrality unreliable, including people's false assumptions about their ability to accurately access and understand their own motivations, cognitions and behaviors, and their willingness to report them honestly in the face of clear social norms.[50]

Nonetheless, decision makers want evidence to prove that racial bias is happening *here* before they are willing to act.[51] They want data to show that, in a given case or a given lab, analysts made the decision to turn left when they should have turned right, and that decision was based on race.

The demand for data is not new or unique to forensic reform. People of color are frequently put to the "prove it" test. But the demand for data misses the point.

Several facts are not in dispute. Implicit bias is real.[52] The presumption of guilt is real.[53] People of color are disproportionately affected by the criminal justice system.[54] The demand for proof of impact in each individual case or each individual lab ignores the reality that implicit bias is *implicit* — meaning silent, tacit, inherent, *unsaid*. It is unreasonable to demand explicit evidence of something that is already understood to be implicit.

The demand for data further ignores the systemic aspects of racism, which is a different category of concern altogether.[55] Systemic racism results from policies that are race-neutral on their face but produce disparate outcomes. In the forensic context, for example, lab policies that allow discretion in the analysis may be race-neutral on their face, and yet they produce disparate outcomes because discretion allows implicit (or explicit) bias to contaminate the results of the examination.

This reality does not necessarily mean that defense lawyers must, after the fact, presume that bias occurred in every case.[56] But it does mean that defenders should proactively protect against bias in every case.[57]

Progress Is Possible, but Requires More Than What We Are Doing

Addressing implicit bias in the criminal justice system requires real work. It would be naïve to think that we can address deeply rooted conscious and unconscious bias with band-aid approaches, like a yearly "anti-bias" training, without more.[58] That type of a "fix" has not been tested to determine efficacy and may give the appearance of productivity without any assurance that it is effective.[59]

The good news is that implicit beliefs and attitudes are malleable,[60] and research confirms that it is possible to prevent bias from affecting some aspects of decision making. The jury is still out on the best way to effect change, but there are steps that can, and should, be taken.

Some researchers advocate for effortful relearning: "[B]eing aware of potential biases, being motivated to check those biases, and being accountable to a superior (as a jury feels toward a judge) should have some effect on the translation of bias to behavior."[61]

Other researchers urge more proactive solutions that can and should be used by forensic practitioners, such as adopting policies to minimize irrelevant contextual information through the use of case managers or procedures like "Linear Sequential Unmasking."[62]

These "blinding" procedures help eliminate discretion where possible, which leading psychologist Professor Anthony Greenwald says has proven effective in the past:

> The classic example of this is when major symphony orchestras in the United States started using blind auditions in the 1970s. This was originally done because musicians thought that the auditions were biased in favor of graduates of certain schools like the Juilliard School. They weren't concerned about gender discrimination.
>
> But as soon as auditions started to be made behind screens so the performer could not be seen, the share of women hired as instrumentalists in major symphony orchestras rose from around 10 percent or 20 percent before 1970 to about 40 percent. This has had a major impact on the rate at

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The Injustice of Implicit Racial Bias

By Jason Z. Puracal

Jason Z. Puracal

I grew up with a rough, but largely ambiguous understanding that with my dark brown skin came a presumption of guilt. My father reminded me of it in subtle and not-so-subtle ways. As a teenager, what I saw as adolescent attempts to display my individuality, he saw as risks that I could not afford to take. Don't wear your hair like that; don't dress like that; don't talk like that.

I did not fully understand the implications of what it meant to walk through the world as a person of color until I was wrongfully imprisoned and falsely branded as an international drug dealer.

Beginning in September 2010, I spent 22 months being slowly starved in a Nicaraguan prison. I was charged and convicted of international drug trafficking, money laundering, and organized crime. I had been wrongfully convicted of crimes that I did not commit and sentenced to 22 years in La Modelo, the maximum-security prison in Nicaragua.

I knew that I was innocent, and I was firmly convinced that the police and prosecutors would see it too. I thought it was a simple case of mistaken identity that would be quickly cleared up, but it turned into a two-year nightmare. About one year in, I began to grapple with the reality that I might die in that hellhole.

When I say hellhole, that is exactly what I mean. I spent every day in a 12' x 15' cell with anywhere from 9 to 12 other men. In the corner of each cell was a small hole that all of us used as a toilet, sink, and shower. There was no running water, so each morning at 4:00 a.m., the guards would wake us up to haul five-gallon buckets of water back to the cell. The water had hair, dirt, and insects floating in it, but we had no choice — it was all we had for drinking, bathing, and cooking.

Guards gave us only rice and beans three times per day. Within six months of my incarceration, I lost more than 40 pounds and was struggling with bleeding gums, hair loss, and an assortment of complications from malnutrition. Medical care was nearly nonexistent, but disease was rampant. The entire place was crawling with cockroaches, ants, mosquitos, and blood-sucking ticks. I would not let my dog stay in that place.

The fight to stay alive took a physical toll on my body. The fight to prove that I was *not* a criminal took a mental and emotional toll that was equally destructive.

How do you prove that you are not a criminal? The obvious answer is to point to the lack of evidence against you. However, that was not enough in my case. There was an innate belief that I was guilty. The police and prosecution interpreted everything I did, everything about who I am, as being consistent with guilt.

I originally moved from Seattle to Nicaragua with the Peace Corps. I fell in love with the country and decided to stay after my service ended. At the time of my arrest, I had married a Nicaraguan woman, had a three-year-old son, and was running a successful real estate office overlooking the beach in San Juan del Sur.

When I was arrested, my success became a liability. The police and prosecution could not believe that I had earned it. To them, it was just more evidence that I was a criminal. How else could a dark-skinned man with long hair and tattoos accumulate wealth?

I lived in terror throughout my case. I never knew what the police and prosecution were going to manufacture next to justify the arrest.

I was infuriated when they manufactured "forensic" evidence at trial. Twice the prosecution offered junk forensic evidence, and twice the judge accepted it without question. First, the prosecution offered a photograph of the screen on a "VaporTracer" machine showing a trace of unknown particulate that the police suggested was cocaine. My defense team was quick to point out that the prosecution had already offered the same photograph for every one of my 10 co-defendants, each time suggesting that the results came from a different search and hoping that the judge would not notice. Second, the prosecution offered a "forensic accountant" who was certain that I had been laundering money through my real estate brokerage because he had never heard of an escrow account and could not understand that the account held client funds in trust for property sales. The judge dismissed any evidence to the contrary, including the testimony of my company accountant and bank records that confirmed the legitimacy of every transaction through the account.

The facts did not matter. The prosecution just kept using the word "forensic" as if it had the magical power to transform nothing into something. It was as if the forensic examiners were granted special truth-telling credibility, whether or not those examiners actually had evidence or could explain the inconsistencies. And it worked.

I could not understand it. I could not understand why these "forensic examiners" were creating lies against me, a person whom they had never met. I could not understand why the police, prosecution, and judge were all so eager to believe it. I could not understand why my factual innocence was not enough to overcome it.

None of it made any sense. Looking back on it now, I know that it did not have to make sense. They believed in the "magic" of forensics because it was consistent with what they already believed to be true. I never stood a chance.

There is an irony to my case that I cannot ignore. While my sister, Janis, was working overtime to downplay my brown skin in the media and in meetings, I was relying on the color of my skin (and all the biases that come with it) as part of my survival in prison. While surrounded by murderers, rapists, and real drug dealers, I learned very quickly how to fit into the pecking order and try to stay out of the way of others. I shaved my head, grew out my beard, and flaunted my tattoos as a strategy to reinforce the biases of other inmates to make them think that I was just as dangerous as they already believed I was. I stayed silent about rumors and traded on biases in order to survive. That was prison.

Now, eight years later, I am living a different reality. The injustice of racism, whether explicit or implicit, has created in me a sense of urgency; an urgency to change my own individual behaviors, an urgency to talk openly about racial justice in my community, and an urgency to participate in understanding the systemic issues that produce inequality.

I do not speak for every person of color, and I am not an expert on all things race-related. My lived experience is one of many. As part of the collective whole, I take seriously my responsibility to understand my own biases and learn how my behavior impacts others.

This emotional work has been, at times, surprising, messy, and uncomfortable. I am constantly having to remind myself that silence upholds injustice.

And when the path forward is particularly murky, I am reminded that the path out of a Nicaraguan prison was not all that clear either.

Jason Z. Puracal is Chief Executive Officer and Co-Founder of ZILA Works, a company that is developing bio-based solutions for a regenerative economy (www.zilaworks.com). ■

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which women have become instrumentalists in major symphony orchestras.[63]

Discretion elimination is possible in many areas of forensic analysis, and Professor Greenwald's example suggests that, even if eliminating racial bias is not the motivating force, reducing discretion produces favorable results.

Let's be clear — the research does not promise that implicit bias can be eliminated altogether. But one can take steps to prevent some biases from translating into behavior.

What Can We Do About It?

Forensic labs, especially law enforcement-run labs, have little incentive to change because courts regularly admit forensic testimony without limitation. Addressing implicit racial bias in forensic testimony will require a culture shift as well as structural changes to forensic labs. These changes will require advocacy from defense attorneys and other criminal justice stakeholders. Below are actions that can directly reduce implicit racial bias in forensic testimony:

1. *Auditing Lab Policies to Minimize Contextual Information and Reduce Discretion*

Many forensic labs do not have policies to prevent analysts from being exposed to irrelevant contextual information, such as the race and background of the suspect. The methods are, further, highly subjective and allow the individual examiner to exercise considerable discretion. These two factors together open the door to implicit bias.

For example, in firearms and toolmark analysis, the examiner may be given police reports with the name and race of the lead suspect, along with the officer's narrative of the investigation to date. The examiner is likely to review those police reports before examining the bullet or casing found at the crime scene and knows that the officer is attempting to identify the suspect's firearm as the source of the bullet or casing from the scene. Adding to that irrelevant contextual information is the lack of any objective standards in the firearms and toolmark methodology itself. The examiner has complete discretion to declare a match and testify that a bullet or casing at a crime scene came from the defendant's firearm. There is no universal standard that tells the examiner the number of similar marks they need to find between the spent ammunition and the test fire before the examiner can declare a "match" and opine that the suspect's firearm was the source of the spent ammunition.[64] There is no universal standard that tells an examiner that a particular mark is unique and discriminating. Indeed, there is nothing objective that prevents an examiner from lowering the threshold to declare a "match" in any particular case.[65] Giving examiners that level of discretion creates opportunities for implicit bias to infect the results — bias of which the examiner may be unaware, and the defendant may never be able to "prove" in a manner that could overcome the strength of the examiner's opinion of a "match."[66]

Several organizations are attempting to create objective standards in different forensic methods, which will reduce discretion in the analysis.[67] Unfortunately, none of those standards are binding on any individual lab or examiner.

