

# **WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS**

National Judicial Education Program  
to Promote Equality for Women and Men in the Courts<sup>\*</sup>

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## Table of Contents

	<u>Page</u>
Acknowledgements.....	v
Limited Permission to Reprint or Adapt Contents .....	x
Reprint Permission for Curriculum Readings .....	xi
How This Curriculum Is Organized .....	xii
How To Use This Curriculum .....	xiii
Suggested Programs .....	xvi
Sample Program Evaluation.....	xviii

## CURRICULUM

### INTRODUCTION: Why a Program on Women of Color in the Courts?

Introduction Text and Directions for Presentation  
Overheads

### UNIT I. Intersectionality, Cognitive Process and the Implications of Stereotypes for Women of Color in the Courts

Curriculum Text and Directions for Presentation  
Overheads & Handouts

#### Readings:

***Pre-Program Primer: Cognitive Process, Stereotyping, Intersectionality and the Implications for the Courts***

*Irwin A. Horowitz and Kenneth S. Borden, "Social Perception: The Construction of Social Reality," Chapter 3 in Social Psychology 87 (1995).*

*Mark Snyder, "Self-Fulfilling Stereotypes" in Race, Class and Gender in the United States 370 (Paula S. Rothenberg ed., 1994).*

*Susan T. Fiske, "Controlling Other People: The Impact of Power on Stereotyping," American*

*Psychologist* 621 (June 1993).

Patricia G. Devine and Steven J. Sherman, *Intuitive Versus Rational Judgment and the Role of Stereotyping in the Human Condition: Kirk or Spock?* @ 3 *Psychological Inquiry* 153 (1992).

Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, @ 83 *California Law Review* 733 (1995).

Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, @ 1989 *The University of Chicago Legal Forum* 139 (1989).

### ***The Intersection of Race and Gender and Its Implications for the Law***

Judge Benjamin Aranda, *Women of Color: The Burdens of Both, The Privileges of Neither*, @ *Judge=s Journal* 29 (Winter 1996).

See also in the Pre-Program Primer, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, @ 1989 *The University of Chicago Legal Forum* 139 (1989).

### ***Findings of the Task Forces on Racial and Ethnic Bias in the Courts Respecting Women of Color***

California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, *Final Report* (1997) (excerpt).

Florida Supreme Court Racial and Ethnic Bias Study Commission, *Special Concern: The Experiences of Minority Women in the Judicial System*, @ in *Where the Injured Fly for Justice* 49 (1991).

### ***Women of Color Attorneys in the Courts and the Profession***

Report of the American Bar Association Multicultural Women Attorneys Network, *The Burdens of Both, The Privileges of Neither* (1994).

### ***Stereotypes About African American Women and Implications for the Courts***

Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, @ 22 *Fordham Urban Law Journal* 1159 (1995).

*Wright v. CTL Distribution*, 650 So. 2d 641 (FL 1995); 679 So. 2d 1233 (FL 1996).

Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, @ in *Critical Race Feminism* 127 (Adrienne K. Wing ed., 1997). The full text of this article is in 104 *Harvard Law Review* 1419 (1991).

## **UNIT II. Controlling the Courtroom and the Courthouse**

### **Curriculum Text and Directions for Presentation**

## Handouts

### Unit III. Women of Color as Victims of Gender-Based Violence

#### Curriculum Text and Directions for Presentation

#### Overheads & Handouts

#### Readings:

##### ***Gender-Based Violence Against Women of Color: Overview***

National Judicial Education Program, *Women of Color as Victims of Gender-Based Violence*, @ from *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts* (1998).

Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, @ 43 *Stanford Law Review* 1241 (1991) (excerpt).

##### ***Domestic Violence***

Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and The Battered Woman=s Syndrome*, @ 1995 *Wisconsin Law Review* 1003.

Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, @ 14 *Boston College Third World Law Journal* 231 (1994).

Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women=s Movement and the Asian American Community*, @ 3 *Asian Law Journal* 151 (1996).

##### ***Domestic Violence and Immigrant Women***

Leslye E. Orloff and Minty Siu Chung, *Overcoming Cultural Barriers* (AYUDA, Washington D.C., 1996).

The Family Violence Prevention Fund, *Issue Paper on Domestic Violence Cases Involving Immigrant and Refugee Communities: The Response of the Courts*, @ December 1991.

##### ***Rape***

Jennifer Wriggins, *Rape, Racism, and the Law*, @ 6 *Harvard Women=s Law Journal* 103 (1983).

Charles R. Lawrence III, *Cringing at Myths of Black Sexuality*, @ 65 *Southern California Law Review* 1357 (March 1992).

##### ***Sexual Harassment***

Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, @ in *Critical Race Feminism* 203 (Adrienne K. Wing, ed., 1997).

Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, @ in *Race-ing Justice, En-*

gendering Power 200 (Toni Morrison ed., 1992).

### **Interpreters**

Monika Batra and Prema Vora, *A Silence! The Court is in Session,*@ The Sakhi Quarterly (Spring 1997).

Maria L. Ontiveros, *A Rosa Lopez, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility,*@ in Critical Race Feminism 269 (Adrienne K. Wing ed., 1997).

