

# **JURY SELECTION AND RACE - DISCOVERING THE GOOD, THE BAD AND THE UGLY**

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## **INTRODUCTION**

Let's talk about race – in a courtroom – as part of a criminal trial. Can we create a more uncomfortable situation? No one likes to talk about race, especially in public. The criminal justice system is perhaps the most volatile forum for a discussion of race. Mix the two together, and you get voir dire on the issue of race in an open, public courtroom in a criminal case. Actual opinions held by jurors, whether expressed or not, will probably cover a broad range. Some people think racism died a long time ago, and they are tired of discussing it. Some feel that if the criminal defense lawyer raises the issue, she is playing the "race card". Some feel that minorities are simply more likely to be criminals and we should simply acknowledge that fact.

At the beginning, it is important not to fool ourselves. Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person's lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people's opinions<sup>1</sup>, we'd better get busy finding out what those opinions are, how strongly they are held and how they may impact a verdict in our case. The challenge in jury selection is to get

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<sup>1</sup> But see, Dasgupta, Greenwald, "On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals." In this study, which can be found at [www.newschool.edu/gf/psy/faculty/dasgupta](http://www.newschool.edu/gf/psy/faculty/dasgupta) participants reminded of pro-black exemplars exhibited less automatic preference for whites over African-Americans than participants who were reminded of pro-white or non racial exemplars. The authors' research

people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.

### **THE RACE CARD**

A lawyer plays the so called "race card" by interjecting the issue of race into the analysis of a factual situation where race is, according to some undefined group of people, irrelevant. Many believed this was exactly what happened in the presentation of the O. J. Simpson defense. This viewpoint reveals how deeply issues of race divide the people that live in this country.

Soon after the Simpson verdict, an African American comedian in New York performed in front of a mostly black audience. He discussed his amusement at the anger exhibited by many white Americans as a result of the Simpson defense team suggesting that Detective Mark Furman's racial views were somehow relevant to the issue of his credibility as a police investigator, and therefore Mr. Simpson's guilt or innocence. The comedian posed a rhetorical question - if Jerry Seinfeld was accused of murder, and Louis Farrakhan was the only police officer who claimed to have found a bloody glove, would people think it inappropriate for Mr. Seinfeld's defense lawyers to discuss Mr. Farrakhan's views about Jewish people? The comedian's comment was met with a large amount of laughter and applause. It is inconceivable to most blacks that there could even be a debate on the appropriateness of exploring the racial bias of a police officer in a homicide prosecution where a black man is charged with killing two white people. And yet, for some white Americans, it is inconceivable that race has any relevance whatsoever in a jury's decision in such a case. Given this,

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suggests that there may be some benefit to encouraging prospective jurors to look at positive African-American role models as part of the selection or questionnaire process.

we had better find out how our potential jurors define the "race card," and how that definition may reflect their broader viewpoint on issues of race.

### **IMPLICATIONS OF THE WAR ON TERROR**

How many times have we heard something like "911 changed everything"? A new paradigm for fear and prejudice has been opened by the so-called "War on Terror." Opinions about immigration, national security, "guest workers" – all have a new overlay. When representing clients of Middle Eastern ancestry, we must now deal with an additional challenge in discovering tainted opinions and feelings or potential jurors.

### **STEREOTYPES CAN LEAD TO CONVICTION**

It is a mistake to assume that, all other things being equal, a non-white juror is a better defense juror in a criminal case than a white juror. On the one hand, the experience of living as a non-white person in America will undoubtedly have an impact on a person's worldview and life experience. Many people of color were either born and raised in the deep south or have family members who were. The first-hand experiences of black people born in the pre-World War II years and those who grew up in the 50's and 60's after are now the subject of documentary films on the horrors of racism. Their life experiences tell them that it is completely possible for a white police officer to be biased and prejudiced against a black defendant. As opposed to many white Americans, they would have no reason to believe that it would be very unlikely or rare for a white police officer to lie on the witness stand in a criminal case involving a black defendant.

These same people are often deeply religious, hard working people. They believe in law and order. They can be politically conservative in many areas, with a notable exception being their views on civil rights for non-whites. In the garden variety criminal case, some jurors of color would not be ideal jurors whether the defendant was non-white or not. It is necessary to go beyond the surface level of analysis to thinking about what it means to grow up non-white in America, and how the world view that a non-white person may have connects with the actual issues in dispute in a particular criminal case.