To address implicit bias in forensics, labs can and should audit their own policies to reduce bias. Labs can adopt policies that minimize contextual information through case managers or procedures like "Linear Sequential Unmasking" (a process that controls the sequence and timing of information to ensure that the examiner makes key analytical judgments, and documents them, before being exposed to relevant, but potentially biasing, information).[68] They can further revise policies to reduce discretion in the analysis, thereby reducing opportunities for bias. According to Professor Greenwald, when decisions "are made based on predetermined, objective criteria that are rigorously applied, they are much less likely to produce disparities."[69]

For those labs that are unwilling to audit policies and reduce bias, legislators have the authority to act. In Oregon, for example, the secretary of state has authority to audit state agencies, including state-run labs.[70] To more effectively and efficiently address the needs of forensic labs and the ever-changing nature of science, legislators in all states can establish independent commissions to provide ongoing oversight for labs, including the authority to conduct audits and mandate the use of objective standards.[71]

2. *Making the Shift to Independent Labs*

In 2009, the National Academy of Sciences issued its groundbreaking report that included a recommendation that public forensic labs be removed from law enforcement control.[72] The reason for the recommendation was to maximize independence in forensic analysis and reduce other forms of bias in the analysis, including confirmation bias and contextual bias.

Shifting to an independent lab model will help to reduce the risk that implicit bias in the policing phase will bleed into the forensic analysis. Forensic examiners who are on the same "team" as the arresting and investigating officers may be pressured (overtly or more subtly) to confirm initial suspicions.[73] When those initial suspicions are based on racial bias, the forensic opinions may be unfairly skewed toward guilt as false inferences and assumptions are fed into the analysis. Indeed, "expectation bias" is a well-known phenomenon that reflects the tendency for experimenters to accept data that agrees with their expectations for the outcome of an experiment, and to disregard or minimize data that appears to conflict with those expectations.[74]

Independence can also help to shift forensic labs toward a "research culture" that prioritizes research-based knowledge, scientific questioning, and consistent efforts to improve methods.[75] That culture is severely lacking in forensic science.[76] A research culture encourages a diversity of perspectives from forensic and nonforensic scientists — including statisticians, psychologists, and those with advanced training in hard sciences like biology, physics, and chemistry — who can question methods, expose weaknesses, and advocate for improvements that will reduce discretion and the opportunity for bias.

3. *Mandating Root Cause Analysis*

Legislators should mandate a specific protocol for root cause analysis in state-run labs based on the knowledge and experience of other disciplines that use root cause analysis to prevent the recurrence of unwanted outcomes.

"Root cause analysis is a process that identifies, in an objective blame-free environment, why an adverse event or near miss occurred."[77] Outside the context of forensics, in industries like engineering, aviation, and medicine, experts examine adverse events and near-miss situations using a root cause analysis that "focuses on 'how' and 'why' something happened, rather than seeking to assign blame."[78] Proper root cause analysis allows stakeholders to develop corrective actions that more specifically address the true cause of the adverse event, resulting in more effective and cost-efficient action.

Some states have urged root cause analyses in criminal justice contexts. For example, the New York State Justice Task Force issued recommendations on how

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to convene and implement root cause analysis in the criminal justice system to prevent wrongful convictions.[79]

Root cause analysis has also been used in the forensic context. For example, in 2018, the FBI selected a third-party risk management company to analyze the root and cultural causes that contributed to reporting and testimonial errors in microscopic hair comparison analysis across the country.[80] As another example, the National Commission on Forensic Science recommended that all forensic science service providers and forensic science medical providers adopt protocols for proper root cause analysis.[81] Similarly, the Texas Commission on Forensic Science mandates, and actively trains on, root cause analysis for labs under its purview.[82]

Root cause analysis can help labs understand where implicit bias may be impacting results and adopt corrective actions to prevent it in the future.

4. *Cross-Examining Forensic Examiners on Implicit Bias*

Great trial attorneys are constantly assessing biases (in jurors, witnesses, judges, and opposing counsel) and figuring out how to fight them, adapt to them, or use them to a client's advantage. The need to address implicit racial bias requires the same perceptivity and willingness to think creatively.

The research confirms that it is possible to reduce bias, and the recommendations above illustrate steps that can be taken to do so. For those labs that are unwilling to meaningfully address the impact of racial bias, forensic examiners can be confronted on cross-examination, whether at trial or at pretrial hearings on scientific validity. Defense attorneys should avoid the trap of believing that racial bias exists only if there is explicit evidence of racism (*e.g.*, a racial slur). Implicit racial bias exists regardless of intent, and defense attorneys can educate the court and the jury about how that bias contaminates decision-making, *even if we assume that the examiner is still a good and decent person*. Defense attorneys can consider questions related to:

- ❖ the existence of implicit bias, such as:
  - the fact that scientific research confirms the pervasiveness of implicit bias,[83]
  - the 2009 report by the National Academy of Sciences that encourages labs to recognize bias in forensic analysis and take affirmative steps in response,[84] and
  - the 2016 report by the President's Council of Advisors on Science and Technology that repeats the need for independence in forensic analysis to avoid bias.[85]
- ❖ concrete actions that have been taken in nonforensic areas to actively address and prevent bias from impacting behavior, such as:
  - bias training in jury orientation and jury instructions that some courts have instituted to reduce bias in jurors,[86]
  - the implementation of blind or double-blind procedures in clinical trials, as well as academics, to eliminate discretion and reduce bias,[87] and
  - the use of techniques that require academic interviewers to consider evidence that supports the opposite conclusion in admissions processes.[88]
- ❖ lab policies that fail to address implicit bias, such as:
  - the lack of any written policy to address implicit bias,
  - the lack of a forum in which examiners are encouraged to discuss and address implicit bias in their work, and
  - specific policies that allow for discretion in the analysis.
- ❖ what the examiner did that may have allowed bias to infect the results, such as:
  - having access to task-irrelevant information about the suspect, including the suspect's race or ethnic background,[89]
  - relying on nonblinded verification or technical review, which can increase confirmation bias and create a self-affirming feedback loop to bolster certainty,[90]
  - discarding or minimizing evidence that supports the opposite conclusion, and
  - lowering the standard to reach an opinion consistent with guilt.
- ❖ what the examiner failed to do to reduce the dangers of bias in that case,[91] such as:
  - failing to implement blind or double-blind analysis,
  - failing to use Linear Sequential Unmasking,
  - failing to follow the scientific method, including testing alternate hypotheses,
  - failing to document and account for inconsistent data, and
  - failing to follow the principle of falsification that requires scientists to determine whether the hypothesis can survive continuing and serious attempts to falsify it.[92]

Defense attorneys can also address these issues in informal conversations with prosecutors to highlight weaknesses and create a culture where implicit racial bias is confronted just as any other harmful evidence.

Conclusion

Implicit bias in forensic testimony is an undeniable barrier to racial justice and equity. Research confirms the need to act preventatively, rather than waiting for proof of explicit racial bias in any individual case. The demand for concrete evidence of racism in a particular case may fit with the natural desire for proof, but it conflicts with the very phenomenon that the defense seeks to prevent. Implicit bias is *implicit*.

The question is not, where is the evidence of racism? That evidence already exists: (1) decades of research on implicit racial bias; (2) known data on disparate outcomes; and (3) written and unwritten lab policies that expose examiners to irrelevant contextual information, like race, and reveal a worrisome level of individual discretion in many forensic methods.

The question is, given that racial bias can be unintended and can persist hidden from view, what have labs or examiners done to protect their opinions from contamination, just as the labs would protect any other piece of evidence?

A desire for a fairer and more transparent criminal justice system means taking action based on the research and the disproportionate outcomes that paint a very real picture of the presumption of guilt facing black

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and brown people. Focusing on the role that forensic testimony plays in perpetrating that presumption is crucial to the pursuit of justice.

Thank you to Jason Puracal, Andrew Lauersdorf, and Aliza Kaplan for their invaluable assistance in writing this article.

Author's Note: For a more thorough treatment of this topic, see the forthcoming article in volume 58 (2022) of the *Criminal Law Bulletin*.

Notes

1. Pattern matching methods, also called "feature comparison methods," are "methods that attempt to determine whether an evidentiary sample (*e.g.*, from a crime scene) is or is not associated with a potential 'source' sample (*e.g.*, from a suspect), based on the presence of similar patterns, impressions, or other features in the sample and the source." President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods at 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [hereinafter PCAST Report]. The PCAST Report discusses examples such as "the analysis of DNA, hair, latent fingerprints, firearms and spent ammunition, toolmarks and bitemarks, shoeprints and tire tracks, and handwriting."

2. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 488 (2010) (discussing the notable summaries of predictive validity studies and the meta-analysis of 122 research reports by Greenwald "that included 184 independent samples and 14,900 subjects"). *See also id.* at 504 (addressing critiques).

3. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1134 (2012); Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004); Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, Wash. Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/; Bryan Stevenson, *A Presumption of Guilt, The Legacy of Lynching and How It Still Shapes American Criminal Justice*, N.Y. Rev. (July 13, 2017), https://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/. *See also* Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

4. 505 U.S. 42, 68 (1992) (citing Developments in the Law — Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559–60 (1988); Douglas Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 110–12 (1990)) (O'Connor, J., dissenting).

5. 476 U.S. 28, 42 (1986) (Brennan, J., dissenting).

6. *State v. Plain*, 898 N.W.2d 801, 830 (Iowa 2017) (Appel, J., dissenting).

7. *Id.*

8. *See, e.g.*, note 4.

9. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Calif. L. Rev. 1169, 1170 (2006).

10. A discussion of implicit bias requires an acknowledgment of the many complex stereotypes facing people of color, whether Black, Indian, Asian, Latino, Native American, or otherwise. Some of the stereotypes may overlap and some may be specific to one race or ethnicity. By focusing on dark skin and criminality, I do not suggest that these other aspects of bias are less important, and I do not suggest that the stereotypes facing one race are universally applicable to all people of color.