*A Judges= Guide to Standards for Interpreted Proceedings,*@ in Court Interpretation: Model Guides for Policy and Practice in the State Courts 124 (1995).

*A Model Code of Professional Responsibility for Interpreters in the Judiciary,*@ in Court Interpretation: Model Guides for Policy and Practice in the State Courts 197 (1995).

## **UNIT IV. Action Planning**

### **Curriculum Text and Directions for Presentation**

#### **Handouts**

## **Unit V. The Cultural Defense and Cultural Evidence**

### **Curriculum Text and Directions for Presentation**

#### **Overheads & Handouts**

#### **Readings:**

Leti Volpp, *A (Mis)identifying Culture: Asian Women and the >Cultural Defense,*=@ 17 Harvard Women=s Law Journal 57 (1994).

Holly Maguigan, *A Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*@ 70 New York University Law Review 36 (1995).

Catherine L. Annas, *A Irreversible Error: The Power and Prejudice of Female Genital Mutilation,*@ 12 Journal of Contemporary Health Law and Policy 325 (1996).

Congresswoman Louise Slaughter, *A Slaughter Releases Report on Female Genital Mutilation:* News Release,@ Washington D.C. (March 23, 1998).

Meg Jones, *A Sex Assault Sentence Draws Charges of Bias,*@ Milwaukee Journal Sentinel, Aug. 29, 1996, at 1

*A Molester's Probation Shocks Kin, @ Associated Press, Aug. 29, 1996, at 3A*

*A Judge Defends Sentence in Sexual Assault Case, @ Associated Press, Sept. 4, 1996, at 5.*

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## How This Curriculum Is Organized

***When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts*** comprises five units:

- X Unit I: Intersectionality, Cognitive Process and the Implications of Stereotypes for Women of Color in the Courts
- X Unit II: Controlling the Courtroom and the Courthouse
- X Unit III: Women of Color as Victims of Gender-Based Violence
- X Unit IV: Action Planning
- X Unit V: Cultural Defenses

Each unit comprises several parts: curriculum, overheads, handouts and readings. This organization is intended to make each unit self-contained in order to promote integration of these materials into a variety of judicial college programs, as explained on the next page.

- X Curriculum  
This is the substantive information to be communicated during the training through expert presentations and exercises.

- X Overheads  
The *overheads* should be shown during the program.

- X Handouts  
The *handouts* are materials to be distributed during the program.

**The overheads and handouts are located in the *Overheads & Handouts* tab in each unit, divided by a colored page.**

- X Readings  
The Readings consist of articles and reports that illuminate the material to be presented during the program. Each unit's Readings has its own table of contents. The Readings should be referred to and cited during the program and given to participants to take home as reference.

The first item in the Unit I Readings is a *Pre-Program Primer on Cognitive Process, Stereotyping, and the Implications for the Courts*. This should be sent out two weeks **before** the program to enable participants to become familiar with these concepts, which will be new to the large majority of readers. At the program, ask participants to insert the Primer at the beginning of the Unit I Readings in order to keep all the resource materials together.

## How To Use This Curriculum

***When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts*** can be utilized in its entirety as a one or more day comprehensive program. Its units and their sub-sections can also be utilized as components of a wide variety of other judicial college courses or as programs in themselves.

### **As a Complete Program:**

This curriculum can be presented in its entirety as a one or more day program for judges or court personnel. Suggested program schedules are on the following pages.

### **Integrating Units or Unit Sections into Other Judicial College Programs:**

Each unit of this curriculum and sections of these units can be integrated into a variety of other judicial college programs.

### **Unit I: Intersectionality, Cognitive Process, and the Implications of Stereotypes for Women of Color in the Courts**

This unit consists of several parts. The segment on **Cognitive Process and Stereotyping** is bedrock material that all judges should know. There is enormous confusion about conscious and unconscious bias and intent. Judges need to understand the automatic mental processes with which we are all hard wired and how to prevent themselves and others from acting on stereotyped thinking. This material can be incorporated into programs on, e.g.,

- \$ Judicial Ethics/Code of Conduct
- \$ Fairness
- X Gender/Race/Ethnic Issues

The material on cognition plus that on the implications of stereotypes about women of color for their treatment in the courts can be integrated into the above listed programs plus those focused on the variety of substantive areas addressed including:

- X Personal Injury Litigation
- X Juvenile Justice
- X Pro Se Litigants
- X Child Support
- X Domestic Violence
- X Courtroom Control



## **Unit II: Controlling the Courtroom and the Courthouse**

This unit raises questions about how judges should relate to and supervise employees under their direct supervision, employees not under their direct supervision, attorneys and jurors. This material can be integrated into programs on:

- \$ The Judge as Employer/ Manager
- \$ Court Personnel
- \$ Trial Management
- \$ Civility
- \$ Fairness
- \$ Voir Dire/Jurors

## **Unit III: Women of Color as Victims of Gender-Based Violence**

This unit covers three areas:

- X Battered Women of Color and Immigrant Women
- X African-American Women=s use of the Battered Woman Syndrome
- X Rape Issues for Women of Color and Immigrant Women.