### **HOW DO YOU GET PEOPLE TO START TALKING?**

No one likes to talk about race - especially not in public. What follows are a series of questions, grouped into chapters (thanks to the organizational talents of Larry Pozner and Roger Dodd) that may be helpful in getting prospective jurors to talk about race. These questions have been developed for use with the "struck method" or "Donahue" style of jury selection - that is, a method of jury selection where the lawyer first addresses questions to the entire panel as opposed to questioning individual jurors one at a time. Follow up with individual jurors is critical.

## CHAPTER 1 - WHAT IF NO ONE LOOKED LIKE YOU?

These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race. .

I. Assume that you are on trial - the alleged victim was (*insert race/ethnicity of client*). The judge and the lawyers are all (*insert race/ethnicity of client*)– the police officers were all (*insert race/ethnicity of client*) – all the jurors who make up your jury are (*insert race/ethnicity of client*), and you are the lone white person in the courtroom:

What are you feeling?

Right now, as I describe this all (*insert race/ethnicity of client*) courtroom in which you are the only white face, what is going through your mind? Tell me about that.

Why do you feel this way?

What are you fearful of being the only one who is white in a sea of (*insert race/ethnicity of client*) faces?

Have you ever been in a situation where you were in the minority racially?

Tell me about that. How did that situation make you feel?

II. Mr./Ms. \_\_\_\_\_ may be tried by an all white jury (this question takes on additional power if the prosecutor decides to strike a juror of color.)

How do you think/feel that an all white jury may affect the verdict?

Why? (ask several people) – If the lawyer finds that this question is not generating responses from the jury:

A. Try the Pozner/Dodd technique of reversal and ask the following: "How many people think that the fact that Mr./Ms. \_\_\_\_\_ may be tried by an all white jury will have no impact on the verdict?"

B. Why do you think this? Tell me more. Who feels otherwise?

C. Or, style the question so the prospective jurors have to choose: e.g. "Some people think an all white jury will have no impact, while others feel it will make it more difficult for my \_\_\_\_\_ client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

## CHAPTER 2 – HOW OFTEN DO YOU SPEND TIME WITH MINORITIES IN YOUR EVERYDAY LIFE?<sup>2</sup>

**I. Neighborhood:** Do you live in a racially integrated area? Why or why not?

Why do you think your neighborhood is (or is not) integrated?

What do you hear/think about racial tensions in (your town)? How do those tensions affect your neighborhood?

**II. Work:** Tell me whether you have contact with (*insert race/ethnicity of client*) at work. How often? Describe those contacts? Have you ever been supervised by or had a boss who was an (*insert race/ethnicity of client*)? How was that experience?

Have you held jobs in the past where you had frequent contact with (*insert race/ethnicity of client*)? Tell me about that.

**III. Socializing:** Do you belong to any social club, political organization or religious groups which have no (*insert race/ethnicity of client*) members?

Why do you think no (*insert race/ethnicity of client*) are members of this club?

How often do you spend your leisure time with (*insert race/ethnicity of client*)? Do you have any friends who are (*insert race/ethnicity of client*)? If yes, please tell us about them - have you ever invited them to your home? Have you ever been invited to their home?

How would you feel if a family member wanted to marry someone who was (*insert race/ethnicity of client*)?

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Tell me about a memorable experience, positive or negative, you have had with a person of (*insert race/ethnicity of client*) descent.

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<sup>2</sup> Expert psychological testimony regarding the difficulty of cross racial identification is premised on research involving persons who had infrequent contact with members of the opposite race. Thus, for example, a white person who works with, lives in a neighborhood with, spends time socializing with or is in a relationship with a non-white is generally better able to accurately identify non-whites than is a white person who has little contact with non-whites.

## CHAPTER 3 - MORE LIKELY TO COMMIT CRIMES?

**I. Racial Hoaxing:**<sup>3</sup> How many people have heard of the Susan Smith case in South Carolina where Ms. Smith drowned her two children and then claimed that a black male had kidnapped them?