11. *See, e.g.*, Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367, 413 (1996) (recognizing "the oft-unstated assumption that Blacks are still on probation — that unlike white men … Blacks are not necessarily granted a presumption of innocence, competence, or even complete humanity.").

12. *See, e.g.*, Stevenson, *supra* note 3; Balko, *supra* note 3; Eberhardt, *supra* note 3.

13. Stevenson, *supra* note 3.

14. *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (citing Charles Lawrence, *The Id. The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L. J. 1329 (1991); Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1119 n.51 (2003)). *See also Commonwealth v. Buckley*, 90 N.E.3d 767, 782 n.4 (2018) (Budd, J., concurring) ("Multiple studies confirm the existence of implicit bias, and that implicit bias predicts real-world behavior. That is, even people who do not believe themselves to harbor implicit bias may in fact act in ways that disfavor people of color." (citing J. Kang & M. Banaji, M., *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 Cal. L. Rev. 1063, 1071–1073 (2006)).

15. Kang, *supra* note 3, at 1126 (2012).

16. Anthony G. Greenwald, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 946 (2006) ("Theories of implicit bias contrast with the 'naïve' psychological conception of social behavior, which views human actors as being guided solely by their explicit beliefs and their conscious intentions to act.").

17. Kang, *supra* note 3, at 1129.

18. *Id.*

19. Greenwald, *supra* note 16, at 946.

20. David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389, 1430 (2008). Professor Faigman points out that "empirical evidence of implicit bias comes from studies using multiple methods and paradigms; it is not limited to the [Implicit Association Test]," although the IAT is well-known. *Id.* at 1393 n.24.

21. *Id.* at 1430.

22. Kang, *supra*, note 3, at 1130–31 (internal citations omitted).

23. *See generally* Greenwald, *supra* note 16, at 953.

24. *See, e.g.*, *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987) ("Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination."). *See also* Gary Blasi, *Advocacy Against the Stereotype*, 49 UCLA L. Rev. 1241, 1274 (2002) ("Racial minorities and others in stereotyped groups suffer silent

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consequences even when, and sometimes it appears especially when, group identity is unmentioned or unmentionable.").

25. Greenwald, *supra* note 16, at 951 ("Implicit biases are especially intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."); Kang, *supra* note 3, at 1129 (Implicit biases "can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.").

26. Greenwald, *supra* note 16, at 961 (citing T. Andrew Poehlman et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity* (unpublished manuscript) (2005)).

27. *See* Michelle Alexander, The New Jim Crow (2012).

28. Eberhardt, *supra* note 3, at 876.

29. Betsy Mason, *Curbing Implicit Bias: What Works and What Doesn't*, Knowable Magazine (June 4, 2020), https://knowablemagazine.org/article/mind/2020/how-to-curb-implicit-bias.

30. *Id.*

31. Eberhardt, *supra* note 3, at 876.

32. *Id.* (citations omitted). *See also* Kang, *supra* note 3, at 1144.

33. *See* Brandon L. Garrett et al., *Mock Juror's Evaluation of Firearm Examiner Testimony*, 44(5) Law & Hum. Behav. 412, 414 (2020), https://doi.apa.org/doiLanding?doi=10.1037%2Flhb0000423 (collecting studies in different forensic methods).

34. *See, e.g.*, Tim Crowe, *How Science Has Been Abused Through the Ages to Promote Racism*, The Conversation (November 19, 2015), https://theconversation.com/how-science-has-been-abused-through-the-ages-to-promote-racism-50629; Thomas Klikauer & Norman Simms, *The Science of Race and the Racism of Science*, Counterpunch (October 23, 2020), https://www.counterpunch.org/2020/10/23/the-science-of-race-and-the-racism-of-science/.

35. *See* Nat'l Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [hereinafter NAS Report]; PCAST Report, *supra* note 1. *See also* Aliza B. Kaplan & Janis C. Puracal, *It's Not a Match: Why the Law Can't Let Go of Junk Science*, 81 Albany L. Rev. 895 (2018).

36. *See* NAS Report, *supra* note 35; PCAST Report, *supra* note 1.

37. *Id.*

38. Itiel E. Dror & Nicholas Scurich, *(Mis)use of Scientific Measurements in Forensic Science*, Forensic Science International: Synergy (2020), https://doi.org/10.1016/j.fsisyn.2020.08.006. *Cf.* Garrett, *supra* note 33.

39. National Registry of Exonerations (searching database by DNA cases and the contributing factor of faulty/misleading forensic evidence), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

40. *See, e.g.*, D.M. Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002); NAS Report, *supra* note 35, at 184; PCAST Report, *supra* note 1, at 31.

41. PCAST Report, *supra* note 1, at 49.

42. Itiel Dror et al., *Cognitive Bias in Forensic Pathology Decision*, 00 J. Forensic Sci. 1 (2021).

43. *Id.* at 4 (emphasis in original).

44. Banks, *supra* note 9, at 1170.

45. *See also* Gary Blasi, *Advocacy Against the Stereotype*, 49 UCLA L. Rev. 1241, 1274 (2002).

46. *See, e.g.*, *Plain*, 898 N.W.2d at 832 (discussing differing views on the utility of a jury instruction on implicit bias); *Commonwealth v. Buckley*, 90 N.E.3d 767, 782 (2018) (Budd, J., concurring) (recognizing "how pretextual stops disproportionately affect people of color" and recognizing that "the solution … is not clear").

47. Kang, *supra* note 3, at 1173–74 (citing Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends Cognitive Sci. 37 (2007)).

48. Kirwan Institute, *State of the Science: Implicit Bias Review 2015*, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/. *Cf.* Kang, *supra* note 3, at 1141–42 ("[T]here is no reason to presume attorney exceptionalism in terms of implicit biases. And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune."); *id.* at 1144 ("[G]iven that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors.").

49. *See id.*

50. *See* Faigman, *supra* note 20, at 1404–07. *See also* Kang, *supra* note 2, at 470.

51. *Cf.* Banks, *supra* note 9, at 1170 ("The ostensible consensus [opposition to bias and discrimination] fractures as one moves from broad statements of principle to specific circumstances. The consensus splinters not so much because of support for bias and discrimination, but rather because there are multiple ways to conceptualize bias and to enact the anti-discrimination principle in the criminal justice context.").

52. *See*, *supra* note 14.

53. *See*, *supra* note 3.

54. *See id.*

55. For an excellent discussion of systemic racism, see The Quattrone Center's panel on "The Administration of Blind Justice: Criminal Justice Institutions and Racial Bias," https://www.youtube.com/watch?v=oM4i-VI7Owc&feature=youtu.be.

56. *See generally* Kang, *supra* note 2, at 492 (discussing strategies to deal with the problem of bias ex ante versus ex post).

57. *Id.* at 499 (discussing prevention). Professors Kang and Lane discuss action using the general approach of "behavioral realism," which seeks to use new understandings in the mind and behavioral sciences to advance the law based on more accurate models of human cognition and behavior. For a description of "behavioral realism," *see id.* at 490.

58. Mason, *supra* note 30 (In an interview, leading psychologist Anthony Greenwald said: "I'm at the moment very skeptical about most of what's offered under the label of implicit bias training, because the methods being used have not been tested scientifically to indicate that they are effective. And they're using it without trying to assess whether the training they do is achieving the desired results. I see most implicit bias training as window dressing that looks good both internally to an organization and externally, as if you're concerned and trying to do something. But it can be deployed without actually achieving anything, which makes it in fact counterproductive.").

59. *Id.*

60. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. Personality and Soc. Psychol. 800, 801 (2001).

61. Kang, *supra* note 2, at 500.

62. Dror, *supra* note 42, at 5–6.

63. Mason, *supra* note 29.

64. Firearms examiners usually testify that two items "match" when the degree of similarity between the spent ammunition and the test fire exceeds the degree of similarity with respect to the "best known non-match." The "best known non-match," however, is based entirely on what that examiner recalls from his or her individual experience.

65. *See generally* Risinger, *supra* note 40, at 16 ("One well-established effect of expectation, however induced or derived, in the perception tuning process is that decision thresholds shift as a function of expectations. Thus, in response to identical stimuli, a positive decision becomes more likely, and therefore more likely to be a false positive, or less likely, and therefore more

(Continued on page 48)

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The NACDL Q&A

Fighting for Justice in a Divided World

How do the racial problems in the criminal legal system impact the dynamics of the lawyer-client relationship? Three zealous advocates share their views.

With feet planted firmly and with a line drawn in the sand, criminal defense lawyers stand between clients and the power of the government. While bar associations like NACDL have the luxury of focusing on the broad picture and tackling issues like public defense reform, sentencing policy and privacy rights, the lawyer in the trenches must focus on being a champion for one client at a time.

We have become two Americas — those who have become ensnared in the criminal legal system and those who, through luck or privilege, have avoided it. The disparity in policing and the bias among the actors in the system contribute to racially unequal outcomes. Three public defenders — Cassandra L. Lopez (Federal Defenders in San Diego, California), Porsha Shaf'on Venable (Bronx Defenders in New York), and Nikita Srivastava (Colorado State Public Defenders) — give their perceptions of the system and what it takes to navigate its perilous waters each day.

Editor's Note: This conversation, conducted via email, has been edited.

Quintin Chatman (QC): Complete this statement: To achieve racial justice in the United States, we must …

Porsha Shaf'on Venable (PV): First, we must recognize that racial injustice is engrained in the United States and all its systems. We must acknowledge the ways in which it is intertwined with capitalism, carceral systems, and other institutions that afford some of us privilege and comfort. Then we must divest from and abolish all systems borne out of or designed to exacerbate racial injustice, including and especially the criminal legal system. Our relationship with the criminal legal system is toxic. It was designed to operate the way it does today, so it is not a broken system that needs to be fixed. It is inherently toxic and therefore cannot be fixed. As a result, we must look at other ways to achieve justice, accountability, safety, and stability in our communities. We must invest in the sustainable resources, political education, and autonomy of communities to build their own systems, and we must practice transformative and restorative justice in lieu of carceral systems.

Nikita Srivastava (NS): To achieve racial justice in the United States, we must undo centuries of discrimination and oppression by integrating critical race theory into

BY QUINTIN CHATMAN

our education system and continuously inspire others to change.

Cassandra L. Lopez (CL): We must honestly acknowledge our history and the fact that our county was founded by stealing land from Native people, enslaving Black people, and denying citizenship to nonwhite people.

QC: Assuming that prisons and police departments will not be abolished, what other reforms could lessen racial disparity in the criminal legal system?

