

RACE, PATERNALISM AND THE RIGHT TO COUNSEL

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The right to counsel is a core component of justice for those accused of crime in the United States. In 1963 and 1967, respectively, the Warren Court guaranteed accused adults and youth the right to appointed counsel in two seminal cases, *Gideon v. Wainwright* and *In re Gault*.¹ Decided during the heart of the Civil Rights era, both of these cases were implicitly – although not explicitly – concerned about the way black defendants were being treated in the criminal and juvenile justice systems and served as an important legal corollary to the Civil Rights struggle against discrimination.² In theory, defense attorneys became the heroes of justice, as they were called to stand in the gap between the coercive power of the state and the relatively limited power of the indigent accused, who were and still are disproportionately black and Latino.

Given this valiant legacy of indigent defense, it is disturbing to contemplate the possibility of racial bias in the criminal defense bar. It is even more jarring to think that black youth may be harmed today by the very people charged with protecting them. Yet, there is considerable evidence that defenders in contemporary American courts are at best complicit in the racial disparities and injustices that define the modern juvenile and criminal justice systems and at worst, actively contribute to the harm imposed on black youth through implicit bias, colorblindness, benign neglect, and outright discrimination.

Recently, a few scholars have examined the impact of implicit racial bias on defenders in the adult criminal justice system.³ These scholars fear that defenders may be biased in their

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¹ *Gideon v. Wainwright*, 372 US 335 (1963); *In Re Gault*, 387 US 1 (1967).

² Gabriel Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236 (2013); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 86 (“[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.”)

³ L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) [hereinafter *Defender Triage*]; Jonathan Rapping, *Symposium: Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparity in the Criminal Justice System: Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999 (2013) [hereinafter *Implicitly Unjust*];

evaluation of evidence, consideration of plea recommendations, acceptance of punishments, and communications with their clients. There is every reason to believe that bias would affect juvenile defenders in the same ways and more. At every stage of the juvenile justice system, black youth penetrate deeper into the system at rates higher than we would expect based on their percentage of the national population.⁴ Black youth are disproportionately represented at arrest, detention, transfer to adult court, and incarceration in long-term facilities. This paper takes a hard look at the role defenders play in perpetuating racial disparities throughout the juvenile justice system.

Although 2017 marks the 50th Anniversary of the Supreme Court's affirmation in *Gault* that children have a Constitutionally protected right to counsel in delinquency cases, scholars and commentators have repeatedly questioned the meaningfulness of this right.⁵ Juvenile defenders, like defenders in the adult criminal justice system, are plagued with high caseloads, few resources, and systemic opposition to zealous advocacy. But juvenile defenders face an additional unique challenge – the challenge of paternalism, which threatens to deprive children of meaningful choice and voice in the delinquency system. In a legal system that routinely pursues the “best interest” of the child and expects children’s advocates to do the same, juvenile defenders have long struggled to understand, accept, and fulfill their role as zealous advocates of their clients’ stated interests. Although scholars and practitioners have made considerable progress in developing literature, standards, and training protocols that firmly delineate the defender’s role as that of loyal, zealous advocate of the child’s expressed interest, there is more work to do. As we continue to dismantle the deep hold of paternalism among juvenile defenders and champion client-directed advocacy as both an ethical mandate and Constitutional right for

Andrea Lyon, *Racial Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).

⁴ NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007) (although African Americans comprised only 16% of all youth in the United States from 2002 to 2004, they accounted for 28% of all juvenile arrests, 30% of juvenile court referrals, 37% of detained youth, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, 38% of youth in residential placements, and 58% percent of youth sent to adult state prison).

⁵ Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 557-58 (2009); Wallace Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court: A Promise Unfulfilled*, 44 NO. 3 CRIM. L. BULL. 5 (2008); Kristin N. Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Right to Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272-73 (2005) [herein after *Loyalty, Paternalism*].

children, we will benefit from understanding all of the root causes of paternalism. To that end, this article explores the unique ways in which implicit racial bias contributes to paternalism and undermines zealous legal representation of children in the juvenile justice system.

Specifically, Part I defines “implicit racial bias” and briefly reviews evidence of implicit bias in the juvenile and criminal justice systems, paying particular attention to bias among defenders. Part II considers the long and deep history of paternalism in children’s advocacy and demonstrates how paternalism is particularly vulnerable to distortion by implicit racial bias. This Part highlights harmful narratives about black parents in the child welfare system and considers the ways in which bias distorts the attorney-child relationship, leads defenders to discount the child’s stated preferences, and undermines the attorney’s advocacy at every stage of a delinquency case. Part III considers the legal implications of implicit bias on the child’s right to counsel in delinquency cases and examines the practical implications of bias on the successful rehabilitation of children in the juvenile justice system. Part IV identifies strategies to reduce implicit racial bias among defenders and empowers defenders to raise racial justice arguments and develop affirming counter-narratives to replace stereotypically negative images of black children and their families in juvenile cases. Part V also concludes that loyal, client-directed representation is not only essential to the child’s right to counsel, but may also be one of the greatest safeguards against the harmful effects of implicit racial bias.

I. DEFENDER ETHICS IN BLACK AND WHITE: RACIAL BIAS IN DEFENSE ADVOCACY

It is jarring to contemplate racial bias in defense advocacy. Given the defender’s career-long opposition to systemic oppression and state coercion, we expect that defenders will be the most fair and the least likely to harbor racial bias of any kind. Yet research shows that even when individuals stand firmly against racism and are ideologically opposed to explicit bias, they may be impacted by the subconscious influence of implicit bias.⁶ In fact, those who are most committed to fighting racism may have a “bias blind-spot” that prevents them from recognizing

⁶ Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 415 (2011).

their own bias.⁷ This section defines “implicit racial bias” and briefly reviews research on the impact of such bias on the criminal and juvenile justice systems.

All of us rely on cognitive short cuts to sort through and manage the vast amount of information we receive every day. We rely on short cuts, biases, and heuristics to filter information we receive, fill in missing data, and categorize people and information according to cultural stereotypes.⁸ Cognitive short cuts involving race are referred to as “implicit racial bias” and include both “unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups).”⁹ Implicit racial bias evolves from our repeated exposure to cultural stereotypes in society.¹⁰ Mere exposure to stereotypes is enough to activate the stereotypes subconsciously, even when we do not endorse them as correct.¹¹

While explicit bias is conscious, expressed, and often willingly embraced,¹² implicit bias is so subtle that we are generally not aware of it and may act on it reflexively without realizing it.¹³ Implicit racial bias is activated by environmental stimuli, including stimuli that cause us to associate crime and race – and particularly crime and blackness.¹⁴ Once stereotypes and biases are subconsciously triggered they may evoke negative judgments and behaviors that are involuntary and unplanned.¹⁵ In the criminal justice system, implicit bias may affect actors’ decisions and judgments and contribute to racial disparity in the criminal justice system.

People of all races have implicit biases that may negatively affect their behavior, even those who actively support equality, vehemently reject racism and discrimination, and have

⁷ Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37-39 (2007).

⁸ L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012) [hereinafter *Suspicion Heuristic*]; Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) [hereinafter *Seeing Black*].

⁹ Richardson & Goff, *Defender Triage*, *supra* note 3 at 2630.

¹⁰ *Id.*

¹¹ *Id.*

¹² Lyon, *supra* note 3, at 758; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) [hereinafter *Bias Affect Trial Judges*].

¹³ Lyon, *supra* note 3, at 759; L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043 (2011) [hereinafter *Arrest Efficiency*]; Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1144-45 (2000); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 956 (2004).

¹⁴ Rapping, *Implicitly Unjust*, *supra* note 3, at 1010; Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, Cambridge University Press (2012); Cheryl Staats, *Kirwan Institute for the Study of Race and Ethnicity*, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 36-45 (2013) (discussing studies that measure the association between race and criminality in the criminal justice context), <http://kirwaninstitute.osu.edu/brochure-understanding-implicit-bias/>.

¹⁵ Richardson, *Arrest Efficiency*, *supra* note 13, at 2043; Richardson & Goff, *Defender Triage*, *supra* note 3, at 2629.

positive relationships with people of other races.¹⁶ Studies indicate that even black Americans have some implicit racial bias in associating blackness with crime.¹⁷

A. IMPLICIT RACIAL BIAS IN THE CRIMINAL AND JUVENILE JUSTICE SYSTEMS

The impact of implicit racial bias has been well documented in all phases of the criminal justice system. The association between blacks and crime is so acute that it has been described as “bidirectional.”¹⁸ “Bidirectional” associations occur when two concepts are so intertwined in one’s perception that it does not matter which one we think of first, we will always think of the other.¹⁹ The cultural stereotype of “blacks as violent, hostile, aggressive, and dangerous” is so pervasive within our society,²⁰ the mere thought of “crime” activates a racial stereotype and the presence of a black male on the street will cause many to fear or at least think about crime. Individuals with more stereotypically black features (i.e., darker skin, broader nose, and fuller lips) are unconsciously judged to be even more dangerous and culpable than other blacks.²¹

The most common tool for measuring bias is the Implicit Association Test (IAT), which measures bias and stereotype through word association tasks that record how quickly a person associates “good” words with one group and “bad” words with another group.²² Using the IAT, researchers have documented the impact of implicit racial bias on decision making in the juvenile and criminal justice systems. Police officers, potential jurors, judges, probation officers, and prosecutors are all vulnerable to its prey.²³ For example, several studies have found that

¹⁶ Richardson, *Arrest Efficiency*, *supra* note 13, at 2039; Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, *supra* note 12, at 1197; Eisenberg & Johnson, *supra* note 3, at 1540. See also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006) (discussing studies, including those in which test subjects have been African American and Latino and reject racism but still display IB).

¹⁷ Rapping, *supra* note 3, at 1011; Richardson & Goff, *Defender Triage*, *supra* note 3, at 2634.

¹⁸ Eberhardt et al., *supra* note 8, at 876.

¹⁹ *Id.*

²⁰ Richardson & Goff, *Defender Triage*, *supra* note 3, at 2630.

²¹ Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 676-77 (2004).

²² <https://implicit.harvard.edu/implicit/> (The IAT was developed by a multi-university research collaboration in 1998 by three scientists - Tony Greenwald (*University of Washington*), Mahzarin Banaji (*Harvard University*), and Brian Nosek (*University of Virginia*)).

²³ See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989) (undergraduate students primed with words associated with black people caused them to activate stereotypical thinking regardless of their level of prejudice); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004) (police officers and juvenile probation officers who were primed with image of black adolescent assigned higher culpability and punishment than those who were not primed); Justin D. Levinson & Danielle Young,

individuals are more likely to interpret ambiguous behavior by blacks as more aggressive and consistent with violent intentions while interpreting the same behavior by whites as harmless.²⁴ In one study, researchers asked participants to view a brief movie clip in which a target's facial expression morphed from unambiguous hostility to unambiguous happiness and vice versa in a second clip.²⁵ Participants with higher levels of implicit bias took longer to perceive black faces change from hostile to friendly, but not white faces.²⁶ In the second clip, participants perceived the onset of hostility much earlier for black faces than white faces.²⁷ In another study, researchers asked participants to view a series of black or white faces and then determine whether the faint outline of an ambiguous object that slowly emerged on the screen was crime-related or neutral.²⁸ Study participants were quicker to see a crime-related object when associating the object with a black face than with a white face.²⁹ In other words, by implicitly thinking black, they more quickly saw a weapon.

Implicit racial bias may also affect an individual's reaction to blacks suspected of crime. When faced with a situation in which there is more than one appropriate response, implicit bias can cause subjects to react more forcefully when interacting with blacks than whites. For example, researchers developed a shooter paradigm video game in which participants (undergraduate students and a random selection of people at a mall) were confronted with photographs of individuals holding an object, superimposed on various city landscapes.³⁰ Researchers found that participants were quicker to shoot when the target was black as compared to white.³¹ Also, under time pressure, participants made more mistakes (false alarms) and shot

Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W. VA. L. REV. 307, 310 (2010) (mock jurors primed with black perpetrator were significantly more likely to find ambiguous evidence to be indicative of guilt than white perpetrator). *See also infra* notes 24-45.

²⁴ Richardson & Goff, *Defender Triage*, *supra* note 3, at 2046-48 (summarizing studies); Levinson & Young, *Different Shades*, *supra* note 22, at 310; Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976) (among college students, threshold for labeling an act as violent is lower when viewing a black person committing the same act).

²⁵ Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH SCI 640 (2003).

²⁶ *Id.* at 641.

²⁷ *Id.* at 643.

²⁸ Eberhardt et al., *supra* note 8.

²⁹ *Id.* at 881.

³⁰ Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17 (2002).

³¹ *Id.*

more unarmed black targets than unarmed white targets, and failed to shoot more armed white targets (misses) than armed black targets.³²

Consistent with these findings in the general population, evidence suggests that implicit bias may also affect police officers' reactions to behavior they observe. In one study, researchers randomly selected 124 patrol police officers and 135 civilians to play a video game simulation in which they were confronted with a black or white person and were asked to shoot if the person was armed or press a "don't shoot" button as quickly as possible if the person was unarmed.³³ Although officers were better able to differentiate armed targets from unarmed targets, the results showed clear evidence of racial bias among both police officers and civilians as both police officers and civilians were faster at shooting black targets than white targets, and police officers were slower to make correct decisions when faced with either an unarmed black man or an armed white man.³⁴ In another study, police officers were initially more likely to mistakenly shoot unarmed black suspects than unarmed white suspects, but over time participation in the simulation resulted in a shift from a liberal bias toward shooting in early trials to a more conservative response in later trials involving both black and white suspects.³⁵

At the trial stage, research indicates that jurors are not only more likely to associate black defendants with guilt,³⁶ but they are also likely to misremember and recall facts in racially biased ways.³⁷ For example, as one study revealed, when asked to recall facts from a fictional story, mock jurors were significantly more likely to recall the fictional defendant as being aggressive when he was black than when he was white or Hawaiian.³⁸ Researchers have also found racial bias in decision-making among trial court judges, especially among white judges.³⁹ Judges, like jurors, are prone to "stereotype-consistent memory errors," causing them to remember facts

³² *Id.*

³³ Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010-13, 1016-17 (2007).