How many people have heard of the case in Boston where a man killed his wife then claimed that a black man had attacked them in a car?" (Ask it this way to see if someone comes up with the name Charles Stuart).

Why do you think these white people chose to tell the police that a black male had attacked them?

Why did the police believe Susan Smith's story for nine days even though there wasn't a shred of evidence to support it?

**If I (white female defender) decided to accuse a man of rape, would it be easier to accuse an African American or a Caucasian? Why?**

**When you walked into the courtroom did anyone think Mr. Defendant was the lawyer and I(white male defender) was the client? (for those who do not raise their hand)Why not?**

**II. Racial Slurs:** What kind of derogatory stereotypes and words have you heard about (*insert race/ethnicity of client*)s? (Perhaps make a list of them on the board.)

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Do you think (*insert race/ethnicity of client*) are more prone toward violence or other kinds of crimes than whites?

Why or why not?

Do you think those opinions are widely held?

What do you think those opinions are based on?

How do you think those opinions will affect \_\_\_\_\_'s ability to get a fair trial? (If you have made a list of derogatory stereotypes, you can refer to it when asking this question.)

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<sup>3</sup> See, Russell, Kathryn K., **The Color of Crime, Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and other Macroaggressions**, New York University Press, (1998): in addition to the Susan Smith and Charles Stuart cases, the author cites over sixty additional cases of racial hoaxing where blacks are blamed for white criminality.

## CHAPTER 4 - EVERYBODY IS PREJUDICED, HOW ABOUT YOU?

**Self Disclosing helps others be truthful:** A very close friend of mine, a white person, a person that I know is not a bigot or a racist, told me that she was at a stoplight the other day when a young black male pulled up in a brand-new BMW. She said that her first thought was "drug dealer". Not son of a doctor, son of a lawyer, but drug dealer. Has anyone else ever had a similar experience? (*You may be able to substitute yourself as the person making the assumption – if you can admit to such thoughts, the jurors may as well*).

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Has anyone flown on an airplane with Middle Eastern Passengers? When I did last month, I was nervous about this person. Has anyone else felt this way? Why?

How many people walked into the courtroom, saw Mr. \_\_\_\_\_, and thought, "well, they have charged another innocent man?" Why or why not?

**If a minority can admit to prejudice, whites can too:** Jesse Jackson tells the story about one night when he was walking down the streets of a large city and got nervous when he heard footsteps approaching from behind, and was then relieved when he saw that it was three young white males instead of three young black males – why do you think he was embarrassed about his thoughts?<sup>4</sup>

**Making the target bigger:** If whites are encouraged to discuss their own experiences with being victims of discrimination, they may have an increased ability to understand the danger of prejudiced thinking in the courtroom.

Have you heard the saying that you should not judge a book by its cover? What does that mean  
Have you been judged by a cover – either because you are old, or young, fat, bald, a bleach blonde, have facial hair, drive a motorcycle, etc.

How did that make you feel?

What was unfair about how you were treated?

What is the risk to an innocent man if jurors rely on judging based on a surface characteristic like skin color rather than look to the evidence?

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<sup>4</sup> December 17, 1993, Wall Street Journal; the full quote from Jesse Jackson reads: "There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then to look around *and see it's somebody white and feel relieved.*"

## CHAPTER 5: LET'S TALK ABOUT "PLAYING THE RACE CARD"

What have you heard about "playing the race card?" Tell me more. Do you believe that (*insert race/ethnicity of client*) "play the race card?" Why do you believe that? How does it help (*insert race/ethnicity of client*) to "play the race card?" How does it hurt (*insert race/ethnicity of client*) to do so?

When is it necessary to look at the role race played in a criminal case? Under what circumstances? When might it make it harder to find the truth if race is ignored?

What is the risk to an innocent (*insert race/ethnicity of client*) person accused of a crime he did not commit if his lawyers never mention race with the jury?

Can racists become police officers? What do you think of that? What have you heard? Can racists sit on juries?

How can a racist end up being a juror when a (*insert race/ethnicity of client*) *person* is on trial?

## **CHAPTERS 6 - WHAT WILL YOU DO YOU IF SOMETHING BAD STARTS TO HAPPEN IN THE JURY ROOM?**

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions.

How do you feel when someone uses a racial slur or tells a racial joke?