NS: Abolishment is my preferred way, but there are other reforms to consider. Prisons do not help, reform, or rehabilitate anyone. If the goal of the justice system is to rehabilitate, then we need to invest in rehabilitation centers that do not put people in cages. If the goal is to deter people from committing offenses, then we need better resources placed in lower-income areas. It is also important to remember why prisons were created in the first place. The guise of prison is to "protect people from criminals," but that is simply not the case. Society created prisons to enslave, especially Black men. By criminalizing a marginalized group, companies could invest into those prisons to get free labor. The prisoners had no rights and no income after doing this work. However, since I cannot abolish anything, then I would ask prisons and police to take a more holistic approach. Increase social workers, learn critical race theory, and stop sending people with drug problems to jail or prison. Make prisons look more like rehabilitation centers by increasing the resources and teach police to stop resorting to violence to resolve conflict.

CL: Appoint more criminal defense lawyers, legal aid attorneys, immigration attorneys, and nonwhite attorneys to the bench. We have far too many former corporate lawyers, former prosecutors, and white men on the bench.

QC: What is the most significant way the criminal legal system fails defendants of color?

PV: There is no one significant way. It fails in all the ways — just as it was designed — and each way is intertwined. The police have failed the community by abusing their discretion with unlawful stops, searches, and seizures. Prosecutors fail members of the community by not listening to them and overcharging crimes. Judges perpetually miss the mark by not using their judicial power and discretion to intercede and rein in the bad behaviors of police and prosecutors.

NS: The justice system fails people by taking a colorblind approach. By failing to see race, the justice system fails people of color. (I don't like to use the word "defendant" because it implies guilt and takes away a person's humanity.) The legal system often says, "Lady justice is blind." She wears a blindfold because she only cares about weighing the truth. This simple approach has led to several wrongful convictions. By ignoring someone's race, you are ignoring all racial experiences. It invalidates a large part of someone's identity. When it comes to race, people are not on even playing fields. And courts absolutely need to consider that. They need to recognize the racial rhetoric taught to all of us starting at a young age. Only then can we even start to talk about real change.

"Being a public defender is a calling. You have to feel it in your bones."

Nikita Srivastava

CL: The United States overincarcerates by locking people in jail for nonviolent (often drug) offenses, and it imposes incredibly harsh sentences unnecessarily without considering alternatives to incarceration such as diversion, drug court, etc. We should not incarcerate people for many offenses that currently result in harsh sentences such as drug offenses and immigration offenses. In addition, we should employ restorative justice practices far more frequently than we do.

QC: Has a client ever expressed hesitation when meeting you for the first time because he or she believes judges and juries will have a more favorable view of a white lawyer? How did you respond?

PV: Absolutely. I was ecstatic to be a defense attorney — armed with the ability to be a vessel for my client and my community's wants and needs. Unfortunately, the racism and sexism that saturates the criminal legal system is not lost on my clients and community. I was not surprised or hurt by the thoughts and feelings of my clients. If I were facing the might of the criminal legal system, I would want to put myself in the best position possible too. All I can do is what I am there to do — fight! The courtroom is a war zone. I fight zealously and mercilessly for each of my clients whether it is a violation or a felony. While that may not change their factual impression of whom the system favors, it does assure them that I am committed to fight that system zealously and skillfully with them.

NS: Yes. Sometimes they flat out say it, and other times they subtly imply it. When this happens, I let them explain all their worries and concerns while I simply listen. It is important that they be heard, and I am not questioning their racial experiences. Then, I am honest with them about my experiences with judges and jurors. And I cannot promise them that judges and jurors will not consider my client's race. However, I can voir dire jurors on my client's race to make sure I can eliminate any jurors with racial biases. Unfortunately, I cannot do this with judges. Trust me, I would love to educate all the judges in the world on racial justice. Most of the time, my clients of color want to be heard on their racial experiences in a safe space. I am that safe space. I will not bulls**t them or invalidate them or tell them they're wrong.

CL: I've never had a client outright tell me anything like this, but I have suspected or wondered whether clients might be more willing to take my advice if I were an older white lawyer. I do my best to establish a relationship of trust with my clients by visiting them, following through with the things that I tell them I

will do, like contact family, and by listening to them.

QC: Have you had a conversation with a client of color in which you are blunt about how racism in the criminal legal system may result in punishment that is more onerous for her or him than the punishment meted out to a white defendant? Did the client appreciate your frankness?

PV: I have that conversation every chance I get. It is rare that I have to remind an older Black person about the racism of the criminal legal system, but I often have to remind young people. And it is gut-wrenching, telling them to be cautious in groups or be mindful not to be too loud when expressing joy. I educate them about how the system will "adultify" them and not treat them as children. It hurts to see them sitting across from me in the cell with all sense of freedom or peace destroyed and experiencing the weight of their Blackness. It is super heavy. But I tell them because I am Black and they are Black, and that is what is required and incumbent upon me. I have seen what the absence of this conversation means. It means that Black people get a swift reminder by the criminal legal system that we are not all the same — from the police interaction to the resolution of the case.

"All I can do is what I am there to do — fight! The courtroom is a war zone."

Porsha Shaf'on Venable

NS: Yes. Again, it goes to creating that safe space. I tell them if I know the prosecutor and the judge will be racist. And my clients like that. It shows them that I know what I am doing and have an understanding about the world that is outside my legal knowledge. I think they do appreciate it.

CL: No. Almost all of my clients are Latinos, Black and/or low-income. I do get some white clients, but they are rare. I do tell my noncitizen clients them. First, it is not another white person in power telling them what they can and cannot do. Second, I have a stronger connect because, like them, I am a person of color in a predominately white space. It can be very hard to explain certain racial feelings and experiences to white people. With people of color, there is an unspoken understanding. For example, I do not need my clients of color to go into depth about their feelings regarding discrimination. I have been through it myself.

CL: I don't know, but I don't think a client needs a lawyer of color to receive zealous advocacy. I think the client needs a lawyer who cares about being a zealous advocate. I've seen attorneys of color who, in my opinion, don't do a good job for their clients, and I've seen white lawyers do an outstanding job for their clients. Many prosecutors are people of color and are working to incarcerate the very communities from which they come. And many white public defenders devote their careers to fighting on behalf of their clients. So I don't think you need to be an attorney of color to be a good lawyer for a client of color. I do think in a big office, like a public defender's office, it is important to have attorneys with a variety of backgrounds, including class, race, immigration status, and ethnic diversity because diversity of experience and race/ethnicity brings an important diversity of perspectives to our work. I work in a collaborative office with attorneys from a range of different backgrounds and life experiences that make our office stronger as a whole because of the diversity of the attorneys in the office.

QC: Would the attorney-client relationship be strengthened if a client assigned a public defender had a right to the public defender of his or her choice? Put another way, are attorney-client relationships necessarily strengthened when people of color are represented by attorneys of color?

NS: I don't think so. Every attorney-client relationship is different. I think my clients of color respond very well to me, a woman of color, representing charged with immigration offenses that the system is hostile to them because they are noncitizens.

QC: How have your white clients reacted to having a lawyer of color?

PV: I work in the Bronx, so the police spend most of their time bothering the people in Black and Brown communities. On the rare occasions that I get a white client, I have not had any issues with them that I can recall.

NS: Most of my clients are not used to seeing a South Asian American lawyer in general, but most have not reacted poorly. At first, they are a little taken aback, but once they talk to me, they are less fazed by it. Yes, I do get offensive questions: "Where are you originally from?" "Are you going to have an arranged marriage?" Sometimes they want to talk about Indian culture with me when I am just trying to focus on representing them. But, overall, I have not had any issues.

CL: I have not noticed my white clients treating me differently. I once asked a white skinhead client with a swastika tattooed on his head if he objected to me representing him. "I'm not down with brown. I'm up with white," he told me. He was part of a white power gang. I don't know if he would have preferred a white attorney, but he was my client for many years because he kept coming back on revocations.

QC: How can society repair the chasm between police and people of color?

PV: Society can't. The system of policing is born out of slave-catching. With that foundation and the ways it has permeated every aspect of how people of color have been treated by police for decades, what is there to repair? It is working as intended.

NS: A lot of damage has been done. One way to fix it is by acknowledging it. Across the country, many are screaming "Blue Lives Matter" or "All Lives Matter" because they do not want to deal with the damage. Once everyone acknowl-

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edges that the police are inherently racists because racist rhetoric is reinforced, then we can start talking about repairing the chasm.

CL: We can start by hiring fewer police officers, having better trained police, and relying less on police for community needs such as mental health treatment, homelessness, or addiction issues. End policies such as stop and frisk.

QC: Does the fact that millions of white people participated in mass protests during the last two years give you hope that real criminal justice reform is within reach?

PV: The presence of white people at protests is not going to make communities safe or achieve justice and liberation. For now, all defense attorneys need to reimagine how we represent our clients by forcing judges to listen to the fact that a stop is not just a stop. We need to engage and educate the communities we are in before they are in our jury boxes. We need to listen to those that are directly impacted by these systems, and we need to step up and be more present for the grassroots and community organizers on the ground doing this work.

NS: No, because achieving criminal justice reform, rather racial justice reform, is more than just symbolic support. Many white people, regardless of their political backgrounds or personal beliefs about themselves, still struggle with the issue of racism in the justice system. In my experience, the white people who believe they're the "most woke" or "most progressive" are harder to educate on racial justice reform. Because they fundamentally believe they are not racist, they will not listen when you correctly point out discriminatory or prejudicial behavior. Instead of listening to you, they will fight you more and cancel you later. This is especially true when it comes to "progressive" judges and prosecutors. Achieving true criminal justice reform requires a lot of self-education and actively being anti-racist. Many white people at these mass protests do not understand why we need critical race theory taught in schools, think affirmative action is a little unfair, and believe ending qualified immunity was enough. They will not take the time to read anti-racist literature or let people of color be active leaders in the fight for change. And this is a lot of work for the white community to do. That's why many do not want to do it. Engaging in self-reflection and self-accountability is not an easy journey.

CL: I would like to be hopeful, but the cynic in me says it will take more than the protests of the past year to create criminal justice reform. We have seen some small changes, like those made in the First Step Act, but there is still a long way to go.

QC: Have you discussed the impact of the trial penalty with your clients? What has been their reaction when they find out what it is and how it works?