³⁴ *Id.* at 1015, 1017.

³⁵ E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

³⁶ Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309-10 (2010); Justin D. Levinson, et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189-90 (2010).

³⁷ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347-50 (2007).

³⁸ *Id.* at 347-50.

³⁹ Rachlinski et al., *Bias Affect Trial Judges*, *supra* note 12 at 1210, 1221 (Judges were given an IAT and asked to judge three different case scenarios with defendants from different races; both black and white judges displayed a link between bias in the IAT and their judgments regarding individual defendants of different races).

through a racially biased filter.⁴⁰ Fortunately, when judges consciously monitor their biases, they may be able to mitigate their responses and prevent bias from affecting their decisions.⁴¹ Unfortunately, a judge's mental energy and cognitive capacity to guard against bias is easily sapped by the increasingly complex issues a judge must navigate in trial, including detailed and often conflicting factual presentations, complex jury instructions, and new and evolving legal standards.⁴²

Research suggests that implicit bias may be particularly harmful in the assessment of youth culpability in juvenile delinquency cases. In a recent study of the perceptions of childhood innocence, researchers showed police officers a series of photographs of white, black and Latino children, advised them that all of the children were accused of either a misdemeanor or a felony, and asked them to estimate the age of each child.⁴³ While officers overestimated the age of adolescent black felony suspects by almost five years, they underestimated the age of adolescent white felony suspects by one year.⁴⁴ Moreover, the older an officer thought a child was, the more culpable the officer perceived the child to be in their suspected crimes.⁴⁵ In a related experiment with university students, the same researchers found that study subjects perceived youth aged 0–9 as equally innocent regardless of race, but began to think of black children as significantly less innocent than other children at every age group thereafter.⁴⁶ The perceived innocence of black children aged 10–13 was equivalent to that of non-black children aged 14–17, and the perceived innocence of black children aged 14–17 was equivalent to that of non-black adults aged 18–21.⁴⁷ These distorted perceptions suggest that black children are more likely to be seen as similar to adults much earlier than other youth, and are less likely to receive the benefits and special considerations typically granted to youth.⁴⁸

Implicit bias may also affect the sentencing, or disposition phase, of a juvenile case. In one empirical study of probation officer recommendations after adjudication, researchers found that even after controlling for the severity of the youth's current and prior criminal behavior,

⁴⁰ Levinson, *supra* note 37, at 347-50.

⁴¹ Rachlinski et al., *supra* note 12, at 1221.

⁴² Levinson, *supra* note 31, at 380-81.

⁴³ Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY AND SOC. PSYCHOL. 526 (2014).

⁴⁴ *Id.* at 534-535 (police officers overestimated black youth's ages with an average age error of 4.59).

⁴⁵ *Id.* at 540.

⁴⁶ *Id.* at 529.

⁴⁷ *Id.*

⁴⁸ *Id.* at 527.

juvenile probation officers were more likely to attribute crime to “internal” factors in black youth compared to “external” or environmental factors for white youth.⁴⁹ External factors include dysfunctional families, drug and alcohol use, difficulties at school, and evidence of delinquent peers.⁵⁰ Internal or personality factors include lack of remorse, lack of cooperation with the probation officer, and failure to take the proceedings seriously.⁵¹ Probation officers consistently portrayed black youth with more negative personality traits than white youth for the same or similar behavior in probation reports.⁵² The probation staff were also more likely to view black youth as more responsible for their criminal behavior and more likely to reoffend than white youth, leading to more severe penalties for black youth, including confinement.⁵³

B. IMPLICIT RACIAL BIAS AND DEFENSE ATTORNEYS

While little empirical research has been conducted on whether and how implicit racial bias affects legal representation by defense counsel, there is little reason to believe that defenders would be immune from the biases that other stakeholders experience. In fact, as noted above, advocates for justice, like defenders, are particularly susceptible to a phenomenon known as “bias blindspot” – the belief that others are biased, but they are not.⁵⁴ Confidence in one’s own egalitarianism may prevent defenders from recognizing their own bias and leave them more susceptible to its effects.⁵⁵

Two studies involving defenders as test subjects provide some preliminary confirmation that defenders likely harbor unconscious biases.⁵⁶ In one study, using the IAT with three subject groups (capital habeas lawyers, capital trial lawyers, and first year law students), researchers measured the response time in which participants were able to associate a racial group with either a positive or negative evaluation.⁵⁷ All three groups were able to react more quickly when white was paired with good and black was paired with bad than when black was paired with

⁴⁹ George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561, 563-64 (1998).

⁵⁰ *Id.* at 559.

⁵¹ *Id.* at 559.

⁵² *Id.* at 561, 567 (based on study of 233 narrative reports written by probation officers for judges in anticipation of a youth’s disposition after a crime).

⁵³ *Id.* at 561, 563-64, 567.

⁵⁴ Pronin, *supra* note 7.

⁵⁵ Richardson & Goff, *Defender Triage*, *supra* note 3 at 2634.

⁵⁶ Eisenberg & Johnson, *supra* note 3; Edkins, *supra* note 6.

⁵⁷ Eisenberg & Johnson, *supra* note 3, at 1542-53.

good and white with bad.⁵⁸ Those who scored higher in pairing white with good than black with good were deemed to have an “automatic preference” for white, even though this preference may not be conscious.⁵⁹ These findings of white preference among capital defense lawyers were consistent with IAT findings across the larger population.⁶⁰

In another empirical study, researchers found that defenders were more willing to accept and recommend plea offers that included more severe sentences for black clients than for white clients.⁶¹ Although defenders in the study did not appear to harbor explicit bias in presuming that blacks were more likely to be guilty than whites, the pleas they felt they could obtain for minority clients contained longer sentences and were more likely to include some jail time.⁶² Because the study protocol indicated that defenders were not basing their recommendations on fears that jurors would react less favorably to black defendants at trial, the results suggests that the defenders’ own personal biases inflated the plea recommendations they would make and deem appropriate for a black client.⁶³ In accepting higher sentences for black clients, defenders may be less likely to investigate mitigating evidence or negotiate aggressively for lower sentences.⁶⁴

The existence of automatic or implicit preferences does not mean that every individual will act on those preferences or that defense attorneys in particular will treat their black clients differently from white clients.⁶⁵ It may be that defenders’ positive interactions with their clients make them more cautious and help them resist stereotypes and overcome subconscious biases.⁶⁶ Unfortunately, evidence suggests that like others, defenders are generally unaware of their biases and regularly face systemic pressures that make them particularly vulnerable to stereotypes and judgments.⁶⁷ The very nature of the contemporary criminal justice system leaves defenders vulnerable to implicit bias, which thrives in situations where individuals are cognitively depleted,

⁵⁸ *Id.* at 1545.

⁵⁹ *Id.* at 1552 (noting that black subjects had an automatic preference for black faces or names, but that preference was weaker than white subjects’ automatic preference for white).

⁶⁰ *Id.*

⁶¹ Edkins, *supra* note 6, at 419.

⁶² *Id.* at 419-420.

⁶³ *Id.* at 422.

⁶⁴ Richardson & Goff, *Defender Triage*, *supra* note 3, at 2640.

⁶⁵ Eisenberg & Johnson, *supra* note 3, at 1154; Edkins, *supra* note 6, at 415.

⁶⁶ Rapping, *supra* note 3, at 1034; Edkins, *supra* note 6, at 423.

⁶⁷ Eisenberg & Johnson, *supra* note 3 at 1155-56.

anxious, distracted, and forced to make decisions with imperfect information.⁶⁸ Stereotypes and assumptions are also more likely to affect a decision-maker's judgment when a task is complex, a decision is difficult, or time is scarce.⁶⁹

There is little dispute that defenders with heavy caseloads and limited resources make decisions and recommendations in fast-paced contexts, with incomplete information, and under intense time pressure and emotional stress. Like other actors in the criminal justice system, defenders exercise considerable discretion in their evaluation of evidence, allocation of time and resources within large caseloads, and the plea recommendations and other legal advice they give to their clients.⁷⁰ Defenders decide how much time they will spend with each client, whether and how extensively to investigate a case, whether and which witnesses to interview, how much legal research to conduct, whether and when to file motions, which cases would be best for trial or plea, whether to consult with an expert, and how much time to invest in mitigation and sentencing advocacy. In an essay on defender bias, Professors Song Richardson and Phillip Goff caution defenders to guard against the impact of implicit racial bias on defender triage decisions.⁷¹ Defenders, acting on cognitive shortcuts and implicit racial biases, may choose not to investigate because they inflate or overestimate the strength of the government's case, discredit the client's version, or discount the value of defense evidence.⁷² The dangers of implicit racial bias are heightened when the allegations involve crimes that are stereotypically associated with black males such as drug offenses.⁷³

Implicit racial bias is likely to implicate juvenile defenders in many of the same ways and more. Historically, juvenile cases have received less attention, support, and resources within defender offices than adult criminal cases. Moreover, because juvenile court was theoretically designed to rehabilitate and not punish youth, defenders did not believe they needed to be as zealous in their advocacy as adult defenders.⁷⁴ Until recently, few defenders specialized in delinquency cases and in many jurisdictions, juvenile cases have been the training ground for new public defenders, or a place of refuge or punishment for defenders who burn out in adult

⁶⁸ Richardson & Goff, *Defender Triage*, *supra* note 3, at 2631.

⁶⁹ Eisenberg & Johnson, *supra* note 3, at 1555; *See also* Edkins, *Plea Recommendations and Client Race*, *supra* note 6, at 414.

⁷⁰ Rapping, *supra* note 3, at 1020.

⁷¹ Richardson & Goff, *supra* note 3.

⁷² *Id.* at 2636-37.

⁷³ *Id.* at 2636.

⁷⁴ Mlyniec, *supra* note 5.

court.⁷⁵ Defenders frequently rotate through a juvenile court assignment with minimal, if any, specialized training and rarely stay long.⁷⁶ Even in indigent defense systems where defenders have a mixed caseload of juvenile and adult cases, juvenile cases are often the lowest in the triage rank.⁷⁷ In defender systems with dedicated juvenile attorneys, public defenders and court-appointed lawyers who represent children generally receive the least amount of funding and investigative and administrative support,⁷⁸ leaving juvenile defenders especially overwhelmed in their decision-making responsibilities. Decision making in juvenile cases is further complicated by the challenges that are inherent in any attorney-child relationship, which may be easily distorted by the child's cognitive and developmental limitations, the power imbalances that exist naturally between children and adults, and the unique interplay between advocacy and rehabilitation in juvenile-criminal cases. Children in delinquency cases also often face multiple legal and social concerns, including child welfare matters with facts that are particularly ambiguous and uncertain. These conditions are all easy fodder for the harmful influences of implicit racial bias.

II. THE INTERSECTION OF RACE AND PATERNALISM

One defining distinction between juvenile and adult criminal proceedings is the deep history of paternalism in the juvenile justice system, and its attendant confusion regarding the appropriate role of attorneys for accused youth. Although the Supreme Court clearly guaranteed accused children the right to counsel in *In re Gault* in 1967,⁷⁹ there was confusion from the outset about whether the role of counsel at the adjudicatory and disposition phases of a delinquency case should mirror the traditional adversarial role of counsel in adult criminal cases, or instead conform to the paternalistic, "best interest" philosophy of the juvenile court.⁸⁰ While

⁷⁵ See, e.g., ABA JUVENILE JUSTICE CENTER ET AL., *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 43 (1995) (results of national survey showing 55% of juvenile defenders stay less than 24 months in juvenile court)[hereinafter *Assessment of Access*]; Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L.Q. 417, 419 (1993); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 557-58 (2009)[hereinafter *Low Income Youth*].

⁷⁶ ABA JUVENILE JUSTICE CENTER ET AL., *Assessment of Access*, *supra* note 75, at 11.

⁷⁷ Majd & Puritz, *supra* note 75, at 560.

⁷⁸ *Id.* at 551; ABA JUVENILE JUSTICE CENTER, *Assessment of Access*, *supra* note 75 at 41; Mlyniec, *supra* note 5.

⁷⁹ *Gault*, 387 U.S. 1.

⁸⁰ Henning, *supra* note 5, at 250.

the role of defender in adult criminal cases is clearly established as one of zealous advocate for the stated interests of the accused, defenders entrenched in the rehabilitative philosophy of juvenile courts are easily co-opted by the system-wide expectation that they will define and protect the child's interests based on what adults believe is "best" for the child.