The suggested one-day program for the curriculum includes only the material on Battered Women of Color and Immigrant Women because of time constraints. A longer program, or a program devoted to violence against women or violence against women of color, can cover all three topics. *There is enough material here to make this a program of its own.* How to present it as such is explained in the unit itself.

This material can also be integrated into programs on:

- \$ Domestic Violence and Battered Women=s Syndrome
- \$ Rape and Sexual Assault
- \$ Voir Dire
- \$ Interpreters
- \$ Race/Ethnic Fairness
- \$ Cultural Defenses

## **Unit IV: Action Planning**

Action Planning is a small group discussion session in which participants discuss and record the actions they will take as a result of the program to ensure equal justice for women of color in the courts. The action plans are collected and compiled into a master plan distributed to all participants for their own use, and a copy retained by the judicial

educator for long-term evaluation.

## **Unit V: Cultural Defenses**

After drafting a complete unit on cultural defenses, we could not include it in our one-day pilots because of time constraints. We provide it here with a variety of options for its use.

- X Include the unit in full in a more than one-day version of the curriculum on women of color in the courts.
- X If you have extended time for the Gender-Based Violence unit, include the expert presentation from the Cultural Defenses unit and have everyone work on the State v. Ortiz case study.
- X Present the Cultural Defenses unit with the unit on Gender-Based Violence as a complete program.
- X Incorporate some or all of the five case studies into other programs on cultural defenses. Whenever that issue is considered, it is important to consider the specific impact on women of color.

## **Programming for Court Personnel**

Although the curriculum as drafted is focused on judges, much of it is appropriate for court personnel as well.

- X The segment on intersectionality, cognitive process and stereotyping is germane to everyone.
- X The courtroom control unit includes scenarios involving inappropriate conduct by court personnel.
- X The violence unit provides information important for court personnel who interact with battered women of color and immigrant women. The case study in that unit could be redrafted to focus on interactions with court personnel rather than judges.
- X The violence unit=s information about interpreters= misconduct vis-a-vis battered immigrant women should be included in training for interpreters and for court personnel who need to monitor interpreters= behavior inside and outside the courtroom.

***When Bias Compounds: Insuring Equal Justice for  
Women of Color in the Courts***

**SUGGESTED ONE-DAY PROGRAM**

8:30 - 9:00	<b>Introduction: Why a Program on Women of Color in the Courts?</b>
9:00 - 12:00 [including break]	<b>Unit I. Intersectionality, Cognitive Process and the Implications of Stereotypes for Women of Color in the Courts</b>
12:00 - 1:00	<b>Lunch</b>
1:00 - 2:00	<b>Unit II. Controlling the Courtroom and the Courthouse</b>
2:00 - 4:00 [including break]	<b>Unit III. Women of Color as Victims of Gender-Based Violence</b>
4:00 - 4:30	<b>Unit IV. Action Planning</b>
4:30 - 4:45	<b>Closing and Evaluation</b>

***When Bias Compounds: Insuring Equal Justice for  
Women of Color in the Courts***

**SUGGESTED ONE AND A HALF-DAY PROGRAM**

**DAY ONE**

9:00 - 9:30	<b>Introduction: Why a Program on Women of Color in the Courts?</b>
9:30 - 12:30 [including break]	<b>Unit I. Intersectionality, Cognitive Process and the Implications of Stereotypes for Women of Color in the Courts</b>
12:30 - 1:30	<b>Lunch</b>
1:30 - 2:30	<b>Unit II. Controlling the Courtroom and the Courthouse</b>
2:30 - 4:30 [including break]	<b>Unit III. Women of Color as Victims of Gender-Based Violence</b>
	<b>Part I: Battered Women of Color and Immigrant Women</b>
4:30 - 4:45	<b>Closing - Day One</b>

**DAY TWO**

9:00 - 10:00	<b>Unit III. Women of Color as Victims of Gender-Based Violence, <i>Continued</i></b>
	<b>Part II: Battered Woman Syndrome and Rape</b>
10:00 - 11:30 [including break]	<b>Unit V. The Cultural Defense and Cultural Evidence</b>
11:30 - 12:00	<b>Unit IV. Action Planning</b>
12:00 - 12:15	<b>Closing and Evaluation</b>

## **Program Evaluation**

The goal of an evaluation is to discover whether participants learned and expect to use what they learned to change their behavior. Following is a sample evaluation that the National Judicial Education Program used at the Georgia pilot program for this curriculum. Adapt the evaluation to include each of the units you present.

You can ask participants to complete an evaluation after each unit while their thoughts are still fresh. In addition, it is useful to conduct an oral debriefing with participants at the end of the program. Also consider a long-term evaluation. A few months after the training, an evaluator should interview by telephone all the judges (or at least a sample) who attended the training to inquire whether they have had any relevant cases since the training and, if so, whether the training informed the way they handled these cases. Utilize the judges' Action Plans in these long-term evaluations.

***WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE  
FOR WOMEN OF COLOR IN THE COURTS***

**INTRODUCTION: WHY A PROGRAM ON WOMEN OF COLOR IN THE COURTS?**

**Learning Objectives:** As a result of this introduction participants will understand the five reasons why a judicial education program about women of color in the courts is necessary for judges of both sexes and all racial and ethnic backgrounds.