PV: I discuss this with every client — no matter how familiar the client is with the criminal legal system. Many of my clients have been so often brutalized and beaten down most of their lives by the systems of oppression. Talking to my clients about a trial tax is just another thing that they have to go through and deal with. And I leave space for all of those experiences and feelings. I do not move until my clients have the space to express and feel whatever they need to and to make the decisions they must make about whether to go to trial.

"It is a David and Goliath story … We enjoy the fight, and we are privileged to fight on behalf of marginalized people who need a good advocate."

Cassandra L. Lopez

NS: Yes. They are usually quiet about it. Deep down they know the consequences and understand better than most how their race plays a part in it. They know how covert the discrimination and biases are. My clients appreciate when their public defender also recognizes it.

CL: I discuss it for every trial case. Most clients decide to plead guilty — even when I advise them not to.

QC: Is a client's paramount concern always getting the charges dismissed or getting an acquittal? How do attorneys determine whether representation of a client was a success?

PV: Absolutely not. There are enmeshed consequences that accompany a criminal case. My clients may not care about their criminal case outcome if (1) they don't have a home to go to or (2) they don't have a job. Also, clients may not care about the criminal case outcome if they don't know where their kids have been kidnapped to — by the family separation system. What will become of their family here in the United States if they are ripped from them and sent back to a country they left? Criminal defense attorneys fail their clients each time they are not mindful of the other systems that directly impact their clients' lives. Success? Success is getting the outcome that matters to my client — not what the criminal legal system has determined is the right outcome.

NS: I always ask my clients what their goal or desired resolution is when I meet them. The answer varies depending on the case and client. For many, it is to get the case dismissed. Or, if we go to trial, to be found not guilty. If they want to plead guilty to either a lesser charge or the charge at hand, then they simply want someone to advocate for a good sentence. If the client is happy with my representation, then my representation was a success. Most clients understand that their public defender does not control the outcome. All their public defender can do is represent them with zeal in hopes they get the right outcome.

CL: Not always. Sometimes clients have other concerns such as keeping their immigration status or keeping custody of their children. Often, they want to do less time in custody. The success of a case is determined on a case-by-case basis. Frequently, success means resolving the case favorably in an alternate disposition or getting a recommendation for substantially less time or convincing the judge to give a lower sentence. I consider it somewhat of a success every time I get less than what the government recommends. Although, of course, I would prefer a dismissal or an acquittal.

"The seemingly small, subtle details in many trials form the tightrope between life and death upon which the accused unknowingly walks."

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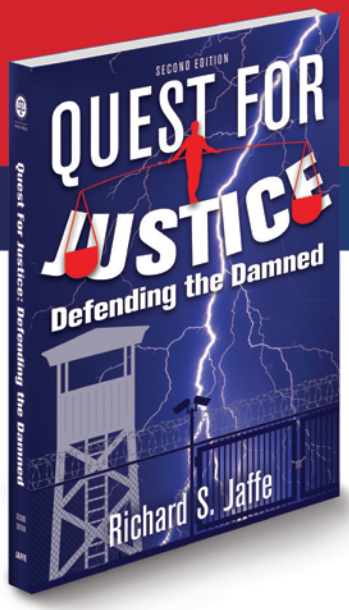

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QC: If you were talking to a group of law students, what would you say to convince them to practice criminal defense and to represent clients of limited means?

NS: I cannot convince anyone to be a public defender. Instead, I can only inspire them to become one. Not everyone can be a public defender. If you want to be a public defender because it is trendy or will get you great trial experience, then pick a different job. Being a public defender is a calling. You have to feel it in your bones. I know many former public defenders who still identify as public defenders. If you know you want to be a public defender, then read every book about indigent defense work and watch every documentary you can. Expand your knowledge base from just the law to other topics such as race, gender, LBGTQAI+, and social justice. Learn about other organizations trying to help the people you want to represent. And take advantage of every opportunity to work at a public defender's office.

CL: It is the best, most satisfying legal career you can imagine! I love being a trial attorney, and I love representing my clients. It is a David and Goliath story. We do not go into this profession because we like to win all the time. Most of the time we do not win. But we enjoy the fight, and we are privileged to fight on behalf of marginalized people who need a good advocate. We get to be really creative and constantly think of ways to outwit the prosecutors and force them to work to take time away from our clients and our clients' families. We are on the right side of history.

QC: What is the most important lesson your clients taught you?

PV: Resilience. My clients come from one of the poorest congressional districts in this country. They are hardworking, they are joyful, they have survived, and they are healing from trauma. This trauma has been visited upon them interpersonally and by all of these systems meant to oppress and suppress them. The thousands of clients I have represented are some of the most beautiful humans I have ever encountered. I am honored, humbled, and grateful that they allow me the privilege of representing them.

NS: The most important lesson my clients have taught is learning not to beat yourself up so you can keep fighting.

Quintin Chatman is the Editor of The Champion. ■

The Role of Implicit Racial Bias in Forensic Testimony

(Continued from page 40)

likely to be a false negative, purely as a consequence of decision thresholds that change as expectation changes.").

66. *Cf.* NAS Report, *supra* note 35, at 185 ("The traps created by such [contextual] biases can be very subtle, and typically one is not aware that his or her judgment is being affected.").

67. *See, e.g.*, Center for Statistics and Applications in Forensic Evidence, https://forensicstats.org/. *See also* Organization of Scientific Area Committees for Forensic Science, https://www.nist.gov/organization-scientific-area-committees-forensic-science.

68. *See, e.g.*, Itiel Dror, *Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias*, 92(12) Anal. Chem. 7998 (2020); Glinda Cooper & Vanessa Meterko, *Cognitive Bias Research in Forensic Science: A Systematic Review*, 297 Forensic Sci. Intl. 35 (2019).

69. Mason, *supra* note 29.

70. *See, e.g.*, ORS 297.070 (Oregon statute describing auditing authority of secretary of state).

71. The Texas Forensic Science Commission and the New York Commission on Forensic Science are examples of independent commissions that were established by state legislatures.

72. NAS Report, *supra* note 35, at 183.

73. *Cf.* Risinger, *supra* note 40, at 19 ("Research on conformity shows that people rely on the views of others in order to develop their own conclusions, sometimes to gain additional information, other times merely to be in step with their peers.").

74. *Id.* at 16.

75. PCAST Report, *supra* note 1, at 32.

76. *Id.*

77. New York State Justice Task Force, Recommendations Regarding Root Cause Analysis, at 2, http://www.nyjusticetaskforce.com/pdfs/JTF-Root-Cause-Analysis.pdf.

78. *Id.*

79. *Id.*

80. ABS Group, *Root and Cultural Cause Analysis of Report and Testimony Errors by FBI MHCA Examiners* (2018), https://vault.fbi.gov/root-cause-analysis-of-microscopic-hair-comparison-analysis/root-cause-analysis-of-microscopic-hair-comparison-analysis-part-01-of-01/view.

81. National Commission on Forensic Science, Root Cause Analysis in Forensic Science, https://www.justice.gov/archives/ncfs/page/file/641621/download. The Department of Justice later decided not to renew the NCFS's charter.

82. *See* Texas Forensic Science Commission, Annual Report (2015), at 23, https://www.txcourts.gov/media/1440351/fsc-annual-report-fy2015.pdf; Texas Forensic Science Commission Analyst and Technician Licensing Examination Basic Information Regarding Examination Content, Scoring, and Syllabus, https://www.txcourts.gov/media/1442004/licensing-exam-syllabus-07112018.pdf.

83. *See* Kang, *supra*, note 3, at 1130–31.

84. NAS Report, *supra* note 35, at 184.

85. PCAST Report, *supra* note 1, at 31.

86. *See, e.g.*, Unconscious Bias Juror Video, U.S. Dist., W.D. Wash., https://www.wawd.uscourts.gov/jury/unconscious-bias; Understanding the Effect of Unconscious Bias, Oregon, https://www.courts.oregon.gov/courts/lane/jury/Pages/Video-Gallery.aspx; Manual of Model Criminal Jury Instructions, Ninth Circuit, http://www3.ce9.uscourts.gov/jury-instructions/node/300.

87. *See* Risinger, *supra* note 40, at 9.

88. *See, e.g.*, Quinn Capers IV, *Rooting Out Implicit Bias in Admissions*, Association of American Medical Colleges (2019), https://www.aamc.org/news-insights/insights/rooting-out-implicit-bias-admissions.

89. Risinger, *supra* note 40, at 31; Dror, *supra* note 68.

90. Kaye N. Ballantyne et al., *Peer Review in Forensic Science*, 277 Forensic Sci. Internat'l 66 (2017).

91. Dror, *supra* note 68.

92. Failing to follow the principle of falsification results in confirmation bias because examiners have a natural tendency "to test a hypothesis by looking for instances that confirm it rather than by searching for potentially falsifying instances." *See* Risinger, *supra* note 40, at 7. ■

About the Author

Janis C. Puracal is an Attorney and the Executive Director of the Forensic Justice Project, a nonprofit organization in Portland, Oregon.