Throughout the last 25 years, scholars, advocates, and leaders in the juvenile defense bar have made significant strides in clarifying the role of child's counsel in delinquency cases. In an effort to dismantle any lingering ambiguity regarding the appropriate role of counsel, a number of national organizations, including the American Bar Association, the Institute for Judicial Administration, and the National Juvenile Defender Center have issued practice standards that firmly identify the role of juvenile counsel as a zealous, loyal advocate who abides by the client's stated interests.⁸¹ The attorney is an agent of the child. She is an advisor and a client-directed advocate. The attorney's responsibility is to help the client make informed decisions after presenting them with all of the options and guiding them through the advantages and disadvantage of each.⁸² Notwithstanding the efforts of these organizations and other advocates, evidence demonstrates that paternalism still affects defense advocacy in juvenile courts across the country.⁸³

There is ample evidence that paternalism undermines the quality of indigent defense representation in juvenile cases. Paternalistic defenders fail to consult their clients on important decisions, disregard their clients' expressed wishes, neglect to investigate and file pretrial motions, and forgo trials and other legal challenges to the delinquency allegations in order to secure services the child purportedly needs from the juvenile court.⁸⁴ Further, while client-directed advocacy requires the defender to defer to the client's voice and grants clients the autonomy to make decisions consistent with their own cultural, racial, and ethnic views, best-interest advocacy allows defenders to make decisions and fill in unknown information with preconceived notions and subtle stereotypes and attitudes about race. When defenders are confused about their own role in the delinquency system, they are vulnerable to the "group think" that perpetuates harmful racial narratives and treats children as victims who need to be

⁸¹ Henning, *supra* note 5, at 255-56; National Juvenile Defender Center, NATIONAL JUVENILE DEFENSE STANDARDS (2012).

⁸² Henning, *supra* note 5, at 315-17.

⁸³ *Id.* at 260-63, 288-89.

⁸⁴ *Id.* at 288-89.

saved from their parents, neighborhoods, and communities.⁸⁵ This Part briefly reviews the historical intersection of race and paternalism in the juvenile justice system and identifies specific aspects of the attorney-child relationship and legal representation that may be compromised by paternalism and implicit racial bias.

A. THE ETHOS OF BEST INTEREST ADVOCACY AND THE HISTORY OF RACE AND CLASS

The ethos of paternalism for children in state care or supervision has long been colored by societal views on race and class. Today, contemporary family courts serve youth in two basic divisions – the child welfare system and the delinquency system. While the child welfare system is concerned with the protection of children believed to be physically or sexually abused, neglected by their caregivers, or otherwise deprived of their basic needs, the delinquency system is concerned about regulating the behavior of youth believed to be involved in illegal behavior. Further, while the child welfare system cares about children’s “protective” rights (life, liberty, sustenance), it is less concerned about children’s autonomy-based rights that give children an opportunity to be heard and participate in critical decision-making in the delinquency or “juvenile justice” system.⁸⁶ Children in the child welfare system tend to be younger than those in the delinquency system and are typically represented by *guardians ad litem* who advocate for the “best interest” of the child.⁸⁷ These *guardians* and other advocates who serve children in the child welfare context are generally unconstrained by the ethical mandate of client-directed advocacy and operate with virtually unfettered discretion to make decisions they believe are “best” for the child.⁸⁸ It is this “best interest” standard that provides the greatest fodder for bias and presumptions based on race, socio-economic class, and gender. Although the standard was envisioned as a framework to serve and help children, “best interest” is a nebulous concept that

⁸⁵ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Bias and Accountability*, 60 CLEV. ST. L. REV. 913, 951 (2013).

⁸⁶ Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J. L. & POL’Y 17, 42-47 (2012).

⁸⁷ AMERICAN BAR ASSOCIATION, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* 1-2, 3, 6 (1996), http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf; AMERICAN BAR ASSOCIATION SECTION OF FAMILY LAW, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 2, 15-20 (2003), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf (forgoing title *guardian ad litem* in favor of “Best Interest Attorneys”).

⁸⁸ *Id.*

is subject to “manipulation and an unlimited number of interpretations.”⁸⁹ The very malleability of the standard allows advocates and decision makers the freedom to determine what is best for children based on middle class norms that often condemn the choices and behavior of poor black youth.

The susceptibility of “best interest” to manipulation by race and class is no surprise when we consider empirical research on the correlation between implicit bias and the evaluation of ambiguous facts and evidence.⁹⁰ Few standards are more ambiguous than the best interest standard. As is true in the criminal context, decisions in the child welfare system are made in fast-paced proceedings with a factual record that is far from clear. Judges, investigators, social workers, and advocates are forced to rely on information from children who have limited capacity to observe, comprehend, and relate information to adults, as well as from adults who have an incentive to conceal family secrets.⁹¹ The more incomplete and ambiguous the information is about a family, the more likely advocates, caseworkers, and judges will fill in unspoken details. Like criminal justice scholars, child-welfare scholars have bemoaned the mental short cuts and cognitive biases that undergird decision making in dependency cases.⁹² Racial narratives that portray black mothers in “stereotypic images of promiscuous Black ‘Jezebels’ and wasteful Black ‘welfare queens’” have a strong influence on best interest determinations in the child welfare system,⁹³ as do images “‘depicting brutal, savage, monstrous parents who inflict brutal injuries and death on their children.’”⁹⁴ The pervasiveness of these parental stereotypes - like the pervasiveness of the link between blackness and criminality - likely activates implicit racial bias even when the stereotypes are not explicitly articulated.

The harmful images and stereotypes that dominate contemporary views about black parents in the child welfare system coincide with early narratives about poor parenting that led to the development of the first juvenile delinquency courts. In the early Twentieth Century, black

⁸⁹ Fraidin, *supra* note 85, at 935; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 251 (1975); Pamela Laufer-Ukeles, *Introduction: Custody Through the Eyes of the Child*, 36 U. DAYTON L. REV. 299, 300 (Spring 2011); See also Linda Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 106-07 (2003) (identifying challenges with best interest standard and explaining why *guardian ad litem* term is disfavored).

⁹⁰ See *supra* notes 24-29 and accompanying text.

⁹¹ See Fraidin, *supra* note 85, at 932-33.

⁹² Fraidin, *supra* note 85; Jesse Russell and Alicia Summers, *Reflective Decision-Making and Foster Care Placements*, 19 PSYCH. PUB. POL. AND L. 127, 129 (2013); Melissa Breger, *The Invisibility of Motherhood in Family Court Proceedings* 36 N.Y.U. REV. L. & SOC. CHANGE 555, 558 (2012).

⁹³ *Id.* at 948.

⁹⁴ *Id.* at 942-43.

club women worked hard to challenge the myth that black children were delinquent because their mothers were degenerate, immoral, and incompetent.⁹⁵ The stereotype that black women were unable to raise moral and well-behaved children was so pervasive that even Jane Addams, a staunch opponent of race discrimination and segregation, seemed to buy into the stereotypes about working class black parents when she suggested that white immigrant parents were more adept than black parents at preventing sexual immorality and delinquency among their daughters.⁹⁶ A chief concern among white reformers was that because black women had to seek employment as cooks, housecleaners, laundresses, caretakers, and domestics to satisfy their basic economic needs, they could not be home to control their children.⁹⁷ Similarly, stereotypes portrayed black neighborhoods as a whole as degenerate breeding grounds for delinquent children.⁹⁸ Black women also resisted the portrayal of “delinquent” black girls as the modern Jezebel who symbolized lust, sexual immorality, “innate wickedness,” and even “disobedience to God.”⁹⁹ When black girls were deemed delinquent for “sexual immorality,” they were sometimes sent to reform schools to be sterilized, or even worse subject to physical and sexual abuse by staff and guards.¹⁰⁰

Today, black children often find themselves in both the child welfare and delinquency systems¹⁰¹ – first, as “dependent” victims of the state’s presumption that their parents are neglectful, and second, as alleged delinquents in a system that is predisposed to interpret normal adolescent behavior as criminal when black and brown children are involved. The demarcation between children as “victims” and children as “perpetrators” blurs as children and families move between both systems. In the delinquency system, even well-intentioned defenders are conflicted about their role when they advocate for children. Although we expect defenders in the criminal

⁹⁵ Cheryl N. Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1388-89 (2013); Geoff K. Ward, *Black Child Savers: Racial Democracy & Juvenile Justice* (2012).

⁹⁶ Butler, *supra* note 95, at 1389.

⁹⁷ *Id.* at 1391-92.

⁹⁸ *Id.* at 1393.

⁹⁹ *Id.* at 1385-87.

¹⁰⁰ *Id.* at 1386.

¹⁰¹ Jane Marie Marshall and Wendy Haight, *Understanding racial disproportionality affecting African American Youth who cross over from the child welfare to the juvenile justice system: Communication, power, race and social class*, 42 CHILDREN AND YOUTH SERVICES REVIEW 82 (2014)(Study “examin[ing] reasons for racial disproportionality affecting African American youth who cross over from child welfare to juvenile justice system involvement from the perspectives of professionals who work within these systems.”); *Is There a Link between Child Welfare and Disproportionate Minority Contact in Juvenile Justice?*, MODELS FOR CHANGE (2011), <http://www.modelsforchange.net/publications/317> (last visited Aug. 7, 2016) (“Even if African-American and white youths in [Illinois] child welfare were at equal risk of arrest, the child welfare system would still account for a disproportionate number of African-American youths in the juvenile justice system.”).

and juvenile systems to protect children from the state's coercive and punitive intervention, defenders who see their clients as victims of their parents and communities no longer feel compelled to shield them from the state. In this way, paternalism and bias interfere with the attorney's ethical mandate to advocate for the child's stated interest and stand guard in the space between the child and state.

B. IMPLICIT RACIAL BIAS AND THE CHILD'S STATED INTEREST

At the heart of paternalism is a presumption that children lack the capacity to make decisions for themselves. In virtually every context – family, school, recreation - adults establish rules and make critical decisions for children. Parents decide what children wear, when they can go out, and with whom they can associate. Teachers decide what children will learn and when they can play. Society decides when children can drive, drink, and have an abortion. Yet, the juvenile delinquency court is one of the few contexts in which children are granted a voice – even if not control – in critical decisions that affect them. Principles of due process and fundamental fairness afford children the right to counsel and the opportunity to assert or waive other important Constitutional rights. The Rules of Professional Conduct governing the attorney-client relationship in a delinquency case grant accused youth autonomy in all critical decisions and require the attorney to defer to the client's stated interests.¹⁰²

Unfortunately, lawyers who buy into paternalistic norms and believe that black children need protection from degenerate parents and communities may disavow these legal and ethical mandates. By its very nature, paternalism causes defenders to evaluate the child's interests differently than the child would. Paternalism filtered by implicit racial bias may lead attorneys to ignore their clients' expressed wishes and advocate for out-of-home residential placements instead of community-based alternatives. Motivated by the belief that black children can only succeed if they are removed from their homes and given the benefits of institutional care, even well-meaning advocates ignore important resources available within the child's home and community, including black churches, recreation centers, neighbors, and relatives. More perniciously, lawyers who are committed to getting "help" for their clients may even reject legal strategies which if successful, would result in dismissal of the child's case and secure the child's

¹⁰² MODEL RULES OF PROF'L CONDUCT R. 1.2 (a) (2016) (requiring lawyer to abide by client's decisions concerning objectives of representation including, in a criminal case, client's decision as to a plea to be entered, whether to waive jury trial, and whether client will testify).

release from the juvenile justice system all together. These lawyers may ignore Fourth and Fifth amendment violations by the police, neglect to investigate facts even when the child provides information about witnesses, fail to litigate winnable cases through trial, or sabotage the trial by not objecting to evidence. Paternalistic lawyers may also deprive youth of the very basic choice of whether to plead guilty or challenge allegations by withholding critical information about affirmative defenses, convincing the child their case is hopeless, or manipulating options available to suggest that a plea is the only viable choice. At disposition, lawyers may outright deny a child's preference by advocating for placement in direct contravention of the client's stated goals or manipulate the child's stated objectives by extolling the benefits of out-of-home care without advising them of the harms and consequences of residential placement and incarceration. Even worse, paternalistic advocates who buy into racial stereotypes may attempt to "save" the child by referring the child to the child welfare system as a "way out" of delinquency proceedings. These advocates fail to recognize the child welfare system as another form of coercive state intervention that wreaks havoc on families and perpetuates harmful stereotypes about black parents and their children.

Paternalistic lawyers often end-run around their ethical obligations by concluding that a child is incompetent or lacks the capacity to maintain a normal attorney-client relationship. Although developmental research shows that psychosocial features of adolescence frustrate the decision-making capacity of youth of all races,¹⁰³ the research also shows that with adequate counseling in a controlled setting with adequate time, adolescents do have the cognitive capacity to make reasoned decisions.¹⁰⁴ Nonetheless, instead of investing the time needed to improve the child's decision-making capacity, paternalistic advocates rely on circular, self-serving reasoning to find a client impaired simply because the advocate believes the client's decision is unreasonable or unwise.¹⁰⁵

Defenders who believe they are serving their clients' best interests are unlikely to recognize the racial distortions of paternalism. Yet, attorneys who ignore the child's stated interests often rely on self-referential determinations about what is best for the child, fail to

¹⁰³ Henning, *Loyalty, Paternalism, supra* note 5, at 270-74 (discussing impact of factors such as risk taking, limited future orientation, and poor temporal perception on adolescent decision making).

¹⁰⁴ Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 592 (2009); Henning, *Loyalty, Paternalism, supra* note 5, at 284, 317-19 (outlining ways attorneys can optimize decision-making capabilities of youth).

¹⁰⁵ Henning, *Loyalty, Paternalism, supra* note 5, at 287.

consider the child’s racial, ethnic, and cultural perspective in the given context, and ignore the race-specific harms and consequences of the various decisions they make on behalf of the child.¹⁰⁶ Thus, out-of-home placements and state interventions that are contrary to the client’s stated interest likely favor the attorney’s middle-class norms over the clients’ legitimate interests and fail to account for the unique race-based harms of detention.