**Overview:** A brief introduction to the faculty, the participants, and the reasons why a judicial education program about women of color in the courts is necessary for judges of both sexes and all racial and ethnic backgrounds, including discussion with participants about their reasons for attending.

**Recommended Length:** 20-30 minutes.

**Faculty:** Judge/Moderator.

**Format:** Plenary session.

**Visual Aids:** Overhead: Why We Need a Program on Women of Color in the Courts

Overhead: Is This Program Needed?

## Judge/Moderator's Introduction to the Program

The Judge/Moderator:

- welcomes participants to the program.
- introduces the judicial faculty and facilitators and the expert faculty.
- invites participants to introduce themselves by name and court only.
- outlines the day and the resource book provided to participants.
- assesses participants' perceptions of why this program is necessary.  
*see explanation below.*
- frames the day with an introduction to the five reasons why this program is needed by all judges of both sexes and all races.  
*suggested introductory statement appears on pages 4-5.*

## Assessing the Audience

**Time:** 15 minutes

Begin by asking the participants why they think judges need a program focused on women of color in the courts:

- If this is not a mandatory program, why did they choose this track?
- How serious do they believe the problems for women of color in the courts to be? (*e.g.*, an artificial or made-up issue, of concern but not as much as organizers think, a serious issue).
- Encourage participants to be candid. Acknowledge that this is not easy but that getting participants' comfort/discomfort level with the program out in the open will increase its value. During the post-program debriefing at the two curriculum pilots, participants said they wished they had spoken as freely during the program as they did during the debriefing.
- For those who perceive a problem in any degree, ask what makes them perceive it? Ask for specifics (incidents, cases) but remember that there is time for detailed discussion of these specific examples in Unit I and govern the time.

Be prepared for skeptics as well as members of the choir. Try to establish up front that there are

genuine problems for women of color in the courts that are unique to them. Note the wealth of materials in the resource books and encourage participants to read them after the program and use them as a future resource.

*The point here is not to defend the program either in this introduction or later. It is to assess your audience and let them assess each other.*

It is important to encourage participants to be upfront early on in the program and speak honestly about what they perceive the experiences of women of color in courts to be. After the Georgia pilot, many participants commented that the debriefing session was the most open discussion of the day. Several judges pointed out the need to discuss participants' sensitivities at the beginning of the program to eliminate the fear of offending a colleague. One judge commented, "I can only see through my eyes. I don't know how to undo 62 years of this."

Emphasize that this program can be the beginning of an on-going discussion in which issues of bias can be addressed openly only if participants are willing to speak frankly.



*Show the first overhead behind the Overheads & Handouts tab as you give this introduction.*

### **Suggested Introduction to the Program**

The title for today's program is "*When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts.*"

Why do we need a judicial education program devoted to women of color?

There are five principal reasons:

- First, we need to understand that the confluence of race and gender shapes the lives of women of color, resulting in a type of bias that is more than race or sex alone, and more than race plus sex. Rather, it is a compound bias with geometrically damaging results. Programs focused on gender bias or on race bias do not address this issue, which, as you know from the article in the Pre-Program Primer by Professor Kimberle Crenshaw, is known as "intersectionality."
- Second, as you also know from the readings in your Pre-Program Primer, research shows that every human being's mind automatically creates stereotypes, and that we must be proactive to prevent ourselves and others from acting on them.

*At this point, show the second overhead behind the Overheads & Handouts tab. Adapt this overhead to cite the report(s) germane to your state.*

- Third, the need for such a program has been widely documented. As we will see during our program, numerous national and state studies of the court system as well as specific reported cases document the unique problems confronting women of color in all their roles in the courts.
- Fourth, the changing nature of our state's population makes this issue a critical aspect of access to justice and public confidence in our courts.
- And fifth, without this program we cannot meet our obligations under the Code of Judicial Conduct, which requires us to be fair and to insure that all proceedings are fair.

We will consider each of these reasons in more depth during the first unit of the program.

## **Terminology**

Before we continue the program, let me comment on the use of appropriate and culturally sensitive terminology. Some people are reluctant to discuss issues of race for fear of appearing ignorant or inadvertently offending a person of color by using the “wrong” term. For example, should someone be referred to as “Black,” “African-American,” or “Afro-American?” The key to candid and productive yet respectful discussion is to use the term you believe is most accurate and then verify with the listener that this term is acceptable. A list of terms is included as a handout in your folder. Look for “A Note on Labels” by Justice Charles Z. Smith of the Washington Supreme Court, founding Chair of the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts.

We use the term “people of color” and “women of color” because, although it is not universally accepted, it is more accurate and less offensive than “minority.” For today’s program we will also use the terms African-American, Asian American, White, Latino and Latina and Native American. We recognize, of course, that these are umbrella terms for people of a wide range of cultures.

## **Note Taking**

With respect to notes that you may want to make about the program, speakers will be utilizing a number of overheads in their presentations. These overheads are provided to you in your handouts so that you can take notes on them directly.