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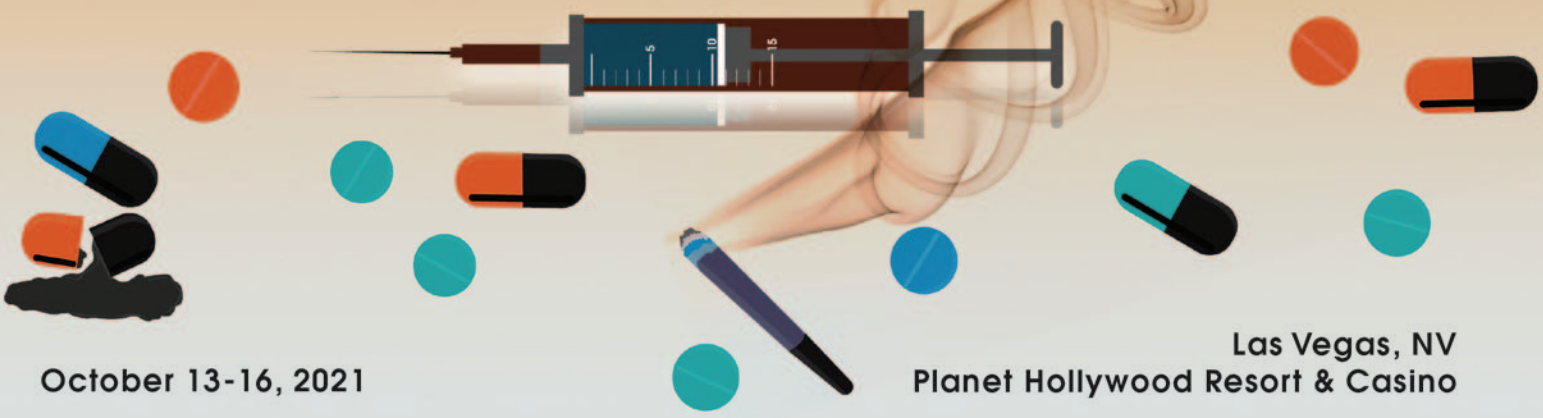

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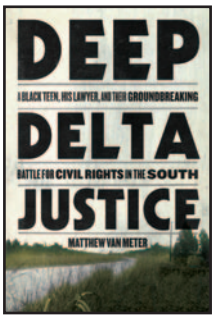
Deep Delta Justice

A Black Teen, His Lawyer, and Their Groundbreaking Battle for Civil Rights in the South

By Matthew Van Meter
Little, Brown and Co. (2020)
Reviewed by Jon M. Sands



All Gary Duncan tried to do was stop a fight. Duncan was African American, 19 years old, and on his way home from work when he saw his two young cousins accosted by a several white teenagers. He knew trouble when he saw it. His cousins were attending the newly integrated high school in Plaquemines Parish, on the southeastern tip of Louisiana. It was one of the most segregated places in the South. Duncan stopped, and despite being insulted with slurs and spat on, he remained calm. He told his cousins to get in his car, and the whites to go on home. He touched the arm of one of them to end the confrontation. It was just the beginning. As Duncan's mother always said, and as he would experience, "Trouble is easy to get into but hard to get out of."

Deep Delta Justice chronicles the next two years, during which Duncan was charged with battery, defended by a Northern civil rights lawyer because no local lawyer would take the appointment, convicted, saw his lawyer also charged and jailed, and had his case end up in the U.S. Supreme Court. There, in *Duncan v. Louisiana*, the Court established that the right to a jury trial was fundamental to due process and that it applied to the states.

In many criminal procedure and constitutional law courses, *Duncan* is taught as establishing a right to a jury trial for offenses punished by greater than six months' imprisonment, and for its role in extending the incorporation doctrine, which made most of the protections of the Bill of Rights, through the Fourteenth Amendment, applicable to the states. The opinion, authored by Justice Byron White, mentions Duncan's race (Negro) and then avoids the contentious struggle for civil rights roiling the United States, especially in the South. The case cannot be understood or appreciated without this background.

Plaquemines Parish is about 65 miles from New Orleans. It was a world, or rather a kingdom, unto itself, ruled by Judge Leander H. Perez Sr., an avowed segregationist, bigot, racist, and ruler of the Parish. Its officeholders, prosecutors, board members, and judges were either relatives or beholden to him. And he was fighting against any integration. The teenager Duncan touched was the son of the president of the newly established private school association that was meant to thwart integration. The father filed a report with the sheriff and Duncan was charged with the misdemeanor of battery, punishable by two years and a fine of $300.

Although this incident was not a lynching, it was yet another of the countless indignities of, and use of the criminal justice system to enforce, in Michelle Alexander's term, "the new Jim Crow." As Van Meter makes clear, Duncan was proud, and he was willing to stand up to this injustice. When no local lawyers would take the case, after Perez threatened them, the family turned to the Lawyers Constitutional Defense Committee (LCDC), a legal organization dedicated to fighting for civil rights, with a newly established office in New Orleans. It was staffed by a new lawyer from the North who wanted to make a difference, Richard Sobol. To Perez and the Southern segregationists, Sobol epitomized the white liberal agitator: A graduate of Columbia Law, he had left a powerhouse Washington, D.C., law firm to come to the South for the civil rights struggle.

Amidst the motions seeking due process, Sobol filed a request for a jury trial. Like his other motions, it was denied. At trial, the judge convicted Duncan and imposed what was at that time an extraordinarily stiff sentence of 60 days' imprisonment plus a $150 fine and costs. At sentencing, the judge specifically stated that Sobol's efforts to have the denial of a jury declared unconstitutional were outrageous and merited a higher sentence for the defendant. He also criticized the role of the LCDC in integrating schools.

The fury of the prosecutors and courts continued unabated. Appellate bond was set in an outrageous amount ($1,500), which was met only by the community's collectively pitching in. Meanwhile, Duncan's lawyer, Sobol, was arrested for practicing law improperly. He was jailed until he could post bond, which was not easily done. The two cases ran on parallel tracks. Sobol and others handled

About the Reviewer

NACDL MEMBER Jon M. Sands is the Federal Public Defender for the District of Arizona.

The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

the appeal while Sobol's lawyers sought to enjoin the prosecution against him.

The issue eventually presented to the Supreme Court was whether the Court should overrule its precedent holding that a state jury trial was not required by the Fourteenth Amendment and find that the Sixth Amendment right to a jury trial applied in all but petty offenses, for both federal and state prosecutions. The raising of this issue was opportune, as the Court was in the midst of its criminal procedure revolution, transforming and constitutionalizing criminal procedure with *Gideon*, *Miranda*, *Mapp*, *Katz*, and other decisions. *Duncan* was added to the due process roll call.

On May 20, 1968, the Court decided *Duncan*. It adopted the argument for incorporation. In this, it was decisive. The debate over the incorporation was settled. Justice White's opinion did not go for full incorporation of the Bill of Rights, as Justices Hugo Black and William O. Douglas advocated in their concurrence, nor did it halt the expansion, as Justices John Marshall Harlan II and Potter Stewart advocated in their dissent. Rather, Justice White would incorporate those rights deemed "basic in our system of jurisprudence" and whether it is "a fundamental right, essential to a fair trial." The right to a jury met this test. Justice White's formulation, as a practical matter, brought the important protections of the Bill of Rights to the states. This is the state of law today, with all but a few rights, such as the Fifth Amendment right to a grand jury, not being incorporated.

As for the jury right at issue, *Duncan* established the right to a jury for all but petty offenses (six months or less). It did leave many questions as to the import of the holding. The states decried the decision. They foresaw disaster, with a deluge of jury requirements that would swamp the system. That did not occur. As with so many cries about impending doom if rights are respected, such as the right to counsel, to *Miranda* warnings, or to the exclusionary rule, state systems quickly adapted. Many states, for example, simply crafted their codes to reduce many misdemeanors to petty offenses (6 months or less).

Van Meter does not end his account with Duncan's win at the Court. There is much more to the story. Crack civil rights lawyers rallied to Sobol when he was charged. Going to federal court, suits were filed alleging federal civil rights violations. Duncan's own case was now reduced to a petty offense, with no jury, but he still faced a hostile prosecutor, court, and community. Again, relief was sought from the federal courts. This was a good, but risky strategy.

At this time, the federal courts were not oblivious to the realities. They stepped in and put a stop to what had been shown to be a trumped-up racially biased charge. First, a federal court enjoined the Sobol prosecution for unlawful practice. Subsequently, another federal court put a stop to the battery charge as being a due process violation. The state appealed, of course, but Sobol had the satisfaction of being able to finally write a letter to his client, Duncan, that read in full: "The Supreme Court refused to hear Perez' appeal of the decision in your favor by the Court of Appeals. The case is therefore over for all time."

At this point, we should ask, aside from the expansion of the incorporation doctrine, what was the real impact of *Duncan*? It can be argued that *Duncan*, as it relates to juries, was a case that established a right but led to no real change. Statutes were revised, but the system moved on. Plea bargaining, now resolving almost 90 percent of cases, has made jury trials increasingly rare.

Yet, taking a step back, *Duncan* can be seen in a broader perspective of addressing juries in the criminal justice system. In establishing the right to a jury, *Duncan* may have led to the questions of who could serve on juries, the use of peremptory strikes, the number of jurors, the unanimity of jurors, and even the conduct of jurors. These questions continue to occupy the Court's attention even today.

Sobol continued to play a role. In 1972, shortly after *Duncan*, Sobol argued *Apodaca v. Oregon* on the issue of jury unanimity. He lost. Almost 50 years later, the Court reconsidered it in *Ramos v. Louisiana* (2020). Acknowledging that racial and other prejudices led to some states not requiring unanimity, the Court held that due process required unanimous juries. Sobol was not alive when Ramos was decided; he died a month before. But, anticipating a favorable decision, he told Van Meter that he might win *Apodaca* retroactively. He was right, although, in *Edwards v. Vannoy* (2021), the Court declined to make this right retroactive. While Sobol has passed, Gary Duncan is alive and well, and recalls how he and Sobol maintained a lifelong friendship.

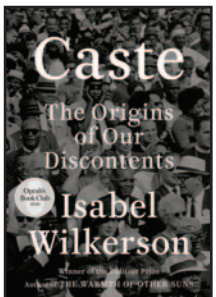
Van Meter chronicles well the legal background of *Duncan* and the legal course of the case. But this is not a law review article nor a legal treatise; it is a story of people, passions, and prejudices. Van Meter gives a feel for Plaquemines Parish, ruled by hate and girded by segregation. He gives a sense of what civil rights lawyers faced in a hostile environment, yet it was not only animosity, but also friendship among the cadre of counsel, drinking bourbon in low-rent offices, plotting legal strategies, and on edge for possible physical attacks. Van Meter has a novelist's sense of detail and pace, enabling us to see and feel what it was like. He follows the actors through the case and beyond. It is a good read.

At the center of this account stands Gary Duncan. Van Meter rightfully concentrates on him as much as on his lawyer, Sobol. Van Meter describes how Duncan had so much to lose — a family (newly married with a young child) and a good job as a boat hand. His decision to stop a fight, and then to fight for his rights, makes him heroic. Because of his tenacity in standing up to an injustice, a Jim Crow misdemeanor, he became both a cause for righteous counsel, such as Sobol and others, to rally around, and to respect and admire. In this way, Duncan changed the law, changed lives, and stayed true to himself. ■

Caste

The Origins of Our Discontents

By Isabel Wilkerson
Random House (2020)
Reviewed by Teresa J. "Teri" Sopp



Isabelle Wilkerson's newest book, *Caste: The Origins of Our Discontents*, is destined to become the seminal explanation of the origin and persistence of racial division in America. Wilkerson, the author of *The Warmth of Other Suns*, is a gimlet-eyed student of race and class in America who nails the source of the current political divisiveness right on the head. In *Caste*, Wilkerson has taken on not only the roots of American racial dysfunction, but also compares it with experiences in both India and Nazi Germany.