C. RACE AND JUVENILE DEFENSE ADVOCACY

It is axiomatic that poor African American, Latino, and Native American children are overrepresented in the juvenile justice and child welfare systems, the two primary legal systems in which children need lawyers.¹⁰⁷ Statistics also confirm that lawyers for children are “overwhelmingly” white and middle class.¹⁰⁸ In this indigent attorney-client framework, the power imbalance between attorneys and their clients is significant. Differences persist not only across race and class, but also across age, education, legal knowledge and expertise, the ability to communicate, the child’s lack of financial power over attorneys, and the child’s general dependence on adults for advice. Each of these gaps creates an opportunity for paternalistic advocates to consciously or subconsciously dominate the relationship and render children powerless to resist. These gaps also leave attorneys vulnerable to cognitive shortcuts and implicit biases that help them fill in missing data, especially when they face significant time constraints, heavy workloads, and a system that favors paternalism.

As outlined in Part I, commentators have identified several ways in which implicit racial bias might manifest among defenders in the adult criminal justice system. Those difficulties are

¹⁰⁶ See Annette R. Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 609-11 (2008)[*Representing Children Representing*].

¹⁰⁷ Joshua Rovner, *Policy Brief: Racial Disparities in Youth Commitments and Arrests*, Sentencing Project, 1 (2016), <http://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests> (Aug. 8, 2016) (the racial gap between black and white youth arrested and placed in secure commitment increased by fifteen percent in ten years, even as the overall rate of commitment declined, and other racial and ethnic disparities saw no improvement); Sara McDermott, *Calibrating the Eighth Amendment: Graham, Miller, and the Right to Mental Healthcare in Juvenile Prison*, 63 UCLA L. REV. 712. (2016). n. 24 (emphasizing that youth of color "comprise 38 percent of the youth population, but 72 percent of incarcerated juveniles"); NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKAN NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 7-8 (2008) (discussing overrepresentation of Native American and Alaskan American youth in the juvenile justice system).

¹⁰⁸ Appell, *supra* note 106, at 608-09; Edkins, *supra* note 6, at 415 (citing United States Department of Labor 2009 to show vast majority of attorneys in the US – 88% - are Caucasian).

likely magnified in the juvenile justice system where the client is a child, with even less power and voice than an accused adult.

1. Implicit Racial Bias and Attorney-Child Communication

Attorneys face many barriers to effective communication with children in the juvenile justice system. Cross-generational communication between a lawyer and a child is difficult not only because youth typically lack the vocabulary and sophistication to engage with the lawyer on legal issues, but also because they often distrust public defenders based on the experiences their relatives or friends have had. Some youth may be reluctant to talk because they are embarrassed or ashamed about their involvement in the system, while others may appear hostile to fit into a culture that often requires youth to hide their weaknesses and project a violent, aggressive, or hostile image.¹⁰⁹

A child's aggression or reticence in the attorney-client interview may also be a cover for developmental disabilities and language impairments, which occur at significantly "elevated" rates among youth in the juvenile justice population.¹¹⁰ Language impairments may include receptive deficits that affect the child's ability to understand the language he or she hears; expressive language deficits that affect the child's ability to comprehend meaning or recall and relate information to others; and pragmatic difficulties that affect the listener's interpretation and reaction to the child's communication style and choices.¹¹¹ Children with language impairments often have difficulty following direction, staying on topic, recognizing and articulating emotions, reading social cues, being sensitive to cause and effect, recognizing and controlling inappropriate behavior, and interpreting the motivations and thoughts of others.¹¹² Further, youth with language impairments are often unable to take the perspective of another person and frequently fail to adapt appropriately in interactions with others.¹¹³ Any of these deficits may cause tension and misunderstanding in the attorney-child relationship. Unfortunately, defenders with little or

¹⁰⁹ See Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1504-07 (2002).

¹¹⁰ Michelle Lavigne & Gregory Van Rybroek, "He got in my face so I shot him": *How Defendants' Language Impairments Impair Attorney-client Relationships*, 17 CUNY L. REV. 69, 71 (2014).

¹¹¹ *Id.* at 74-75.

¹¹² *Id.* at 77.

¹¹³ *Id.* at 75

no knowledge about language impairments often perceive their clients as having a “bad attitude” or “no remorse,” “lying,” or being “non-compliant.”¹¹⁴

Challenges in cross-generational communications between the attorney and the child are likely exacerbated by implicit racial bias that shapes the defender’s interpretation of their clients’ behavior. The potential for an attorney to misinterpret adolescent speech and behavior is heightened by evidence that individuals are more likely to interpret ambiguous facial expressions or behavior by blacks as violent or aggressive.¹¹⁵ If an initial interview goes poorly, the child may shut down all together, exacerbating the attorney’s perceptions of the child as recalcitrant, uncooperative, and maybe even unamenable to treatment and rehabilitation.¹¹⁶ Implicit racial bias thrives in circumstances in which behaviors appear to conform to stereotypes.¹¹⁷ Thus, when children are hostile or aggressive with their advocates, the attorney may perceive that behavior as consistent with pervasive stereotypes about “angry black males.”

The risk that implicit bias will deteriorate the relationship is even greater with children who already have difficulty understanding concepts of attorney confidentiality and client loyalty.¹¹⁸ A child who senses the attorney’s rejection, hostility, or paternalism may withhold information from the attorney, depriving both the attorney and the child of an opportunity to exchange important insights in the case.”¹¹⁹ Lawyers depend on their clients for narratives about their social background, personal views, and alleged criminal events.¹²⁰ Even when there is no obvious tension in the attorney-client relationship, many children in the juvenile justice system have language barriers and cognitive limitations that prevent them from telling an effective narrative. Studies have concluded that young men involved in the criminal and juvenile justice systems provide narratives that are less complete and less sophisticated than non-court-involved youth of the same age or even younger.¹²¹ Narratives by court-involved youth are less likely to include details and emotion or to describe a character’s plan, the cause and effect of the

¹¹⁴ *Id.* at 84.

¹¹⁵ *See supra* notes 23-24 and discussion.

¹¹⁶ *See* Richardson & Goff, *Defender Triage*, *supra* note 3 at 2637 (discussing attorneys’ relationships with adult defendants)

¹¹⁷ Richardson, *Suspicion Heuristic*, *supra* note 8 at 305, 313.

¹¹⁸ Henning, *Loyalty, Paternalism*, *supra* note 5, at 272-73.

¹¹⁹ *Id.* at 273.

¹²⁰ Lavigne & Rybroek, *Defendants’ Language Impairments*, *supra* note 10 at 88-89 (citing Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 16 (1997)).

¹²¹ *Id.* at 89-90 (discussing a study involving young males 13 to 19 years of age).

character's actions, or the character's motivations.¹²² Attorneys who are missing a large part of a child's story are left to fill in details (consciously or subconsciously) with information that conforms to common racial stereotypes. Defenders who experience mental fatigue in the juvenile justice system may not investigate deeply enough to overcome these stereotypes and instead rely on cognitive short cuts that foster perceptions distorted by bias.

Unfortunately, children are generally in no position to perceive and correct the misunderstandings that may occur in the attorney-client relationship. Juveniles and young adults with language impairments often lack the linguistic and emotional ability to ask questions, clarify confusion, and navigate difficult and unfamiliar relationships.¹²³ Likewise, few children – especially those with language impairments - have developed the skills they need to assert their rightful authority to direct the attorney-client relationship, especially in light of social norms that teach children to defer to adults.¹²⁴ At the same time, attorneys who perceive black children as less childlike and innocent than white children may presume their black clients are streetwise and sophisticated and overlook the child's need for advice and counseling that would enhance their decision-making skills.

2. Implicit Racial Bias and Opinions About A Child's Home Environment

Stage by stage, from arrest to disposition, children of color penetrate deeper into the juvenile justice system at rates that far exceed their percentage in the general population. Although black youth comprised only approximately 17% of youth ages 10-17 in the United States in 2012,¹²⁵ they accounted for 34% of all juvenile arrests, 39% of detained youth, 37% of youth formally processed by the juvenile court, 35% of youth adjudicated, and 45% of youth judicially waived to criminal court.¹²⁶ According to 2008 statistics, Latino children were 43% more likely than white youth to be waived to the adult system and 40% more likely to be

¹²² *Id.* at 90.

¹²³ *Id.* at 87.

¹²⁴ *Id.* at 86; Henning, *Loyalty, Paternalism, supra* note 5, at 273; OFF. JUV. JUST. & DELINQ. PREVENTION, *Easy Access to Juvenile Court Statistics: 1985-2012*, <http://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp> (last visited Aug. 8, 2016); Ellen Marrus, *Best-Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 342 (2003) (“children naturally look to authority figures to make decision for them”).

¹²⁵ OFF. JUV. JUST. & DELINQ. PREVENTION, *Easy Access to Juvenile Populations: 1990-2013*, http://ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp (last visited Aug. 8, 2016).

¹²⁶ OFF. JUV. JUST. & DELINQ. PREVENTION, *Easy Access to Juvenile Court Statistics: 1985-2012*, <http://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp> (last visited Aug. 8, 2016).

admitted to adult prison.¹²⁷ Native American youth were 1.5 times more likely than white youth to receive out-of-home placement and 1.5 times more likely to be waived to the adult criminal system.¹²⁸ The numbers are even worse for girls of color, as black women and girls continue to be over-represented among those who are in contact with the criminal and juvenile justice systems.¹²⁹ A joint report issued by the Women's Law Center and the NAACP Legal Defense and Educational Fund, Inc. in 2014 reports that African American girls make up 17% of the total school population, but 31% of referrals to law enforcement and 43% of school related arrests.¹³⁰ Similarly, black girls continue to experience some of the highest rates of residential detention and represent the fastest-growing segment of the juvenile justice population.¹³¹ At every stage of their representation, juvenile defenders affect these outcomes through their advocacy and legal advice.

At repeated intervals throughout a juvenile case, the defender is responsible for advocating for the child's release from detention. To secure the child's release, the defender must convince the court that the child will have the stability, support, and discipline he needs from his family. Judges and probation officers will consider the parents' employment, criminal and child welfare records, residence in a high crime area, length of time at the same address, and presence at the child's court hearings. Like other decision-makers in the system, defenders often evaluate these factors through a racially-distorted lens.¹³²

Black families in the juvenile justice system are often treated as presumptively unstable owing to the historical vestiges of the *parens patriae* doctrine that viewed delinquency as the

¹²⁷ Campaign for Youth Justice, *Key Facts: Youth in the Justice System*, at 4, <http://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf> (Last updated April 2012) (citing Arya, N., Villarruel, F., Villanueva, C., & Augarten, I. *America's Invisible Children: Latino Youth and the Failure of Justice* (2009)).

¹²⁸ *Id.* at 4 (citing Arya, N., & Rolnick, A. A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS. (2008)).

¹²⁹ See THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (last updated Nov. 2015) (citing E.A. Carson, *Prisoners in 2014*, Bureau of Justice Statistics (2015)).

¹³⁰ *Unlocking Opportunity for African American Girls*, joint report by the NAACP Legal Defense and Educational Fund, Inc. and the Women's Law Center, http://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_report.pdf.

¹³¹ *Id.*

¹³² Kenneth B. Nunn, *The End of Adolescence: The Child As Other: Race and Differential Treatment In Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, at 683-688; 708-708. (2002) (discussing the overrepresentation of African Americans at each stage; sharing the different perspectives of probation officer's narratives based on the race of the juvenile).

product of bad parenting, especially by poor, immigrant, and black parents.¹³³ It is easy for defenders to zealously advocate for a client's release when the client's family comports with middle class norms of a two-parent, all-employed household. When families do not comport with these norms, defenders may overgeneralize and make assumptions, especially about parents who are hard to reach, miss court proceedings, and frequently change residences. At face value, a parent's frequent moves, prior criminal record, and failure to accompany a child to court may provide "evidence" that the parent is unsuitable to supervise the child, protect the community, or guarantee the child's return to court. At worst, such information may appear to confirm racialized narratives that black mothers are lazy and neglectful, if not violent and abusive.

Harmful narratives about black parents in the delinquency system may also undermine the defender's effort to cultivate important relationships with parents and other caretakers in the child's life. Parents are important allies for children throughout the delinquency case, making it essential for defenders to respect and engage the child's parents at all stages of the defense representation.¹³⁴ Yet, too often, defenders accept the probation officers' assessment of risk and dangers in the child's home without adequate investigation or independent evaluation of their own. Ironically, many paternalistic children's advocates defer to parents for guidance about what is best for the child, but when racial stereotypes about black parents are explicitly or implicitly activated attorneys may displace both the child's voice and the parents' voice with their own middle class perspectives. Unlike white middle class parents, stereotyped black parents are deemed unworthy of the parents' traditional role as arbiter of their children's lives and values. Attorneys who fail to engage parents not only subvert the parents' role as ally, but may also obstruct child-centered outcomes, which are often inextricably tied to the child's family and community.¹³⁵

3. Implicit Racial Bias and the Evaluation of Evidence for Trial or Juvenile Transfer Hearing

Implicit bias research should give us particular concerns about the juvenile defenders' assessment of culpability and mitigation for black defendants in their caseload. In 2012,

¹³³ See *supra* notes 95-100 and discussion.

¹³⁴ Kristin N. Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L. J. 836, 839-47 (2006).