**When Bias Compounds:  
Insuring Equal Justice for  
Women of Color in the Courts**

**UNIT I**

**INTERSECTIONALITY, COGNITIVE  
PROCESS AND THE IMPLICATIONS OF  
STEREOTYPES FOR  
WOMEN OF COLOR IN THE COURTS**

**A Model Judicial Education Curriculum  
Developed by the**

**National Judicial Education Program  
to Promote Equality for Women and Men in the Courts\***

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*\*A Project of the NOW Legal Defense and Education Fund (now Legal Momentum)  
in cooperation with the National Association of Women Judges*



## **UNIT I. INTERSECTIONALITY, COGNITIVE PROCESS AND THE IMPLICATIONS OF STEREOTYPES FOR WOMEN OF COLOR IN THE COURTS**

**Learning Objectives:** As a result of this unit, participants will be able to:

1. Understand the concept of intersectionality.
2. Recognize the various stereotypes about communities of color in general, and about women of color specifically.
3. Understand that this stereotyping is an outgrowth of the brain's automatic tendency to categorize things, events and people.
4. Know how to overcome this automatic tendency through controlled processing.
5. Recognize how stereotyped thinking about women of color affects the judicial process, court interactions and court employment.
6. Take effective action to insure women of color equal access to justice and equal participation in the justice system.

**Overview:** This unit provides an in-depth consideration of the five reasons a program on women of color in the courts is necessary for judges of both sexes and all races and ethnic backgrounds. Utilizing large and small group exercises, role plays, lecture and discussion, the unit recaps the Pre-Program Primer material on intersectionality, cognitive process and stereotyping; illustrates how the specific stereotypes about women of color affect their interactions with the court as litigants, complainants, witnesses, defendants, lawyers, judges and court employees and in diverse areas of the law; and explores how judges can meet their Code of Judicial Conduct obligation to provide women of color equal access to justice and equal participation in the justice system.

**Recommended Length:** Three hours including a break.

**Faculty:** Judge/Moderator to open and close the unit and present the information on intersectionality, review the Primer, conduct the exercises and give the lecture;

or

Divide these assignments among the Judge/Moderator and the Judge/Facilitators.

**Format:** A plenary session with role play and exercises.

The two role plays utilize participants as actors. *Choose the actors before the program and give them the scripts so they can present their plays with energy.*

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

**Equipment:** Five easels with flip charts

Marking Pens

**Overheads:**

- Intersectionality Diagram
- Professor Kimberle Crenshaw quotation
- Explanation of Exercise
- Knowledge of Stereotyping
- Summary of Pre-Program Primer [Seven Overheads]
- Racial and Ethnic Composition of the United States, 1990 and 2010
- *Make an overhead with your state's racial and ethnic composition in 1990 and projected for 2010*
- Code of Judicial Conduct. *Make overheads with your state's version of Canons 3(B)(5) and (6) of the ABA Model Code of Judicial Conduct. If your state has not adopted these canons, make an overheard of your relevant canon.*

**Handouts:** Scripts:

- Hiring Committee Role Play
- Voir Dire Role Play - Walker v. Blue Truck

Overheads:

- Intersectionality Diagram
- Professor Kimberle Crenshaw quotation
- Explanation of Exercise
- Knowledge of Stereotyping
- Summary of Pre-Program Primer
- Racial and Ethnic Composition of the United States, 1990 and 2010
- *Make an overhead with your state's racial and ethnic composition in 1990 and projected for 2010*

- Code of Judicial Conduct. *Make overheads with your state's version of Canons 3(B)(5) and (6) of the ABA Model Code of Judicial Conduct. If your state has not adopted these canons, make an overhead of your relevant canon.*

Recording Sheets:

- Recording sheet for responses to Walker v. Blue Truck Role Play
- Recording sheet for small group exercise: *What Steps Can Judges Take to Insure Equal Justice for Women of Color in the Courts.*

Fact Sheets:

- Fact Sheets on Women of Color in the Community and the Courts.

**Readings:** Readings for this unit are at the Readings tab for the unit.

**Structure and Time Frame for Unit I:**

Part One

I.	Intersectionality	15 minutes
II.	Stereotypes Exercise	15 minutes
III.	Cognition and Stereotyping: Recap of Pre-Program Primer and Application of Its Ideas on Controlled Processing	20 minutes
IV.	Hiring Committee Role Play, Discussion	25 minutes
	Break	15 minutes

Part II

V.	Possible panel discussion by women of color judges <i>See note at page 23.</i>	20-30 minutes*
VI.	Documented Need: The Implications of Stereotypes for Women of Color in the Courts	30 minutes
VII.	Why the Courts Must Respond to this Need A. Changing Nature of the Population B. Code of Judicial Conduct	10 minutes
VIII.	What Steps Can Judges Take to Insure Equal Justice for Women of Color in the Courts	50 minutes
	[Voir Dire Role Play- Walker v. Blue Truck	10minutes

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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Small Groups Rule on and Discuss Role Play and	25 minutes
Other Steps Judges Can Take to Minimize the Impact	
of Stereotypes on Women of Color in the Courts	
Report Back	15 minutes]

*\*If you have a panel, adjust time accordingly.*

**I. INTERSECTIONALITY (15 minutes)**

***Note to Judge/Moderator:** Before the program, try to develop additional illustrations of intersectionality. During the discussion in the Introduction to the Program, be alert for examples of incidents/situations that illustrate intersectionality and use them in the following commentary.*

**Judge/Moderator's Introduction to Intersectionality**

*Following is a suggested script for this section.*

We are now going to explore in depth each of the five reasons why a program on women of color in the courts is essential for all judges.