Wilkerson posits that a dominant group exists in any social grouping, and that members of a dominant group will take all action necessary to maintain their positions of dominance. Wilkerson points to the most glaring recent exam-

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ple of the need for that control: When conservative media outlets spread the word that white Europeans would be in the minority in the United States by the 2040s, the people in the dominant caste in American circled their wagons and anointed a nativist reality television star as their savior. Wilkerson's ease in explaining how the caste system furthers and protects racial discrimination is astonishing. She calls caste "the architecture of human hierarchy" and sets forth the "eight pillars" of caste that prop up the artificial distinctions in society. Wilkerson rightly describes caste as being solely about power, not about morality.

Wilkerson is a careful researcher and accomplished writer who makes even tedious details interesting and exciting. She describes "race" in the United States as the "unseen force of caste," noting "caste is the bonds, race the skin." Her explanation of the origins of caste and the difference between "caste" and "class" are thought-provoking, and her laser-focused explanation of the ramifications and consequences of caste domination is eye-opening. *Caste* serves also as a history of some of the more egregious discriminatory practices during Reconstruction and Jim Crow; Wilkerson recounts racist politicians and community leaders urging violence to sustain segregation. Many of the anecdotes are astonishingly heartbreaking:

> The only way to keep an entire group of sentient beings in an artificially fixed place, beneath all others and beneath their own talents, is with violence and terror, psychological and physical, to preempt resistance before it can be imagined. Evil asks little of the dominant caste other than to sit back and do nothing. All that it needs from bystanders is their silent complicity in the evil committed on their behalf, though a caste system will protect, and perhaps even reward, those who deign to join in the terror.

Wilkerson's theory of the eight pillars of caste neatly organizes factors we know exist; she informs these tenets with statutory development and anecdotal history. The eight pillars, as Wilkerson sees it, are: (1) purported divine will and the laws of nature, (2) heritability, (3) endogamy (control of marriage), (4) belief in the purity of the dominant caste, (5) occupational hierarchy, (6) dehumanization and stigma, (7) terror and cruelty as enforcement and control, and finally, (8) inherent superiority. Wilkerson devotes a chapter to each of these pillars; she cites historical pamphlets, political speeches, and legislative processes in each chapter to underscore the long-term institutionalization of the caste system in America.

Caste should have won the Pulitzer Prize for nonfiction. Wilkerson has won past Pulitzers for her work as a *New York Times* reporter but not for any of her books. *Caste* should have been the one.

This book is a "must read" for anyone interested in the origins of artificial discrimination and hierarchy based on skin color and economic status. It is truly an epic work that provides a broad education on the origin and persistence of racial discrimination. ■

About the Reviewer

NACDL MEMBER Teresa J."Teri" Sopp is an Assistant Public Defender in Jacksonville, Florida. She handles homicides, death penalty cases, and juvenile life resentencing cases.

Bones of Black Saints

By Alex Charns
(2020)
Reviewed by Bob Hurley

Alex Charns' *Bones of Black Saints* is a compelling courtroom drama that takes readers behind the scenes of a trial and into the minds of defense counsel. As an attorney whose practice has focused on representing criminal defendants and suing police departments for over 35 years, Charns knows his way around a courtroom. The book follows the highly charged trial of Marcos Salazar, a Black Lives Matter activist, who has been charged with attempted murder of a white vice cop. The prosecution claims that, after a routine traffic stop, Marcos attacked the cop, stripped him of his gun, and shot him at point-blank range. The defense contends that the traffic stop was a sham and that the cop stopped Marcos to harass and intimidate him for his outspoken criticism of the police department. When Marcos refused to kowtow, the cop pulled his gun, pointed it at Marcos, and threatened to shoot him. Fearing for his life, Marcos attempted to disarm the cop and, during the struggle over the gun, the cop accidentally shot himself.

Marcos is represented by Star Gwiazda, a charismatic and hard-charging defense attorney who was appointed by the court to represent Marcos. She is outraged by the prosecutor's decision to indict Marcos, and she vows to win an acquittal. Star is assisted by her law partner, Zenko Luczek, an experienced defense lawyer who volunteered to assist Star in representing Marcos. Zenko, who is known for his legal acumen, helps formulate defense strategy and research legal issues that arise during trial. He also serves as the book's narrator. Star is a character readers will root for as she pours her heart and soul into representing her client and fighting the cover up orchestrated by the police department to protect one of its own. As Marcos' trial begins, passions in a city that has seen more than its share of racial strife are running high. The tense atmosphere surrounding Marcos' trial is heightened by the drama occurring outside the courtroom, as Black Lives Matter activists protest the presence of a Confederate monument near the courthouse, and neo-Nazis descend upon the town to protect the monument. When Star's house is vandalized and Zenko's house is shot up by neo-Nazis, Star and Zenko must decide whether justice can be obtained in such an incendiary atmosphere.

In *Bones of Black Saints*, Charns seeks not only to entertain his readers, but also to enlighten them. He subtly demonstrates how a judge's rulings on objections, evidentiary issues and jury instructions, which may seem innocuous to the casual observer, can affect the outcome of the trial. He also highlights the challenges faced by defense counsel in trying a case against a prosecutor whose credo is "win at all costs." In addition, Charns uses Zenko's background to focus attention on the emotional and mental toll paid by many defense attorneys who walk into court every day representing clients who are not only outcasts from society but also underdogs at trial.

Although Charns' book focuses mostly on Star and Zenko's relentless fight to obtain justice for their client and the travails of trying a high-profile crim-

About the Reviewer

Bob Hurley is the former Capital Defender for North Carolina. He lives in Raleigh and represents inmates in postconviction proceedings in state and federal court.

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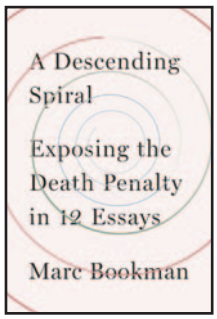
inal case, it does have its lighter moments. Charns leavens *Bones of Black Saints* with facts about the intricacies of hockey and obscure Catholic saints that will broaden readers' horizons. Finally, what I liked most about *Bones of Black Saints* was Charns' ability to capture the commitment, dedication, and passion that drove so many of us to become criminal defense attorneys.

The verdict is in: *Bones of Black Saints* is a winner. ■

A Descending Spiral

Exposing the Death Penalty in 12 Essays

By Marc Bookman
The New Press (2021)
Reviewed by David R. Dow



If you are against capital punishment and you want to persuade a death penalty supporter to your point of view, do not talk about morality. That is the wrong strategy for two separate reasons. The first is that most death penalty supporters also hold their view for moral reasons; they believe in the concept of an eye for an eye, even if they do not quite understand that the rabbis living at the time of Jesus had long since made carrying out executions practically impossible.

But there is a second reason as well: High-brow philosophical discussions of capital punishment, of the kind one might find in the writings of Immanuel Kant or John Stuart Mill, have exactly nothing to do with the system of capital punishment as it actually exists in the United States.

Someone who wants to convince a death penalty supporter to change her mind is best off, therefore, focusing on the world in which we actually live. And in that world, there are two facts about the death penalty that play prominently in the debate over whether to keep it: the first is cost, the second is stories.

Marc Bookman is a long-time death penalty lawyer in Pennsylvania and the executive director of the Atlantic Center for Capital Representation. In his new book, *A Descending Spiral*, there is not a spreadsheet to be found. Bookman is not interested in the economics of capital punishment; he is interested in the stories. And he tells these stories in a riveting and page-turning way that will leave most readers embarrassed or in disbelief, or maybe both, that such a system can still exist in 21st century America.

Sister Helen Prejean, the world's most well-known death penalty opponent, famously said that popular support for capital punishment is a mile wide but only an inch deep. Support for the death penalty has shallow roots because most people do not know very much, if they know anything at all, about how the system actually works. Bookman aims to change that and provide a crash course for all those Americans whose opinion favoring the death penalty rests on a hollow foundation.

Most of the 12 chapters focus on a single case that illuminates a single significant yet recurring failure of the death penalty system. There is the defendant in Florida who gets sentenced to death by the judge even though the jurors want his life to be spared. We meet a defendant in Texas so mentally ill he gouges out his own eyeballs, and a Jewish defendant who is sentenced to death by a racist and anti-Semitic judge in a Texas county who distributed a book to prosecutors telling them to make sure the jury did not contain "Jews, Negroes, Dagos, [or] Mexicans."

In Georgia, a death-sentenced inmate was represented at trial by a lawyer who drank more vodka every day than most people drink water. We meet a man facing death in Pennsylvania who confessed to a crime he did not commit and another whose crime was to kill his sexual abuser. Bookman writes about sordid police and about jurors who casually use racist language during their deliberations to describe the men whose fates they control.

Perceptive readers will have two questions: How common are these debacles? And why don't they get corrected during the appellate process? Bookman answers them both, clearly and dispassionately.

As for the debacles, they are routine. Not every death penalty lawyer can tell war stories with Bookman's elegance or verve, but Bookman explains they could all tell them in some form or fashion. Bookman has mined the universe of capital cases not for the extraordinary, but for the mundane, and he has gathered these quotidian details into a volume that reveals abstract and philosophical discussions about the morality of capital punishment to be a farce. The death penalty is not a debate topic for intellectuals sitting in a sidewalk cafe; it is a remnant of lynching, an arbitrary system where racists and demagogues rig the results to disfavor the poor and the powerless and those with black or brown skin.

As for the supposed safety net of the appeals system, Bookman shows how through a combination of hostile legislation and judges who are unprincipled or indifferent, these cases fall through the cracks because the cracks have become chasms. Our system might not be as corrupt or broken as the system in Iran — nobody can know for sure because the Iranian system is a secretive black box — but it is more corrupt and broken than the typical death penalty supporter could even begin to imagine.

It is hard to predict whether Bookman's book will change any minds. But it is easy to conclude that if it doesn't at least shatter the faith of any death penalty supporter who reads it, that supporter's mind was not open to begin with. ■

About the Reviewer

David R. Dow is the Cullen Professor of Law at the University of Houston Law Center.