What, if anything, do you do in response to hearing such language?

If your child used a racial slur, what would you tell your child?

What, if anything, do you think teachers should do to a white high school student who calls a *(insert race/ethnicity of client)* high school student by a racial slur?

If you hear a juror making an argument based on race prejudice or stereotypes, what would you do about it? (You are really hoping here for someone to say that they will tell the judge-if that suggestion does not come up, you might ask, "would anyone consider telling the judge?")

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## CHAPTER 7 – MAY I SEE A SHOW OF HANDS?

Robert Hirschhorn<sup>5</sup> is a member of NACDL and an expert on jury selection techniques. He suggests asking a series of questions which can simply be answered by a show of hands – for example, making a statement and asking who agrees and who disagrees. This format can encourage more of the prospective jurors to express themselves, thereby expanding the pool of persons who can be asked follow up questions on an individual basis. Some questions that may work with this technique follow:

**Yes or No Questions:** How many say “yes?” – if so, please raise your hand. Now, how many say “no?” Again, please raise your hand.

Is racism by whites against (*insert race/ethnicity of client*) a thing of the past?

Do you believe there is more racial prejudice today than there was 30 years ago?

(*Insert race/ethnicity of client*) commit more violent crimes per capita than whites.

Whites who encourage their children not to marry (*insert race/ethnicity of client*) are making a wise choice.

Whites are being discriminated against due to affirmative action programs.

Blacks use more illegal drugs than whites.

Have any of you ever seen an example of racism? (The lawyer can ask people who raise their hands to describe the incident and their feelings about it, and then ask other jurors about their reaction to the incident described.)

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<sup>5</sup> Robert B. Hirschhorn, 217 South Stemmons Freeway, Suite 203, Lewisville, TX 75067; (972) 434-5879; Fax: (972) 434-0176; [cebjury@gte.net](mailto:cebjury@gte.net)

## CHAPTER 8: IDEAS FOR QUESTIONNAIRES

Robert Hirschhorn also encourages petitioning the court for use of a questionnaire in cases where race is an issue. Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller responses:

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### **RACIAL PREJUDICE: Personal Experience:**

#### **A. Free response questions:**

Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice. Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudices beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?

What has been your most memorable experience with someone who is African American?

When you are sitting at a stoplight two young Black men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are African American? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was African American?

Have you ever invited someone who is African American to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a black police officer would be more likely to commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

**B. Multiple choice questions: Circle the answer that you feel is most true:**

I would not want my child to marry a (*insert race/ethnicity of client*).

Strongly agree      Agree      Disagree      Strongly Disagree

I have become angry when I hear negative remarks about (*insert race/ethnicity of client*).

Strongly agree      Agree      Disagree      Strongly Disagree

Blacks (*insert race/ethnicity of client*) are less disciplined than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

No respectable white woman would ever have consensual sex with a (*insert race/ethnicity of client*) man.

Strongly agree      Agree      Disagree      Strongly Disagree

**RACIAL PREJUDICE: Beliefs about societal prejudice: Circle the answer that you feel is most true:**

Racial prejudice still exists.

Strongly agree      Agree      Disagree      Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly agree      Agree      Disagree      Strongly Disagree

(*Insert race/ethnicity of client*) commit more violent crimes per capita than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

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Whites who encourage their children not to marry (*insert race/ethnicity of client*) are making a wise choice.

Strongly agree      Agree      Disagree      Strongly Disagree

Whites are being discriminated against due to affirmative action programs.

Strongly agree      Agree      Disagree      Strongly Disagree

(*Insert race/ethnicity of client*) use more illegal drugs than whites.

Strongly agree      Agree      Disagree      Strongly Disagree

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**CHAPTER 9: Batson v. Kentucky is good for something: maximizing the case for  
individual voir dire  
MOTION OF xxxxx FOR INDIVIDUALIZED  
VOIR DIRE BY COUNSEL AND INCORPORATED MEMORANDUM**

xxxx xxxxxx, by and through undersigned counsel, move the Court for an Order permitting defense and government counsel to voir dire the venire panel individually.

**MEMORANDUM IN SUPPORT**

1. Individualized voir dire by counsel is essential so that the defendants can effectively and adequately exercise his peremptory challenges in selecting jurors. In light of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, including Georgia v. McCollum, 112 S.Ct. 2348 (1992), and J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), parties (including an accused) cannot exercise their peremptory challenges based on their personal race or gender biases or prejudices.