The first reason is that training on race bias or sex bias does not address the unique bias confronting women of color.

*Show the overhead with the diagram of intersectionality. It is in the Overheads tab for this unit.*

A key to understanding the issues we will grapple with today is the term “intersectionality.” As you know from your Pre-Program Primer, this is the term coined by legal theorists to describe the way in which the confluence of race and gender creates an indivisible identity that shapes the lives of women of color, resulting in a type of bias that is more than race or sex bias alone, and more than race plus sex. Rather, as the title of our program states, it is a compound bias with geometrically damaging results.

The paucity of data about women of color is in part explained by the description of African-American women as “[e]xisting within the margins of race and gender discourse and in the empty spaces between[;] it is a location whose very nature resists telling.”<sup>1</sup> This observation comes from Columbia Law Professor Kimberle Crenshaw, considered the premier theorist in the area of intersectionality. In your Primer there is an article by Professor Crenshaw explaining the

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<sup>1</sup>Kimberle Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402, 403 (Toni Morrison, Ed. 1992)



multidimensionality of Black women's experience and how it is not recognized in anti-discrimination law. She explains the concept of intersectionality as it pertains to African-American women:

*Show the overhead with this quotation. It is in the Overheads tab for this unit.*

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women.<sup>2</sup>

In programs about gender or race bias alone, this experience gets lost. As California Superior Court Judge Candace Cooper, herself an African-American woman, explains, of all the superior court judges in California, many of the judges are white women, and many are men of color, but only four are women of color. When the discussion is about women judges, it is about white women, and when the discussion is about minority judges it is about minority men. The unique experiences of women of color judges are never addressed. The implications of the conflicts between antiracist and antisexist discourse that leave women of color out of the debate are also discussed by Professor Crenshaw in an article in the Readings about violence against women of color. We will explore that subject this afternoon.

Our discussions about race and sex often proceed as if only people of color and women have these attributes. When Justice Thurgood Marshall retired from the Supreme Court there was much debate about whether sex or race should ever be factors in choosing a Supreme Court Justice. Some commentators asserted that these factors should never be considered.<sup>3</sup> Others pointed out that for the entire history of the Court, being male and white were absolute prerequisites for appointment. When President Truman asked Chief Justice Minton in 1949 what he thought about the President's intention to appoint Judge Florence Allen to the high court, the Chief consulted his all-male colleagues and reported that they did not want a woman. Judge Allen was not nominated.<sup>4</sup> In 1967 Justice Marshall's nomination occasioned an outpouring of race-based opposition.

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<sup>2</sup>Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 149 (1989). This article is in the Pre-Program Primer.

<sup>3</sup>E.g., Bruce Fein, *Supreme Court Nominees: Should race and gender be factors in choosing justices? No: Don't Play Politics*, 77 A.B.A. J. 39 (Sept. 1991).

<sup>4</sup>E.g., Lynn Hecht Schafran, *Supreme Court Nominees: Should race and gender be factors in choosing justices? Yes: More Than a Symbol*, 77 A.B.A. J. 38 (Sept. 1991).

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

Social science and legal literature repeatedly point out that, as stated in the Fourth Edition of the Handbook of Social Psychology, “given no other information, the word ‘person’ apparently brings to mind a white, heterosexual, able-bodied, youngish man; these are the U.S. cultural default values...”<sup>5</sup> If that sounds extreme to you, consider that the reason air bags are killing women and children is that they were designed for a 170 lb. man. When individuals are identified in the press, you read about a Black astronaut or a woman judge. No one is ever identified as a white astronaut or a male judge. To quote again from the Handbook:

Women have gender, and blacks have race, more than men and whites respectively do. Marked status suggests that people will be categorized according to the ways in which they differ from the default. Thus, black men are more likely and more quickly categorized as black, not male, and white women are rapidly categorized as women, not white.<sup>6</sup>

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<sup>5</sup>Susan Fiske, *Stereotyping, Prejudice and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 366 (D.T. Gilbert, S. T. Fiske, & G. Lindzey eds., 4th ed., 1998).

<sup>6</sup>Id.

White women are no more conscious of their “skin privilege” than are white men. For example, at a 1988 meeting of a group of feminist law professors, the organizers asked all the women present to use two or three words to describe themselves. “None of the white women mentioned their race; all of the women of color did.”<sup>7</sup>

Think about what all of this means for women of color, who are twice removed from the white male norm. Women of color attorneys report that they are repeatedly assumed by judges, court personnel and other lawyers, both men and women, to be court reporters, social workers, relatives of their clients or the parties to the case, despite their obviously professional dress, demeanor and bulging briefcases. This is because women of color lawyers twice violate the status set that says lawyer = white male. They are two deviations from the norm; neither white nor male.