No Noose

Musicians United to End the Death Penalty
www.NoNoose.org
Reviewed by Marvin D. Miller

As a lifelong opponent of the death penalty, I admire those musicians and singer-songwriters who spent three years making this album. All of the contributors are dedicated to that laudable goal and donated their time and energy to make this recording possible. It is good, not only because of its purpose and that all proceeds go to stopping executions, but also because of its creativity and diversity.

Whether you like country, bluegrass or rock, you will find a cut to enjoy on this album. One of my favorites is "Dusty Trails." It is a stirring guitar piece that calls to mind one of my favorite heroes — Doc Watson.

(Continued on page 63)

About the Reviewer

NACDL MEMBER Marvin D. Miller is a criminal defense attorney in Alexandria, Virginia.

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PERSPECTIVE

BY TOVA INDRITZ

There Should Be a Right to Appointed Counsel for Indigent Persons Facing Imprisonment in Tribal Courts

Indigent Native Americans facing up to a year of imprisonment by a tribal court are not protected by the Sixth Amendment and are not entitled to appointed counsel. They should receive the same right to appointed counsel afforded to everyone else in the United States who is facing any term of incarceration.

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Every society has mechanisms to deal with deviant behavior, and that was true for Native American tribes before Columbus landed in what is now called the United States in 1492. Tribes had restitution, including mandating the provision of labor to victims and their families that victims would have provided, mediation, methods for seeking forgiveness, shaming, and in the worst case, banishment. The goals were to compensate the victim and to rehabilitate the wrongdoer.[1] But no tribe had what is now called incarceration, jail, or prison. The federal government imposed the idea of jails after 1868.

Native American communities do not tolerate domestic violence, assaults, harms to persons or property, or violation of societal norms and expectations. Tribes are sovereign governments and as such have the right to choose how to self-govern their communities.

But to the extent that tribes adopt the mainstream society's methodology of punishment by incarceration, should they not also be afforded and adopt the mainstream society's protection of individual rights, including due process and the provision of appointed counsel to indigent persons?

Fifty-eight years ago, the U.S. Supreme Court held in *Gideon v. Wainwright*[2] that a person facing imprisonment who is indigent is entitled to appointed counsel, because it is "an obvious truth" that "any person haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," and that having an attorney is a "fundamental right essential to a fair trial." And 49 years ago, the U.S. Supreme Court held in *Argersinger v. Hamlin* that even for a misdemeanor or a petty misdemeanor, a person who is facing any jail time at all and is indigent is entitled to appointed counsel,[3] writing that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."

Yet an indigent Native American who is charged in tribal court, facing a year in jail, with all the consequences of confinement — loss of employment, housing, and supporting family — is *not* entitled to appointed counsel, only counsel at his or her own expense if the possible punishment is a year or less.

This is because the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, when first passed in 1968 allowed tribal courts to only sentence people up to six months in jail and a fine of up to $500; at that time, prior to *Argersinger*, Congress traded off limiting the term of punishment and not requiring appointed counsel for indigent persons. So the Indian Civil Rights Act set out at 25 U.S.C. § 1302 that

> No Indian tribe in exercising powers of self-government shall —
>
> . . .
>
> (6) deny to any person in a criminal proceeding the right … at his own expense to have the assistance of counsel for his defense ….

The truth, then and now, is that the vast majority of persons facing tribal court charges are indigent and unable to afford counsel.[4] Most are unfamiliar with such concepts as due process, presumption of innocence, burden of proof, admissible evidence, expert testimony, judicial conflict of interest, right not to self-incriminate, and other rudiments of Anglo-American criminal jurisprudence. Yet, without counsel, they face a very serious Anglo-American result — deprivation of freedom and separation from home, family, and livelihood.

It is also true that the provision of defense counsel is expensive, and most tribes cannot afford that cost. Practices vary widely from tribe to tribe: Some tribes have public defenders, some have nonlawyer advocates who may have no education requirements, some tribes that provide representation do so for only a very small percentage of defendants, and some provide no representation at all.

In 1986, Congress extended tribal courts' sentencing authority to one year in jail and a fine of $5,000, but did not require appointed counsel for indigent persons in tribal court.

In 2010, Congress passed the Tribal Law and Order Act (TLOA), which amended ICRA to provide a greater punishment power (up to three years of imprisonment) for the tribes. NACDL testified at the congressional hearings on

TLOA in 2009. That testimony described problems in tribal court ranging from not making the tribal laws public and lack of law-trained judges to lack of appointed counsel (specifically lawyers licensed by a state rather than nonlawyer advocates who may be licensed by a tribe). NACDL urged that if the penalties were to be increased, at least there should be a right to appointed counsel. Congress' compromise between these concerns — about individual rights and the desire of some tribes to be able to impose greater punishment — now allows sentences up to three years with certain additional rights to defendants.[5]

Still today, the Sixth Amendment right to counsel does not apply in tribal court proceedings,[6] and ICRA provides for a right to retained counsel only,[7] unless the tribe has taken TLOA jurisdiction for more than one year.[8]

United States v. Percy[9]

Percy involved an individual who had been arraigned on tribal charges but not yet arraigned on the federal charges arising from the same facts.

> It is well established that tribal proceedings do not afford criminal defendants the same protections as do federal proceedings. The protections of the United States Constitution are generally inapplicable to Indian tribes, Indian courts, and Indians on the reservation. See *Talton v. Mayes*, 163 U.S. 376, 381-82, 41 L. Ed. 196, 16 S. Ct. 986 (1896); *Tom v. Sutton*, 533 F.2d 1101, 1102-3 (9th Cir. 1976). The underlying rationale is that Indian tribes are quasi-sovereign nations. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172-73, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). This circuit has held the Sixth Amendment right to counsel does not apply in tribal court criminal proceedings. *United States v. Ant*, 882 F.2d 1389, 1392 (9th Cir. 1989); *Settler v. Lameer*, 507 F.2d 231, 241 (1974). Thus, Percy's Sixth Amendment right to counsel had not attached for the purposes of the tribal proceedings flowing from the tribal arraignment.

Now consider another example of how this lack of right to counsel in tribal court also impacts Native Americans facing federal felony charges. Lezmond Mitchell, a Navajo in Arizona, was suspected of killing two Navajos on Navajo land 19 years ago. He was 20 years old at the time and had no prior criminal record. When the case was first being investigated, the FBI asked the U.S. Attorney to be able to arrest Mitchell. The AUSA said he did not have enough evidence to arrest Mitchell, but to see if the tribe would arrest him. The tribe did arrest him; never charged him with any crime in tribal court; never enabled him to have counsel; and kept him in tribal jail for 25 days, during which time the FBI interviewed him multiple times without counsel, and then again interrogated him on the ride from tribal jail to federal court. A non-Indian would have been entitled to the prompt appointment of a lawyer and prompt presentation to a judge. All the statements without counsel Mitchell made during that time were used against him in federal court, but the statements could not have been used against a non-Indian.[10] The federal government executed Lezmond Mitchell for this crime on August 26, 2020.

The other factor is that since 2015, the tribes can choose to exercise domestic violence jurisdiction over non-Indians,.[11] In those criminal prosecutions in tribal court where the defendant is a non-Indian, that defendant has the right to appointed counsel if indigent, and the tribe would have to pay for that. However, an indigent Indian charged with the same crime (even as a co-defendant) does not have the right to appointed counsel if facing a sentence of a year or less. How can that be fair?

No one ever says that the sovereignty of the federal or state government is diminished when individuals charged by those governments have rights to due process and to appointed counsel when indigent. Nor would it diminish tribal sovereignty to provide individual Native Americans with those same rights when they are facing incarceration.

Indians are, after all, U.S. citizens, who when charged in federal or state courts, have the same rights as other persons to appointed counsel and full due process. There should be a right to appointed counsel for any indigent person facing imprisonment anywhere in the United States, including in tribal courts; ICRA should be amended to so provide. Federal funding is also needed for tribes to hire public defenders or pay defense counsel on a case-by-case basis.

Notes

1. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M.L. Rev. 85 (2007); Stephanie J. Kim, *Sentencing and Cultural Differences: Banishment of the American Indian Robbers*, 29 J. Mar. L. Rev. 239 (1995-96); Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 Am. Indian L. Rev. 379 (1993); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. Rev. 225, 252 (1994); Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 Am. Indian L. Rev. 117 (2000-2001).

2. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

4. Most defendants in the hundreds of tribal courts are without counsel. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 Am. Indian L. Rev. 117, 119, 123 (2000-2001).

5. The current ICRA law provides as follows:

> (b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000. A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who —
>
> > (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
> >
> > (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.
>
> (c) Rights of defendants. In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall —
>
> > (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding —

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

6. See *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001).

7. *Id*. at 724 n.2.

8. Prior to TLOA, there was litigation over whether the one-year limit was per count or per occurrence. A prosecutor would have to be quite unimaginative not to see how one event could result in more than one charge. In one case a man had a restraining order not to go to his parents' home; he went there and stole a bottle of shampoo, which resulted in charges of violating the restraining order, burglary, and theft. He received separate sentences that totaled more than one year. *Bustamante v. Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010). In *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2013), where Miranda, who had no lawyer, was charged with "eight criminal violations arising from a single criminal transaction," the Ninth Circuit held that ICRA, Section 7, "unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation." 684 F.3d at 847. NACDL filed an amicus brief in that case and on various other cases on these issues of lack of counsel.

9. *United States v. Percy*, 250 F.3d at 725.

10. *United States v. Mitchell*, 502 F.3d 931, at 959-962, and dissent at 997-1003 (9th Cir. 2007).

11. See 25 U.S.C. § 1304(b)(4)(B). ■

About the Author

Tova Indritz is a criminal defense attorney in New Mexico.

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Book and Music Reviews

(Continued from page 58)

There is one tune that anyone who has spent a career in criminal defense will find all too familiar and all too sad. It is called "Daddy's Gun." The song tells the story of a 17-year-old kid who took his daddy's gun out one night and, without really thinking about what was going on and without any real planning or thought, indeed, being thoughtless, ends up facing the death penalty for having shot a store clerk over some stolen beer.

"I'm Gonna Live Forever" is a lighter country tune about having too much damn fun here on earth to want to leave. It contemplates sitting on the porch with the grim reaper, smoking a joint.

This is an enjoyable album. It goes from being poignant and thought-provoking to just plain fun. I recommend it not only because your purchase supports ending the death penalty, but also because I believe you will enjoy it.

All sales from the album (www.NoNoose.org) support the Arizona Capital Representation Project, a nonprofit that fights capital punishment in one of America's worst death penalty states. ■

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