2. Case law now holds that where there is a prima facie case of racial discrimination in the exercise of a party's peremptory challenges, that party "must articulate a racially neutral explanation for the peremptory challenge." McCollum, 112 S.Ct. at 2359; see Batson, 476 U.S. at 98. Similarly, if there is a prima facie case of gender discrimination, counsel must offer a gender-neutral, non-pretexual explanation for the peremptory challenge. J.E.B., 114 S.Ct. at 1430. To enable the accused to exercise his peremptory challenges intelligently and adequately, and to ensure that they can be supported by a race and gender neutral explanation, individualized voir dire is essential.

3. The Supreme Court's decision in J.E.B. declared:

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently, See, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602 . . . (1976) (Brennan, J., concurring in the judgement) (voir dire "facilitate[s] intelligent exercise or peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Witt, 718 F.2d 1494, 1497 (CA10 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").

114 S. Ct. at 1429 (brackets in original). Because, as Justice O'Connor pointed out in her concurring opinion in J.E.B., litigants can no longer simply rely on their intuition in exercising peremptory challenges, 114 S.Ct. at 1432 (O'Connor, J., concurring), fairness dictates that defense counsel be given an opportunity to voir dire the venire panel individually to ensure that a fair and impartial jury is selected consistent with the dictates of Batson and its progeny.

**CONCLUSION**

For the foregoing reasons, the Court should enter an Order permitting defense and government counsel to voir dire the venire panel individually so that the accused can effectively and adequately exercise his peremptory challenges in selecting jurors.

## **2 Sample Jury Instructions**

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It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes. "Stereotypes" constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.

As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to any particular racial group. Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. "Race-switching" involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is \_\_\_\_\_ and the accuser is White, you should imagine a White accused and an \_\_\_\_\_ accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.

### **INSTRUCTION No. \_\_\_\_\_**

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes.<sup>6</sup> "Stereotypes" constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so.<sup>7</sup> As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to any particular racial group.<sup>8</sup> Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and

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<sup>6</sup> Social science research establishes that reliance on stereotypes is a common means by which people comprehend and interpret the world, particularly ambiguous interactions between people. Hofstadter, *Metamagical Themes: Questioning the Essence of Mind and Pattern*, 137 (1985); Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan.L.Rev.* 1161, 1187-89 (1995); Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, 12 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 52 (L. Berkowitz ed., 1979).

<sup>7</sup> Reliance on racial stereotypes often operates at a subconscious level. C.R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan.L.Rev.* 317, 322 (1987).

<sup>8</sup> The Black-as-violent-criminal stereotype is ingrained in, and pervades, American society. B.L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 4 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1976) (75% of 104 white undergrads described Black person shoving White person as "violent," 6% as "playing around;" only 17% described White person shoving Black person as violent; 42% described White person as playing around); Sager & Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1980) (both Black and White children tend to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites); C. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 *Minn.L.Rev.* 367, 406-10, 464 n.389 (1996) (impact of racial stereotypes in specific self-defense cases and studies of effect of stereotypes on jury function in sexual violence cases). The American media and entertainment industries perp

because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.<sup>9</sup>

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If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.<sup>10</sup>

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<sup>9</sup> White people's fear of being victimized by violent African-American criminals is a case in point. In 1994, African-Americans arrested for violent crimes constituted less than 1% of the total African-American population, and less than 2% of male members of that group. FBI, U.S. Dept. of Justice, U.S. Uniform Crime Reports for the U.S. (1993 & 1994); Bureau of Census, U.S. Dept. of Commerce, Statistical Abstract of the U.S., 21 (1995). overall, only 3% of all violent crimes involve African-American defendants and White victims. Kennedy, Comment: The State, Criminal Law, and Racial Discrimination, 107 Harv.L.Rev. 1255 (1994).

<sup>10</sup> This instruction is derived from a model instruction proposed by Associate Professor C. Lee, in her article Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn.L.Rev. 367, 482 (1996).

18 U.S.C.A. § 3593(f):

(f) Special precaution to ensure against discrimination. -- In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1964.)