As we think about intersectionality, it is important to remember that we *all* exist at the confluence of race and gender, as well as many other statuses, but for some of us this is less apparent than for others. There has also been a wholesale failure to recognize and honor the indivisibility of these attributes. For example, the President of Radcliffe recently reported that despite the fact that one-third of the Harvard undergraduate student body is people of color, female African-American undergraduates tell her they feel invisible or pressed to define themselves as either African-American or women.<sup>8</sup> For women of color, race and sex are not only immutable characteristics, they are indivisible characteristics.

Our program today challenges us to think hard about our unstated, indeed unconscious, assumptions about norms and neutrality, categories and stereotypes and the lives of women very different from ourselves because of their race and/or sex, plus, often, their economic and immigrant status. We believe that by day’s end your ability to meet the requirements of Canons 3B(5) and (6) will be enhanced by the wealth of information about intersectionality that we will explore together in this program.

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<sup>7</sup>Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STANFORD L. R. 581, 604 (1990).

<sup>8</sup>Remarks by Linda Wilson at the Women and Leadership Conference, John F. Kennedy School of Government, Harvard University, May 30, 1997.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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**II. STEREOTYPES EXERCISE (15 minutes)**

*Have five easels with flip charts at the front of the room. The charts have the headings below. Instructions are included in the suggested script for the Judge/Moderator.*

**EASEL 1**

African-American	African-American Women
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**EASEL 2**

Asian-American	Asian-American Women
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**EASEL 3**

Latino	Latinas
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**EASEL 4**

Native American	Native American Women
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**EASEL 5**

White	White Women
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**Judge/Moderator's Introduction to Stereotypes Exercise**

Explain that the group will now turn to identifying the specific stereotypes about women of color in the community and the courts.

*Show the third and fourth overheads at the Overheads tab to explain the exercise.*

Have all participants stand, give each a marking pen, and tell them to go to each easel and write a stereotype they have heard about the group in general and women in that group in particular. ***Emphasize that this exercise is not about their personal beliefs.*** Research documents that knowledge of stereotypes does not imply prejudice toward a group or implicate personal beliefs. The question is, what stereotypes have they heard about in the community, in the media, in the courts, etc.

Participants may be reluctant to do this exercise. It is important that the small group facilitators and a few other participants be primed to break the ice.

Realize that reactions of participants will vary. Some may feel “stung” by words that apply to a group with which they identify. Others may feel “liberated” to write words they have heard but feel uncomfortable using. Still others may be confused about why they are being asked to do this exercise when many of the words are harmful and will cause pain. At the start of the exercise explain that these are all normal reactions and no one should feel shamed by having or sharing these feelings. All of the varied reactions are ways we as individuals are advancing on the diversity learning model.

After approximately seven minutes have participants take their seats. If the group does not participate or produces very little, you will have to complete the lists. Lists of stereotypes for each group and women within that group developed at the two pilots for this curriculum are on the following pages.

The responses should be instructive on many levels. For example, it is likely that a stereotype listed for the Latino group will be “macho.” This is a word applicable to only half the group—men—but that half is seen as the whole, the group standard.

Conduct a short debriefing. As you review each sheet, ask the group for any additions they may want to make.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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**Stereotypes Lists**

<b><u>African-American</u></b>	<b><u>African-American Women</u></b>
<p>           Lazy            Unintelligent/Ignorant            Immoral            Disabling Culture            Criminal/ Gang bangers/ Dope dealers            Shiftless            Lascivious            Subhuman savages            Sexually predatory            Dishonest            In need of affirmative action            Violent            Poor            Loud            Ghetto dwellers            Watermelon eaters            Fried chicken eaters            Gang members            Monkey/gorilla            Have natural rhythm/ can sing and dance            Good athletes (but not swimmers)            After white women            Angry            Hostile/ aggressive            Have big lips and noses            Always late            Spear-chuckers            Can't understand speech            Crackheads            Limited            Undependable            Strong            Promiscuous            Sense of victimhood            Hate police/ whites            Prison         </p>	<p>           Mammy            Aunt Jemima            Jezebel            Promiscuous            Loose            Welfare Queen            Sapphire            Matriarch            Tragic mulatto            Rude            Nurturing            Unintelligent            Unhealthy/overweight            Too blunt            Disrespectful            Strong            Large families with no dads            Religious            Good cooks            Good singers            Street smart            Lack good jobs            Oversexed            Favor male children         </p>

<u><b>Asian-American</b></u>	<u><b>Asian-American Women</b></u>
<p> “Model minority”  Computer geeks  Overachievers/Ambitious  Enterprising/ Industrious  Nerds  Smart/ Studious  Tourists with cameras  Buck-toothed, squinty-eyed, pony-tailed  Chinks  Gooks  Rice-eaters  Sushi-eaters  Sumo wrestlers  Bruce Lee  Jackie Chan/Martial Arts  Extended support of each other (beyond family)  Sinister  Sly/cunning  Good at math/technology  Polite  Rude/ pushy  Racist/ Discriminatory  Law Abiding  Team work  Poor Drivers  Respect for Elders  Many jobs  Cliques  Wealthy  Inscrutable  Pride/ loss of face  Gamblers  Amoral  Non-athletic  Meditate </p>	<p> Docile  Suzie Wong  Submissive  Dragon Lady  Geisha girl  Thai prostitute  Mail-order brides  Courteous  Passive  Accommodating  Private (secretive)  Can’t Drive  No humor  Quiet  Family-oriented  Not professional  Cliques  Defensive  Good cooks  Short  Have a lot of babies  Non-English speaking  Materialistic/ Status Conscious  Smart/ Educated </p> <p> <u><b>Asian Indian Women</b></u>  Exotic - erotic  Passive - demure  Dutiful - reserved  Manipulative - calculative  Slavish -subservient  Loud - stupid  Inarticulate - incompetent  Dependent - faithful  Conservative - politically unaware  Asexual - frigid </p>