¹³⁵ Appell, *supra* note 106, at 608.

researchers interested in public perceptions of race, culpability, and sentencing provided study participants with a factual summary of the Supreme Court case *Sullivan v. Florida* along with information about life without parole sentences in non-homicide cases.¹³⁶ In half the case summaries, participants were primed to believe the offender was black; in the other half, participants were primed to believe the offender was white.¹³⁷ Researchers found that study participants were more likely to impose harsher sentences when they believed the offender was black than when they believed the offender was white.¹³⁸ Specifically, researchers found that study participants perceived black adolescent offenders as more deserving of adult treatment than identical white adolescent offenders.¹³⁹ Remarkably, these results and the effect of race on perceptions of juvenile culpability held true even when researchers controlled for the participant's political ideology and evidence of explicit racial bias.¹⁴⁰

Similarly, in 2014 another team of researchers found that “dehumanization” effects led individuals to see black children as more like adults and be less concerned about prohibitions against treating children more harshly in the adult system.¹⁴¹ Using a dehumanization Implicit Association Test, researchers determined that the more readily study participants implicitly associated blacks with apes, the higher their culpability ratings were for both black misdemeanor and felony suspects.¹⁴² These findings reflect more than basic prejudices and attitudes among the participants, but also indicate a tendency of participants to dehumanize black children, that is, to believe that black children are not children at all, or dehumanized.¹⁴³ When children are dehumanized they may be afforded fewer of the basic protections typically afforded to children and become vulnerable to harsh treatments usually reserved for adults.¹⁴⁴ Dehumanization makes it permissible for decision makers - including defenders - to treat people in a way that would be morally objectionable if they were fully human – as evident in slavery, execution, and

¹³⁶ Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLoS ONE 1, 2 (2012)(citing transcript of Oral Argument, *Sullivan v. Florida*, 129 S.Ct. 2157 (2009), involving a 13 year old convicted of sexual battery and sentenced by the Florida Supreme Court to life in prison without parole).

¹³⁷ *Id.*

¹³⁸ *Id.* at 2, 4 (reporting the results of 735 white American study subjects).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2-4.

¹⁴¹ Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY. 526, 527 (2014) (dehumanization defined as the “denial of full humanness to others”, particularly used here as the dehumanizing of black boys by associating them with apes).

¹⁴² Goff et al. *supra* note 43, at 532.

¹⁴³ Goff et al. *supra* note 43, at 527.

¹⁴⁴ *Id.*

lynching.¹⁴⁵

The phenomena of implicit bias operates subtly, even among those who ascribe to democratic and egalitarian virtues.¹⁴⁶ Thus, juvenile defenders affected by implicit racial bias and dehumanization effects may be easily coopted by a juvenile justice system that disproportionately accuses children of color. Like other actors in the juvenile and criminal justice systems, juvenile defenders may be more likely to accept police interpretations of the facts in evaluating evidence in a case and become complacent with the number of black youth facing transfer to adult court.¹⁴⁷ Defenders who manage large caseloads may also subconsciously relegate black youth to the end of triage decisions when deciding how much time and resources to invest in fighting a transfer proceeding based on latent assumptions that black youth are more mature and culpable than whites.

4. Implicit Racial Bias and Disposition Advocacy

Disposition is a seminal moment in a juvenile case. As the analog of adult sentencing, disposition is one of the most complicated stages of the case for the juvenile defender. Disposition requires the defender to triage cases on her docket, evaluate the child's home environment, assess the child's culpability, remorse, and amenability to rehabilitation, and identify creative and culturally appropriate disposition programs. The defender is not only expected to protect the child's due process interests and abide by the client's wishes in a system that is otherwise paternalistic, but she is also expected to help her client identify a disposition plan that is best suited to the child's needs and interests. Defenders are particularly vulnerable to paternalism and implicit bias at this stage, when the system is most interested in "treating" the child after some proven delinquent behavior.

Disposition requires all parties to evaluate the nature and circumstances of the child's offense, as well as the child's family structure, school attendance and behavior, drug use, mental health issues, community involvement, and other social factors. Like probation officers, defenders may be more likely to attribute a black child's delinquency to personality deficits, such as lack of remorse and callous disregard for the feelings of others, and less likely to acknowledge

¹⁴⁵ *Id.*

¹⁴⁶ *See supra* notes 6-17 and accompanying discussion.

¹⁴⁷ *See supra* note 61-64 and accompanying discussion.

mitigating factors in the child's family, school, and physical environment.¹⁴⁸ Remorse is a critical factor in the court's assessment of an appropriate disposition for the child. By displaying remorse and apologizing to a victim, a child demonstrates that he has accepted social norms, recognizes that his conduct has fallen outside of societal expectations,¹⁴⁹ and has the capacity to rehabilitate and self-regulate in the future.¹⁵⁰ Youth who fail to demonstrate remorse appear callous and unemotional, are considered likely to reoffend, and become candidates for more severe penalties in juvenile or adult criminal court.¹⁵¹

Like so many other aspects of the attorney-client relationship, implicit racial bias may affect a defender's assessment of the child's capacity for remorse. Recognizing that judges, prosecutors, and probation officers all weigh remorse heavily in evaluating an offender's character and the resolution of delinquency cases,¹⁵² defenders must be particularly zealous in demonstrating the child's capacity to experience remorse. Unfortunately, not every young offender will have the mental capacity to experience contrition or the intellectual capacity and language skills to convey it.¹⁵³ Thus, attorneys who are not well versed in adolescent development and mindful of their vulnerability to implicit racial bias may be ineffective in advocating for youth at disposition. Defenders may interpret a child's normal adolescent behaviors – such as failing to make eye contact, appearing to laugh or smirk during discussions about a victim, inarticulate apologies, flat facial expressions, or apparent disinterest - as evidence of remorselessness and a lack of amenability to treatment.¹⁵⁴ Because remorse is a type of painful suffering, youth will sometimes “resort to defense mechanisms” of humor, denial, or apparent indifference to avoid it.¹⁵⁵ Other developmental features of adolescence, including the rejection of child-like behaviors such as crying, may also block traditional expressions of grief and

¹⁴⁸ See *supra* notes 49-53, and accompanying discussion.

¹⁴⁹ See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 113 (2004).

¹⁵⁰ Bibas & Bierschbach, *supra* note 149 at 88, 94-95 (arguing that remorse and apology serve as indicators that defendants are “less bad and so need less deterrence, incapacitation or retribution”).

¹⁵¹ See Duncan, *supra* note 109, at 1493-94.

¹⁵² See Bibas & Bierschbach, *supra* note 149, at 92-94 (2004); Duncan, *supra* note 109, at 1493, 1500.

¹⁵³ See Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 142-44 (2006); Joseph A. Nese, Jr., Comment, *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 383 (2002).

¹⁵⁴ See Duncan, *supra* note 109 at 1498-1499 (discussing example of a case in which the judge relied on child's facial expression to determine his interpretation of the juvenile's lack of remorse).

¹⁵⁵ Duncan, *supra* note 109, at 1472, 1478-79, 1485, 1500.

repentance.¹⁵⁶ Similarly, youth culture, which often requires youth to hide their weaknesses and project a violent image, stifles guilt and other remorseful emotions.¹⁵⁷ Defenders who subconsciously see black youth as more culpable for their actions, less capable of remorse, and less amenable to treatment than white youth may fail to think creatively and fight aggressively at the disposition stage.

5. Implicit Racial Bias and the Criminalization of Normal Adolescent Behavior

Implicit racial bias might also surface in a much more subtle and destructive form of complacency among juvenile defenders¹⁵⁸ – a complacency that manifests itself in a tacit acceptance of policy and practice that criminalizes normal adolescent behavior among children of color. Defenders who have practiced for a long time with a high percentage of black and Latino youth may unwittingly employ cognitive defenses to accommodate that reality. They might gradually come to believe that children of color commit more crime than white youth because of the vast social and structural disadvantages they face,¹⁵⁹ or they may simply accept the premise that their contact with police and the courts is “inevitable” given the ubiquitous presence of law enforcement in communities of color. If they do not lose their outrage at injustice all together, defenders who have little time and resources to resist systemic discrimination may lose their ability to recognize the more subtle forms of inequity or their motivation to respond to them.

Defenders who have become complacent may accept leg shackling as standard practice in juvenile court even when there is no evidence that their clients pose a risk of flight. They may accept routine conditions of release, such as weekly drug testing and stay-away orders, as appropriate in every juvenile case even when there is no evidence of drug use or when there are alternative strategies to keep the child and the public safe. In surveying entire caseloads, defenders may fail to identify and confront persistent patterns of disparity in the prosecution of PCP and other drugs that are more commonly accessible in black communities or ignore disparities in drug diversion opportunities for black and white youth. Advocates may also

¹⁵⁶ See *id.* at 1483, 1492.

¹⁵⁷ See *id.* at 1504-07.

¹⁵⁸ Rapping, *supra* note 3, at 1001 (discussing defenders’ “waning sensitivity to racial disparity”).

¹⁵⁹ See Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 414-15 (2013) [hereinafter *Criminalizing Adolescent Behavior*] (summarizing youth self-report data and development research demonstrating that white youth engage in risky, delinquent behavior at rates equal to or higher than black youth).

become desensitized to implicit narratives about black parents and communities that drive decision-making at every stage of the juvenile case. At worst, they may lose courage to challenge the most obvious racial injustices and Fourth Amendment violations in police-youth encounters.

6. Microaggressions

When asked, most people believe in democracy, fairness, and other values that explicitly condemn racism and inequality.¹⁶⁰ As a result, most people find it difficult to believe they possess any biased racial attitudes or engage in any behaviors that are discriminatory.¹⁶¹ This is especially true of defenders who have devoted their careers to helping people of color and would likely never consciously or deliberately commit racist acts toward their clients. Unfortunately, the unconscious nature of implicit racial bias makes it particularly difficult to recognize and address, especially among those who identify themselves as politically liberal. For liberals, egalitarian values operate on a conscious level, while unconscious racism and bias are covert and operate in the subconscious.¹⁶² This kind of bias is the most difficult to identify and correct because it is so “subtle and nebulous.”¹⁶³

Defenders who are not aware of their own biases may unintentionally engage in “microaggressions,” defined as “brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group.”¹⁶⁴ Microaggressions occur automatically as a result of cultural conditioning and are largely invisible to those who have the privilege of not being subjected to them.¹⁶⁵ Even when microaggressions are explained away by nonbiased and valid reasons, the recipient always has the nagging feeling that they have been disrespected. Microaggressions may occur in three categories – microassaults, which tend to hurt the victim through name calling, avoidance, or discriminatory actions; micro insults, which are even less conscious and less intentional

¹⁶⁰ Derald Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AMERICAN PSYCHOLOGIST 271-286, 280 (2007).

¹⁶¹ *Id.* at 275.

¹⁶² *Id.* at 272.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 273. See also Russell, Kathryn K., *Affirmative (Re)Action: Anything but Race*, 45 AM. U. L. REV. Vol. 45, Issue 3 (February 1996), 803, 805-06 (1996) (providing examples of microaggressions towards blacks such as failure to make eye contact, not holding an elevator door, or physical distance in public).

¹⁶⁵ Sue, *supra* note 160, at 277.

communications that convey rudeness and insensitivity to a person's racial identity; and microinvalidations, which are communications that exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality of the person of color.¹⁶⁶

Microinvalidations may occur in the defender's physical environment when office art and magazines do not reflect the cultural diversity of the client population,¹⁶⁷ there are no bilingual staff to work with Spanish-speaking clients, or staff and receptionists are dismissive or judgmental of young black males who come to the office dressed inappropriately.¹⁶⁸ Microinvalidations also surface as overworked and impatient defenders interact with their clients. Defenders are often distracted or rushed during client interviews, fail to return clients' calls, refuse to listen to clients' accounts of an alleged offense, dismiss or become overly negative about a client's proposed defense, and discourage all hope in a client's desired outcome without adequate and patient explanation. Even when there are valid, race-neutral explanations for the defender's impatience, the child may perceive the lawyer's behavior as a microaggression. Most significantly, defenders who refuse to advocate for the child's stated preference not only deprive the child of effective legal representation, but they may also cause black youth to believe their views and preferences are unworthy. Defenders may also invalidate clients by refusing to incorporate arguments about racial discrimination in a trial defense theory or motion to suppress evidence.

Microaggressions occur in the subtle and explicit assumptions defenders convey to their clients, including assumptions that clients are using drugs, guilty of a crime charged, or talk back to the police as alleged. Defenders may insult black children when they lecture them in condescending tones about repeated arrests, probation violations, or difficulties in school without at least acknowledging the challenges children of color often face in having their educational needs met and complying with conditions of probation. Defenders also engage in microinsults when they act with low expectations for certain clients. Without consciously realizing it, juvenile defenders may have higher expectations for their white clients, whom they assume will go to college or trade school while they assume their black clients will not. Defenders may work harder to seal records of white clients to preserve future opportunities, be more responsive to

¹⁶⁶ *Id.* at 274; Ronald Wheeler, *REGULAR FEATURE: Diversity Dialogues . . . : About Microaggressions*, 108 LAW LIBR. J. 321, 322-325 (2016).

¹⁶⁷ Sue, *supra* note 160, at 275; Wheeler, *supra* note 166, at 324-325.

¹⁶⁸ For additional examples of microaggressions, see Sue, *supra* note 160, at 277-79.

phone calls from white parents, or push white clients harder to succeed on probation because the defender believes they can succeed. Even more harmful aggressions may occur during the attorneys' interactions with parents. Defenders may routinely mistake a black father for a defendant or ask a black father who they are and what their connection is to the case, while assuming that any white males who show up with a child must be the parent.

As noted above, inherent power imbalances in the attorney-child relationship make it more difficult for children to express their discomfort with the attorney-client relationship and confront perceived biases and slights by their attorney. Microaggressions further sap the psychic and spiritual energy of their recipients,¹⁶⁹ and may cause clients to shut down altogether. When children feel misunderstood or devalued, they are likely to withdraw from the attorney-client relationship. Daily experiences of racial aggression may cause even more anger and frustration than traditional overt forms of racism,¹⁷⁰ and may help explain why youth and families are so distrustful and dissatisfied with the juvenile and criminal justice systems. The cumulative effects of these types of aggressions are particularly harmful to children, who may experience feelings of self-doubt, low self-esteem, frustration, isolation, and emotional turmoil.¹⁷¹

III. LEGAL AND PRACTICAL IMPLICATIONS AT THE INTERSECTION OF RACE AND PATERNALISM

As discussed in Part I, implicit racial bias thrives in environments where advocates are overworked, under-resourced, emotionally and cognitively depleted, and anxious. Unfortunately, these features characterize most, if not all, contemporary indigent defense systems that disproportionately serve children of color. Thus, systemic inequalities not only increase the lawyer's vulnerability to bias and impact the quality of lawyering for children, but they also affect long-term outcomes for youth.

A. LEGAL IMPLICATIONS

The idea that racial bias might compromise the quality of the child's legal representation is particularly troubling when we consider the attorney's Constitutional obligation to stand guard between the child and the coercive power of the state. The right to counsel was affirmed in a

¹⁶⁹ *Id.* at 273.

¹⁷⁰ *Id.* at 272.

¹⁷¹ *Id.* at 279.

series of cases that were implicitly – although not explicitly – concerned about institutional racism.¹⁷² The Constitutionalization of criminal procedure during the Warren Court’s Due Process Revolution grew out of a concern that the criminal justice system was not treating black defendants fairly.¹⁷³ *In re Gault*, decided in 1967, just four years after *Gideon v. Wainwright*, should be understood as an important legal corollary to the Civil Rights struggle against discrimination and for procedural justice for minorities.¹⁷⁴ Recognizing *Gault*’s place within the legacy of *Gideon*, it is even more important that juvenile defenders guard against the harmful effects of implicit racial bias.

The child’s Constitutional right to counsel is intricately tied to all other rights in the juvenile justice system. The attorney-client relationship is the primary vehicle through which children assert and waive their right to testify and confront witnesses through cross examination, their right to assert a privilege against self-incrimination, their right to have the government prove charges against them beyond a reasonable doubt, and their right to freedom from searches and seizures without a warrant. Client-directed advocacy protects the child’s substantive and due process rights by giving the child unfettered authority to exercise each of those rights. The attorney is also responsible for protecting the child’s liberty interests and limiting the state’s intervention in their lives. To advance these goals, the lawyer must thoroughly investigate youth-police encounters and zealously challenge Fourth and Fifth Amendment violations, as consistent with the client’s stated interests. When implicit racial bias interferes with any of these functions, the child may be deprived of his fundamental right to the effective assistance of counsel.

B. PRACTICAL IMPLICATIONS: PROCEDURAL JUSTICE AND LEGAL SOCIALIZATION

Implicit racial bias in the attorney-client relationship not only threatens to undermine the child’s Constitutional right to counsel, but it also jeopardizes the practical goals of rehabilitation, accountability, and public safety. The attorney-client relationship is often the primary lens

¹⁷² Chin, *supra* note 2, at 2239; Neuborne, *supra* note 2, at 86 (“[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.”)

¹⁷³ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) (“[C]riminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race.”).

¹⁷⁴ Barry C. Feld, *The Transformation of the Juvenile Court – Part II: Race and the Crack Down on Youth Crime*, 83 MINN. L. REV. 327, 345-349 (1999).

through which children view, understand, and evaluate the juvenile court system. It is the lens through which children come to understand broader notions of law, liberty, justice, and fairness and develop positive or negative responses to the rehabilitative goals of the juvenile court.

Because adolescence is a critical time during which norms, values, and beliefs about the law and legal institutions are formed, youths' experiences and perceptions of fairness and justice during adolescence may have a substantial impact on their risk of offending as they transition into adulthood.¹⁷⁵ Legal socialization is the process by which individuals come to understand and appreciate the law, the institutions that create those laws, and the people who enforce those laws.¹⁷⁶ Effective legal socialization occurs when young people develop a healthy respect for legal authority and internalize the social norms that prohibit illegal behavior. Positive legal socialization is achieved over time by fair and "procedurally just" social interactions with legal authorities.¹⁷⁷ When authorities enforce rules and make decisions in a way that is fair, young people are more likely to support and cooperate with those authorities and ultimately to obey their rules.¹⁷⁸

Individuals evaluate procedural justice based on four primary variables - voice and participation, which refers to the degree which people feel they are given an opportunity to express their opinions and concerns during a decision-making process; impartiality, which refers to the perceived neutrality and consistency of a decision-making process; respect and dignity, which relates to the way people perceive they are being treated; and the trust-worthiness and perceived benevolence of the authorities' motives.¹⁷⁹ For many, a fair process is even more important than the outcome. Notably, the attorney-client relationship has considerable impact on a defendant's perception of fairness and respect.¹⁸⁰ In a procedurally just system, litigants value

¹⁷⁵ Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUSTICE RESEARCH 217-241, 220 (2005) [hereinafter *Legal Socialization of Children*].

¹⁷⁶ Rick Trinkner & Ellen S. Cohn, *Putting the "Social" Back in Legal Socialization: Procedural Justice, Legitimacy and Cynicism in Legal and Non-Legal Authorities*, 38 LAW AND HUMAN BEHAV. 602 (2014).

¹⁷⁷ *Id.* at 602; Fagan & Tyler, *supra* note 175, at 222.

¹⁷⁸ *Id.* at 603.

¹⁷⁹ Fagan & Tyler, *supra* note 175, at 222; Erika K. Penner, Jodi L. Viljoen, Kevin S. Douglas, Ronald Roesch, *Procedural Justice versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38 LAW & HUM. BEHAVIOR 225 (2014).

¹⁸⁰ Carolyn Copps Hartley & Carrie J. Pertrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work & the Law*, 14 WASH. U. J.L. & POL'Y 133, 156-57 (2004) [hereinafter *Culturally Competent Jurisprudence*] (citing Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984)).

and expect neutrality, honesty, and respect from their lawyers.¹⁸¹ In one study of procedural justice and the attorney-client relationship, researchers asked prison inmates and attorneys to rank 13 lawyering skills based on order of importance.¹⁸² Inmates rated client-relations skills such as obtaining clients' opinions, spending time with clients before court, and keeping clients informed of their cases higher than attorneys rated those items.¹⁸³ In a separate study, researchers found that the time defendants spent with their attorneys also had a significant influence on procedural justice, which in turn impacted outcome satisfaction¹⁸⁴

Children and adolescents are no different in their desire for procedural justice, and in fact may be even more sensitive to issues of “fairness” and respect.¹⁸⁵ Youth who experience the legal decision-making process as fair and respectful are more likely to believe in the legitimacy of the law and, in turn, are less likely to reoffend.¹⁸⁶ In one recent study, researchers found that perceptions of procedural justice and legitimacy accounted for self-reported recidivism among youth on probation over and above the predictive power of well-established risk factors for delinquency, such as peer offending, substance abuse, psychopathy, and the child’s age at first contact with the law.¹⁸⁷ This study supports claims that the manner in which youth are treated affects youths’ beliefs about the legitimacy of the law and legal authorities and has the power to influence youths’ sense of obligation to obey the law as well as the extent to which youth support the justice system.¹⁸⁸

Children who evaluate fairness and impartiality by opportunity for voice and participation may be particularly offended by their lack of voice in a paternalistic legal system that presumes they have no insight into what they need. Studies in the psychology of choice indicate that people who make choices for themselves function more effectively in treatment and

¹⁸¹ Hartley & Pertrucci, *supra* note 180, at 156 (citing Tom R. Tyler, *WHY PEOPLE OBEY THE LAW* (1990), at 4).

¹⁸² *Id.* at 133, 137, 155-59 (citing Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *LAW & PSYCHOL. REV.* 97 (2002)).

¹⁸³ *Id.* at 160 (citing Boccaccini, *supra* note 182 at 110).

¹⁸⁴ *Id.* at 137, 158 (2004) (reviewing studies).

¹⁸⁵ Jennifer L. Woolard, Samantha A. Harvell, S. Graham, *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 *BEHAVIORAL SCIENCES & THE LAW* 207, 209 (2008).

¹⁸⁶ Penner et al., *supra* note 179, at 230; Fagan & Tyler, *supra* note 175, at 217-241; J. Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOCIETY*, 513-548, 536 (2003) (people are more cooperative to authority when treated with fairness and respect).

¹⁸⁷ Penner, *supra* note 179, at 225, 232-33 (reduced recidivism occurred in the short term, but did not persist in the long term likely due to instability of youth’s opinions over time and youth’s tendency to focus on the present).

¹⁸⁸ *Id.* at 233.

have greater satisfaction.¹⁸⁹ Paternalism, by contrast, is anti-therapeutic because it breeds apathy, hinders motivation, and limits the potential for rehabilitation.¹⁹⁰ Paternalism also likely leaves children resentful and resistant to juvenile court intervention. Children who value autonomy and the accuracy of outcomes may resent court judgments rendered without adequate investigation, probing cross-examination of prosecution witnesses, or testimony from appropriate defense witnesses. Simple changes like ensuring that youth are given an opportunity to tell their story and express their views and opinions before important decisions are made about their guilt or innocence, removal from the community, or course of treatment may increase a child's sense of procedural justice and respect for the law.¹⁹¹

IV. IMPROVING JUVENILE INDIGENT DEFENSE

The impact of implicit racial bias on the attorney-child relationship and zealous legal advocacy are significant and arguably require juvenile defenders to be even more vigilant in guarding against bias than defenders in the adult criminal system. An obvious and important first step is awareness, as acquired through training, publicly-available Implicit Association Tests, and empirical research or other literature that summarizes recent studies on implicit racial bias. Defenders can only begin to resist implicit bias when they are aware of it and understand its likely effect on their behavior and judgment.¹⁹² Fortunately, research suggests that those who are both aware of their bias and motivated to change are in the best position to do so.¹⁹³ Even more

¹⁸⁹ See David B. Wexler, *Just Some Juvenile Thinking About Delinquent Behavior: A Therapeutic Jurisprudence Approach To Relapse Prevention Planning and Youth Advisory Juries*, 69 *UNIV. OF MISSOURI AT KANSAS CITY L. REV.* 96-105 (2000); Roger J. Heideman, et al., *Giving Parents A Voice: A Case Study of a Family Treatment Drug Court Track in Lancaster County, Nebraska*, 52 *COURT REVIEW* 36, 37 (2016) (stating that respect for participant autonomy and expression of preferences are considered central to ensuring therapeutic jurisprudence and procedural justice...this autonomy in decision making is thought to provide for self-determination and choice, which are central to psychological health.).

¹⁹⁰ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PSYCHOLOGY, PUBLIC POLICY, AND LAW* 184-206 (1997). See also Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 *WASH. U. L. REV.* 843, 866 (2010) (finding that community-based programs, such as mediation, are beneficial because they allow the child to communicate his or her opinions in the hopes of coming to a mutually agreeable rehabilitation plan, rather than being told by a parent or judge of his disposition).

¹⁹¹ Penner, *supra* note 179, at 234.

¹⁹² Richardson, *Defender Triage*, *supra* note 3, at 2645-46.

¹⁹³ Rapping, *supra* note 3, at 1021 n. 108 (citing John F. Dovidio, Kerry Kawakami, Craig Johnson, Brenda Johnson & Adaiah Howard, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 *J. EXPERIMENTAL SOC. PSYCHOL.* 510, 535 (1997)).

fortunate, defenders may be among the most motivated to change.¹⁹⁴ This Part explores strategies to help defenders reduce implicit racial bias and improve their advocacy on behalf of children of color.

A. RESISTING IMPLICIT RACIAL BIAS

Studies suggest that well-intentioned actors can overcome automatic or implicit biases, at least to some extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.¹⁹⁵ People also need to know when their biased responses are most likely to occur and learn how to replace those responses with responses that are more consistent with their egalitarian goals.¹⁹⁶ Although attorneys choose to represent criminal defendants for a myriad of reasons, attorneys practicing in indigent defense systems are often particularly devoted to protecting the rights of poor, disproportionately people of color. People who endorse values opposed to prejudice are generally motivated to inhibit the expression of implicit bias by seeking out information and exerting effort at tasks they believe will help them break the habit of bias.¹⁹⁷

As an initial step, defender offices should convene office-wide trainings that introduce defenders to the concepts of implicit racial bias and microaggressions and encourage defenders to reflect on how their latent attitudes and behaviors may compromise their advocacy on behalf of clients. Defender offices might also require attorneys to take the Implicit Association Test and share their results in small group discussions. In jurisdictions where there is no defender office, state resources should be set aside for training on cognitive biases, and state-wide continuing legal education requirements should mandate implicit racial bias training for all attorneys. When funding is not forthcoming, private and court-appointed defenders might partner with local bar associations to lobby for increased funding and support for indigent defense training.

¹⁹⁴ Richardson & Goff, *Defender Triage*, *supra* note 3, at 2642.

¹⁹⁵ Patricia G. Devine et al., *Long-term Reduction in Implicit Racial Bias: A Prejudice Habit-Breaking Intervention*, 48 J EXP. SOC. PSYCHOL. 1267, 1268 (2012) (noting that people must be concerned about the consequences of their biases before they will be motivated to exert effort to eliminate them); John F. Irwin and Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 8-9 (2010) (summarizing research on strategies to reduce implicit judicial bias); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196-97, 1221 (2009) (indicating that judges are able to control implicit biases when they are aware of them and motivated to do so); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1529-30, n.207 (2005).

¹⁹⁶ Devine, *supra* note 197, at 1268.

¹⁹⁷ *Id.*

Overcoming prejudices, especially those arising out of long-held implicit biases, is a protracted process that requires intentionality and commitment.¹⁹⁸ Beyond training, researchers have found positive results in the simultaneous and long-term implementation of five corrective strategies to reduce implicit racial bias – stereotype replacement, counter-stereotypic imaging, individuation, perspective-taking, and increased opportunities for contact with commonly stereotyped groups.¹⁹⁹ When implemented in tandem, these strategies increase the actor’s prospects of breaking persistent, subconscious bias-induced habits.²⁰⁰

Stereotype replacement would require defenders to replace stereotypical responses to their clients of color with non-stereotypical responses.²⁰¹ Thus, instead of responding in frustration to a black child’s apparent anger, hostility, or disengagement in an interview, the attorney would be patient, validate the child’s own frustrations with the process, and inquire further about what the child wants and needs from the lawyer. To alter her routine responses, the attorney must recognize that her own interpretation of the child’s behavior is likely rooted in stereotypes, assumptions, and labels that are often incomplete, if not altogether inaccurate. Instead of interpreting a black child’s reticence and hostility as defiance of authority, typical of an “angry black male,” the defender would draw upon principles of adolescent development and continue the client interview with patience and empathy. Training on adolescent development will help defenders understand that youth often hide behind humor, denial, and apparent indifference to avoid embarrassment and discomfort and frequently lack the language skills they need to express their true feelings and navigate new relationships.²⁰²

Counter-stereotypic imaging would require defenders to imagine their black clients in detail in counter-stereotypic ways.²⁰³ These new counter-stereotypic images may be abstract (a client caseload made up entirely of high school graduates) or real (a former client who has excelled). Defenders might periodically identify and share success stories about black or Latino children from the local community, including stories about former clients who have enrolled in college, secured employment, or excelled in academics or sports. Although defenders have frequent and often positive contact with their clients, initial attorney-client contacts in the

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1267 (2012).

²⁰⁰ *Id.* at 1267-1268.

²⁰¹ *Id.* at 1270-1271, 1276.

²⁰² *See supra* note 109 and accompanying text.

²⁰³ Devine, *supra* note 197, at 1270-1271.

juvenile justice system always follow allegations of criminal activity that might subconsciously confirm stereotypes about children of color. To offset this context, defenders need to imagine their clients completely disconnected from the juvenile and criminal justice systems. In client interviews, defenders may visualize their clients in a college classroom, a doctor's office, on city council, or the judge's bench.

Defenders should not assume that regular client encounters are sufficient to overcome implicit biases, but should instead look for new opportunities for positive contact with children of color.²⁰⁴ Counter-stereotypic imaging is enhanced by the independent strategy of seeking increased opportunities to engage in positive interactions with commonly stereotyped client populations.²⁰⁵ Defenders may engage youth in community service and extra-curricular activities, such as sports teams, tutoring, or local church and recreational events. Defenders might invite clients to participate in an intramural sports league or coach children in a spelling bee contest or mock trial competition. Defender offices or smaller groups of defenders might host holiday dinners for clients and their families or invite clients to join them in serving dinner to the homeless.

Individuation would require defenders to obtain more specific information about each client and the facts of each case before making any judgments about the child, the child's family, or the advantages and disadvantages of a plea versus trial.²⁰⁶ Of course, individuation is good practice for any attorney, but it has profound significance in the defender's effort to identify and resist subconscious racial biases that may affect her judgment and advice in a juvenile case. Effective attorney-client interviews not only increase the client's trust and willingness to share information, but they also reduce the attorney's need to fill in gaps with racialized assumptions and stereotypes.²⁰⁷ As I have argued elsewhere, children's attorneys may mitigate the inherent imbalance in any attorney-child relationship by building rapport with the child over an extended time, allowing the child to talk freely, and communicating with the child in age-appropriate

²⁰⁴ *Id.* at 1270-1271.

²⁰⁵ Z. Kunda and S. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, American Psychological Association, *PSYCHOLOGICAL BULLETIN*, 2003, Vol. 129, No. 4, 522-544, 523, available at <http://www.arts.uwaterloo.ca/~pthagard/ziva/psychbul2003.pdf> (research has shown that even ten minutes of interacting with a member of a stereotyped group can be enough to stop stereotype activation).

²⁰⁶ Devine, *supra* note 195, at 1270-1271.

²⁰⁷ Richardson & Goff, *supra* note 3, at 2643; Christine Schnyder Pierce & Stanley L. Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 *BEHAV. SCI. & L.* 89, 102 (2002) (finding that juveniles did not trust their attorneys to do their bidding).

language with culturally relevant examples to explain key concepts.²⁰⁸ Attorneys who interact with their young clients in the client's own space and gain insights from the child and the child's family, teachers, and other important adults in the child's life will better understand and appreciate the child in the child's culturally relevant context.

Individuation also compels more comprehensive case investigation. To resist stereotypical assumptions about clients' cases, defenders should read all police reports with skepticism, actively suspend disbelief in listening to the client's account of events, and hypothesize that every case is going to trial during investigation and pre-trial research. The defender should reject any suggestion that a case is a "typical" drug case or a "typical" snatch-and-grab robbery. Defender offices might offer periodic case rounds in which attorneys must justify their actions, beliefs, and feelings about their clients and their client's cases to other attorneys who can help them guard against inappropriate mental shortcuts and biases that distort decision-making.²⁰⁹ Case rounds would increase the complexity of the attorney's analysis, require the attorney to respond to their colleagues' objections, and generate a wider range of disparate and even conflicting viewpoints in the office.²¹⁰ This type of accountability would help defenders recognize their own biases, reevaluate their initial impressions and opinions about each case, and ultimately improve their client outcomes.

Finally, perspective-taking would require defenders to assume the first-person perspective of their clients during any communication, advocacy, counseling, or decision-making.²¹¹ Perspective taking would help attorneys avoid subtle microaggressions, resist harmful assumptions, and improve their attorney-client interactions. Although clients have final authority over all critical decisions in a criminal case, attorneys have considerable discretion and implicit authority to act in furtherance of the client's stated goals. Perspective taking would require defenders to actively anticipate their client's views on any discretionary action, such as whether to conduct additional investigation, file a creative legal pleading, or disclose some potentially embarrassing information about the client. Ultimately, perspective taking should increase the defender's psychological affinity with her client,²¹² and enhance the lawyer's respect for and deference to client autonomy.

²⁰⁸ Henning, *Loyalty, Paternalism*, *supra* note 5, at 317.

²⁰⁹ Fraidin, *supra* note 85, at 953.

²¹⁰ *Id.* at 954

²¹¹ Devine, *supra* note 195, at 1271.

²¹² *Id.* at 1276.

This section provides only a few examples of how each strategy to reduce implicit racial bias might be applied in the attorney-child relationship. As an office-wide training activity, defenders might generate a longer list of circumstances in which they might use these tools. Over time, defenders will hopefully experience these strategies as mutually reinforcing.²¹³ For example, increased contact with stereotyped groups inside and outside of the juvenile justice systems will likely improve the defenders' success in counter-stereotypic imaging, individuation, and perspective taking. Similarly, perspective taking should improve the defender's work in stereotype replacement and individuation by increasing the lawyer's desire to learn more about and empathize with her clients.²¹⁴ At best, all of the interventions may increase the defenders' awareness of more subtle instances of bias and discrimination in the system and revive the defenders' waning sense of outrage about racial injustice.²¹⁵

Undoubtedly, any effort to disrupt long-standing biases will demand more time and energy from defenders who are already over-worked, under-resourced, and at times cognitively and emotionally drained. Nonetheless, greater office morale, reduced burn out, improved client satisfaction, and better client outcomes should justify the extra time defenders devote to their representation.

B. CLIENT-DIRECTED ADVOCACY

Lawyers are rarely in the best position to know what is "best" for a child in the juvenile justice system.²¹⁶ Lawyers typically meet their clients at a moment of crisis, have limited interactions with them, and rarely understand them in the broader context of their families, schools, and community. Defenders committed to reducing the impact of implicit racial bias on their practice must reject paternalistic models of lawyering and insist upon client-directed advocacy that requires lawyers to engage all clients – and especially culturally diverse clients - in respectful and reciprocal interactions.²¹⁷ Client-directed advocacy, rooted in the American values of individual autonomy, self-determination, and the dignity of clients,²¹⁸ is itself a critical weapon in the fight against implicit racial bias. As lawyers genuinely seek to understand and

²¹³ Devine, *supra* note 197, at 1270.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1276.

²¹⁶ Henning, *Loyalty, Paternalism*, *supra* note 5, at 313.

²¹⁷ Hartley & Pertrucci, *supra* note 180, at 179.

²¹⁸ Henning, *Loyalty, Paternalism*, *supra* note 5, at 312.

accept their client's perspectives,²¹⁹ there is increasingly less need for lawyers to impose their own dominate, middle class norms in the relationship.

In client-directed and collaborative models of lawyering, the client controls the decisions, but the lawyer offers advice and structures the counseling process in a way that is likely to foster good decision making about available options.²²⁰ When clients seek advice, lawyers provide information about several courses of action and empower clients to understand and weigh the advantages and consequences of each. Collaboration empowers politically disadvantaged clients - such as the young, the poor, minorities, and others who may be unsophisticated in legal matters - to understand the system and have a voice in decisions that affect them. Thus, a lawyer working with a young black client may use culturally relevant and developmentally appropriate examples to explain key concepts and help the client make critical decisions.²²¹ Client-directed advocates are nonjudgmental, empathetic, and avoid manipulating their client's preferences at various decision points in the case. These advocates learn to appreciate their client's expressed interests in context and help clients make decisions that are consistent with their own culture and world view.²²²

Defender offices should develop strategies to mandate and support client-directed advocacy within their offices. Written attorney practice standards, mission statements, client Bills of Rights, and statements of key principles should all clearly require and explain the value of client-directed legal representation. Annual ethics trainings should require defenders to review local Rules of Professional Conduct and national juvenile defense practice standards that govern the attorney-client relationship, allocate decision-making authority to the client, and mandate client loyalty.²²³ Trainings might incorporate hypothetical fact patterns that ask defenders to identify the lawyer's appropriate client-centered and ethical response to the factual dilemma presented.²²⁴

²¹⁹ Hartley & Pertrucci, *supra* note 180, at 179-80.

²²⁰ Henning, *Loyalty, Paternalism*, *supra* note 5, at 315.

²²¹ *Id.* at 317-318.

²²² *Report of the Working Group on the Role of Race, Ethnicity and Class*, 6 NEV. L.J. 634, 634 (2006).

²²³ See NJDC Practice Standards, <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>

²²⁴ See Juvenile Training Immersion Program Training Curriculum; <http://njdc.info/our-work/jtip/>; <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/JJC/new-projects/jtip-summer-academy.cfm> (last visited Aug. 11th, 2106).

Supervisors might also develop case tracking systems that require attorneys to clearly document their client's stated objectives as they evolve over time in a delinquency case. Case tracking systems could monitor the child's preferences at the pretrial, trial, disposition, and post-disposition phases, paying attention not only to traditional client decisions regarding trial versus plea, but also to the client's more nuanced opinions about the value and cultural relevance of various probation services, defense theories, and motions strategies.

C. ALTERING THE NARRATIVES: PARENT, CHILD, AND COMMUNITY

One of the most important responsibilities any defender has is to alter the harmful, racially-distorted narratives that persist about children of color and their families in the juvenile justice system. Defenders in the adult system shape their clients' narratives by highlighting the client's humanity and portraying their client's mistakes in the proper perspective. A juvenile defender must not only protect her client's image, but must also protect and redefine common narratives about her client's family. As other scholars have noted, everyone has more than one narrative or "schema" that applies to them.²²⁵ Thus, a child in the delinquency system is more than just "a suspect" or "defendant." He is often also a promising student, a devoted son or daughter, a reliable employee, a caretaker of siblings, a talented musician, an artist, an athlete, and a church member. More important, he is probably a typical child who has engaged in some normal adolescent indiscretion.

Similarly, the child's parent is more than a parent with a delinquent child, but she is also likely an employee, a supervisor, a church member, a provider, a caretaker, a disciplinarian, and more. By emphasizing the latter narratives, defenders begin to unsettle primary narratives about the family and replace them with more affirming images of parents who advocate for their children in school, discipline them at home, and deeply care for them outside of the court context. When parents have been absent from court proceedings, defenders may help contextualize those absences by highlighting the parents' health challenges, work schedule, or illiteracy. The lawyer may explain that parents work two jobs to provide food and shelter for the rest of the family, attend school themselves to improve their earning potential, or work hourly wage jobs that provide them little flexibility to attend court proceedings. Defenders may also

²²⁵ Rapping, *supra* note 3, at 1037. See generally Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012).

help stakeholders understand family challenges in the context of structural racism and cultural realities. To contextualize a parent's prior criminal record or unemployment, defenders may introduce evidence about the particularly high rates of unemployment in the client's community and limited opportunities for unskilled work. With additional investigation, a defender might discover that a parent's prior arrest was ultimately unjustified and merely reflects the racial bias that explains many of the police stops in the child's neighborhood. To address concerns about the parents' lack of a stable address, the defender may explain that a family's frequent moves were compensated by the stability of a grandparent who remained actively involved in the child's life. When attorneys fail to recast court narratives in a racially-appropriate framework, they become complicit in enforcing dominant norms and invalidating the strengths and virtues of families in non-dominate communities.

Because families occupy such a significant role at every stage of the juvenile justice system, the defender must vigilantly resist claims that black families cannot supervise and support their own children. Defenders may identify services and supports, such as drug treatment, parenting skills, vocational training, housing assistance, public benefits, and child care, that help the family overcome structural challenges. Defenders may reach out to the child's extended family to identify alternatives to detention and broaden the scope of supervision and support available to court-involved youth. These efforts challenge narratives that highlight community degradation and violence to the exclusion of positive supports in the black community. Defenders may correct deficit-based narratives about black communities by identifying churches, recreational centers, sororities, and fraternities that may support the child and enhance the child's prospect for rehabilitation. This type of thorough narrative development narrows the window through which judges, probation officers, and other stakeholders can fill in unknown information about the child's family and community.

One of the most persistent and pernicious assumptions about black and Latina youth is that they are more deviant than white youth. These views persist despite a growing body of developmental research demonstrating that normative features of adolescence (including risk taking and poor impulse control) occur across all races and classes and an extensive national self-report database showing that youth of all races engage in delinquent behavior at the same or

similar rates.²²⁶ Defenders should gather information about race and adolescence not only to improve their own counter-stereotypic imaging, but also to help other stakeholders individualize their clients at critical stages of the juvenile case. By normalizing adolescence across race, defenders may disrupt implicit assumptions that children of color are inherently more likely to engage in violence and delinquency than their white counterparts.

At the disposition phase of a delinquency case, defenders should vehemently resist narratives that presume black children are incapable of rehabilitation.²²⁷ Despite a long history of juvenile courts that deemed education, vocational training, and rehabilitative services a waste of resources for black youth,²²⁸ defenders may help contemporary stakeholders recognize that all youth have an inherent potential for growth, change, and rehabilitation through healthy psychosocial development facilitated by caring and supportive adults, positive peer supports, vocational skills training, structured extracurricular activities, neighborhood youth groups, and community programs.²²⁹

D. AVOIDING MICROAGGRESSIONS

Implicit racial bias is intricately tied to microaggressions. Both occur automatically and subconsciously, and neither would likely be endorsed by the actor if the actor were aware of their

²²⁶ For self-report studies, see Lloyd D. Johnson et al., *Monitoring the Future: National Survey Results on Drug Use 1975-2010. VOLUME I: SECONDARY SCHOOL STUDENTS* (2011); *Youth Online: High School YRBS*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf> (last visited Aug. 11th, 2106) (sharing developmental research finding similar features of adolescent development that contribute to delinquency across all ethnicities and socio-economic groups); See e.g., Elizabeth Cauffman et al., *Age Difference in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010) (finding preference among adolescents for risk taking and short term reward over long-term gain, with no significant differences between ethnicities or socio-economic status); Laurence Steinberg et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) (finding that youth of similar ages in study exhibited similar levels of weak future orientation across ethnicity and socio-economic status); Laurence Steinberg, et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008) (finding that youth across all ethnic and socio-economic groups exhibited similar patterns in sensation-seeking and impulsivity).

²²⁷ Ward, *The Black Child-Savers: Racial Democracy & Juvenile Justice*, *supra* note 95, at 39, 52-53, 60, 86-87; Butler, *supra* note 95, at 1386-87 (discussing the Jezebel myth).

²²⁸ Ward, *supra* note 95, at 52-53; James Bell & Laura John Ridolfi, W. HAYWOOD BURNS INST., *Adoration of the Questions: Reflections on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System*, at 3 (Shadi Rahimi ed., Dec. 2008), available at <http://www.thechicagourbanleague.org/cms/lib/07/IL/07000264/Centricity/Domain/80/JJResources/Reflections%20on%20the%20Failure%20to%20Reduce%20Racial%20and%20Ethnic%20Disparities%20in%20the%20Juvenile%20Jstice%20System-%20December%202008.PDF>.

²²⁹ Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 56-58 (2008); He Len Chen et al., *The Transition to Adulthood for Adolescents in the Juvenile System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS, 77-78 (D. Wayne Osgood et al. eds., 2005).

presence.²³⁰ As a result, strategies to reduce implicit bias will also hopefully increase the defenders' awareness of and motivation to avoid microaggressions. Beyond the strategies identified above, attorneys should be careful about the ways in which they inadvertently engage in hostile and unwelcoming microaggressions.

As an individual or office-wide activity, defenders should examine their physical environment. Taking their clients' perspective, defenders might ask: Does our office decor honor the diverse clientele of the communities we serve? Can our staff engage clients in the languages most commonly spoken by our client population? Have all of our staff completed cultural sensitivity and implicit racial bias training? Do our hiring and promotion criteria clearly communicate the value of treating clients with respect and racial sensitivity?

Defender offices might also evaluate client intake procedures to ensure that clients are not being singled out on specific issues such as unemployment, drug use, or the need for language interpreters. To avoid this perception among clients, attorneys might advise clients at the start of the intake interview that all clients are asked the same questions to make sure their needs are met. Similarly, defenders should be thoughtful about how to explain court dress codes, as even well-intentioned commentary on the clients' dress may be perceived as judgmental and offensive. To avoid offense, defenders might acknowledge the client's creativity and style, but educate clients on the benefits of dressing in accord with court norms.

Research on procedural justice and therapeutic jurisprudence suggests that defenders must be mindful of their clients' perceptions of injustice and prejudice regardless of whether there is proof of actual discrimination.²³¹ Thus, defenders should be attentive of how they frame questions to avoid subtle inferences and judgment. Instead of asking "were you high?," the defender might ask "will the officer claim you were using drugs?" or "what will drug test results show?" Instead of asking "do you go to school?," a defender might start by asking the client what he "likes and dislikes about school?" Instead of implying that a child must have talked back to a police officer with questions like "what did you say?," the defender might start with a more open ended question that asks the client to describe their interaction with the police. Defenders should also be mindful of seemingly innocuous language and jokes, even when such humor provides much-needed relief from the emotional drain lawyers often experience in

²³⁰ Sue, *supra* note 160, at 273.

²³¹ Hartley & Pertrucci, *supra* note 180, at 144.

juvenile courts. Even light-hearted banter about “stupid” crimes may carry overtones of race and stereotypes that might be hurtful if overheard by clients.

To expand this catalogue of examples, supervisors might ask front line defenders to generate a list of ways they may inadvertently offend clients in attorney-client interactions. Defenders might identify assumptions they make whenever they meet children and families with a particular accent, religion, or dress, or list judgments they have whenever they meet parents who are unemployed, live in a certain neighborhood, or have a large number of children. Defenders might determine whether they have any disparate expectations of their clients based on race, religion, or socioeconomic status. To be sure, these exercises will require honest reflection and might be painful or embarrassing, but they should be well worth the effort for advocates who genuinely care about breaking habits that arise out of implicit racial bias.

E. RAISING RACE

Thus far, most of the strategies for reform have focused on the defender’s own self-reflection and motivation to change, but defenders must also think about ways to educate and challenge other stakeholders. At the most basic level, defenders must be willing to talk about race and raise racial justice arguments in their juvenile and criminal cases. Raising race not only forces defenders to think about cases from their client’s perspective, but it may also improve client satisfaction and enhance the client’s sense of loyalty and alliance with their attorneys.

Little research has looked at the relationship between racial attitudes among service providers and their clients' perceptions of service delivery, but in one study of mental health case managers and their clients, researchers found that clients whose case managers scored higher on a Racial Oppression Sensitivity Scale felt better about the services they received and had less difficulty in receiving services than clients whose case managers were less sensitive to racial oppression issues.²³² Although research is needed on the link between client satisfaction and lawyers’ sensitivity to racial justice in criminal representation, it is not too farfetched to assume that clients value lawyers who are willing and able to evaluate their cases through a relevant

²³² Sharron M. Singleton-Bowie, *The Effect of Mental Health Practitioners' Racial Sensitivity on African Americans' Perceptions of Services*, 19 SOC. WORK RES. 238, 241 (1995).

racial lens.²³³ Defendants want their stories told, and they want their lawyers and other justice stakeholders to interpret facts within the racial realities of contemporary society.

Criminal justice scholars like Jonathan Rapping and Robin Walker Sterling contend that criminal defense attorneys are uniquely positioned to fight racial injustice in the criminal justice system.²³⁴ As defenders learn more about implicit racial bias and the way it operates, ideally they will be increasingly more sensitive to its pernicious impact at every stage of the juvenile and criminal justice systems. In the criminal justice system, Rapping urges defenders to be vigilant in educating the court on the impact of implicit racial bias through motions practice, voir dire, the use of experts, narrative reconstruction, jury instructions, and sentencing advocacy.²³⁵ In the juvenile justice system, defenders may also raise racial justice arguments at the pretrial detention phase, challenge prosecutorial decisions influenced by race, encourage judges to interpret and evaluate youth-police encounters based on what we know about race and adolescent development, and begin to alter harmful narratives about children of color and their families at the disposition phase.

Defender offices should think globally about where and how cases originate across the office. By tracking charges and arrest or offense locations, defenders might identify patterns of discrimination in schools, businesses, or recreation centers and advance a more coordinated office-wide strategy to challenge racial discrimination in charging decisions.²³⁶ Defenders might consider filing state and federal selective prosecution or Equal Protection claims to challenge one or more charging or transfer decisions. Even when such claims are not likely to succeed given the Supreme Court's persistent reluctance to give defendants the tools they need to vindicate racial bias in criminal cases,²³⁷ defenders may use these challenges to raise awareness among prosecutors and judges and create skepticism about the validity of charges alleged at recurring locations.

²³³ Hartley & Pertrucci, *supra* note 180, at 169, 181 (2004).

²³⁴ Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2251 (2014); Rapping, *supra* note 3, at 1016-19.

²³⁵ Rapping, *supra* note 3, at 1022-23. *See also*, Robin W. Sterling, *Raising Race*, THE CHAMPION (2011).

²³⁶ Henning, *Criminalizing Normal Adolescent Behavior*, *supra* 159, at 430.

²³⁷ *See e.g.*, *Whren v. US*, 517 U.S. 806, 818-19 (1996) (upholding police officers use of minor traffic violations as a pretext for to stop drivers for suspected drug involvement); *United States v. Armstrong*, 517 U.S. 456, 460-62 (1996) (holding defendant not entitled to discovery in selective prosecution case unless defendant shows that others similarly situated were not prosecuted).

In developing arguments for the child's release after detention, the defender might educate the judge on the impact of implicit racial bias on the probation officer's assessment of the child's conduct and home environment. A motion to reduce detention should thoroughly introduce the fact-finder to alternate narratives about the child and his parent and highlight the parents' capacity to support and supervise the child at home. Defenders might also systemically, or in case-by-case pleadings, challenge the validity of risk assessment instruments that rely on racially-coded criteria - such as the presence or absence of two parents in the home or the arrest record of parents and siblings - to score the child's risk of flight and re-offending. The defender might also incorporate statistical evidence of racial disparity in pre-trial release arguments and urge the judge to consider alternatives to detention that are culturally appropriate for the client.

In pre-trial motions alleging Fourth and Fifth Amendment violations, defenders should encourage judges to consider the unique interplay between race and adolescence in evaluating an officer's purported justification for an encounter and interrogation with a youth.²³⁸ Fourth Amendment pleadings and expert testimony should help judges understand how implicit bias affects the officers' recollection of facts and interpretation of a suspect's behavior.²³⁹ Defenders may also encourage judges to revisit long-held inferences about flight, nervousness, and furtive gestures in a typical police-youth exchange. In cross examination and oral argument, the defender should consider how heightened media attention to police-involved shootings of black males undermines traditional inferences of consciousness of guilt when a child runs from the police. In both the Fourth and Fifth Amendment contexts, defenders might help judges better evaluate seizures, custody, and the voluntariness of a child's consent to search or answer questions in light of modern racial realities.

At trial, defenders should be attentive to the frailties of cross-racial identification and consider introducing implicit bias expert testimony, not only on identification procedures, but also on the impact of implicit racial bias on victims' interpretations of suspect behavior. At the disposition phase, defenders may file mitigation letters that contextualize the behavior of black youth as normal adolescent behavior, much like that of white youth who are not court-involved or deemed less culpable and more amenable to rehabilitation.

²³⁸ For a more thorough discussion of race, adolescence and the Fourth Amendment see Kristin N. Henning, *The Reasonable Black Child: Race, Adolescence, and Reasonable Articulable Suspicion*, forthcoming, on file with author.

²³⁹ Rapping, *supra* note 3, at 1025-26.

V. CONCLUSION

It is daunting to contemplate racial bias among criminal defense attorneys – the very people assigned to protect the accused from state coercion and racial injustice. Yet, the reality is that defenders either actively perpetuate injustice through their own implicit racial bias or passively accept it through color blindness, benign neglect, or their failure to address inequities head on. Juvenile defenders may be even more vulnerable to the negative effects of implicit bias as they practice in a paternalistic system that is easily manipulated by perceptions of race and class. This article introduces defenders to the definition of implicit racial bias and helps them identify bias in their own practice. Fortunately, with adequate training and motivation, defenders can ameliorate their own bias and improve their attorney-client relationships and advocacy on behalf of children. To that end, this article examines several empirically-validated strategies to reduce implicit racial bias and translates them into concrete, practical tools for lawyers representing youth in juvenile and criminal proceedings. Applying the guidance offered herein, lawyers learn to regulate their own emotions and assumptions in their interactions with clients, avoid racially-induced microaggressions in their offices and individual practice, resist harmful narratives about youth and families of color, and become mindful of the impact of race on every decision in the juvenile and criminal justice systems. Most important, this article insists upon loyal, client-directed legal advocacy as one the greatest safeguards against the harmful effects of implicit bias. As defenders confront bias in their own advocacy, hopefully they will also be outraged by the myriad of obvious and subtle racial injustices in the system as a whole and motivated to challenge them head on.