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

<u><b>Latino</b></u>	<u><b>Latinas</b></u>
Macho	Innocent Virgins
Religious	Sexy Vixens
Hot-blooded	Accepts her community's patriarchal structure
Passionate	Docile
Violent-Tempered	Domestic
Uncontrollably Destructive	"Fiery"
Mentally Inferior	Innocent but sensual
Fertile	Sensual
Wetbacks	Sexually Responsive
Mustachioed	Loose
Oily/greasy	Traditional
Migrant farm workers	Self-sacrificing
Refried beans	Religious
Tortillas	Maria
Illegal aliens	Loudly dressed
Gang members	Too much makeup
Go home	Maids
Gorgeous	Sweatshop workers
Latin Lover	Pretty
Great dancers	Aggressive/ hot-tempered
Always drinking/drunks	Material
Lazy	Overweight
Low riders	Mothers
Musical	Lots of children
Under educated	AFDC
Family oriented	Uneducated
Druggies	"Childhood" pregnancy
Laborers	Good cooks
Drop outs	Not speaking English used as an excuse
Scapegoaters	Poor
Poor	Protective of their men
Tattoos	



**National Judicial Education Program to Promote Equality for Women and Men in the Courts**

<u><b>Native American</b></u>	<u><b>Native American Women</b></u>
<p> Alcoholic  Spiritual  Peyote  Extinct  Turquoise jewelry  Mohawks  Feathers  Sports teams  War paint  Massacres (of and by)  Dirty  Unintelligent  Ignorant  Lazy/ no ambition  Rebellious  Respect for nature  Reservation  Deprived  Fishermen  Silent  Angry  Casinos  Poverty stricken  Chauvinistic  Large families  Lack social graces  Good at sports (running)  Unemployed  Uneducated </p>	<p> “Maize”  Pocahontas  Squaw  Placid  Pretty  Dependent  Lazy  Fat  Dirty  Hard working  Artifacts  Welfare  Irresponsible parents/ can’t discipline kids  Passive  Heavy-set  Cultural  Roadside peddlers  Uneducated  Artistic  Powerful </p>

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

<u><b>White</b></u>	<u><b>White Women</b></u>
<p> Industrious  Intelligent  Moral  Knowledgeable  Enabling Culture  Law Abiding/ white color crime  Responsible  Virtuous/Pious  Honkie/ Redneck  Racist  Stiff  Bad dancers  Bland (white bread, mayonnaise)  WASP  Oppressor  Insider  Arrogant/ condescending  Self-centered/ egotistical  Sense of entitlement  Destructive  Wear shorts in the winter  “norm”  Anti-black  Patronizing/ don’t listen  Believe black women to be “exotic”  Courthouse crowd  Establishment  Bald Eagle  Aristocrat  High Employment  Powerful  Wealthy  Spoiled  Athletic  Entrepreneurs/ Self-starters  Country club  Complain they are discriminated against </p>	<p> Helpless  Whiners - nasal vocal quality  Princess  Thin-lipped  Narrow-hipped  Trouble for black men  Privileged  Dress flashy  Bitch  White Bitch  Oppressed oppressor  Arrogant  Stupid  Obsessed with black men  Manipulative  Aggressive  Privileged  Professional  Educated  Housewives  Soccer Moms  Rich volunteers  PTA  Pretentious  Image conscious  Prissy  Weight-obsessed  Bimbo  Sheltered  Fundraising  Barbie-syndrome  Low birth rate </p>

### **III. Cognition and Stereotyping: Recap of Pre-Program Primer and Application of It's Ideas on Controlled Processing** (20 minutes)

*Following is a suggested script for the recap of the Pre-Program Primer. The overheads and handouts are at the tab following the curriculum text. Following the recap lecture there is a short discussion period in which participants apply the controlled processing mechanism described in Overhead Seven.*

The second of the five reasons for today's program is the power of stereotyping and our need to be proactive to prevent or minimize it. The Pre-Program Primer on Cognitive Process, Stereotyping, and the Implications for the Courts you received as an introduction to today's program explored the voluminous and thoroughly documented scientific research about the way our minds work, whether we are female or male and whatever our racial or ethnic background. We now know that everyone's brain is hard-wired to create categories and stereotypes, and that only by conscious effort can we prevent these stereotypes from becoming reflexive judgments that impair fairness. We need to understand this research and its lessons for us as judges. To reinforce this crucial information, let me remind you of the key points from the Primer. The overheads are in your packets as handouts.

[SHOW OVERHEAD ONE] The research shows that stereotyping is part of the normal psychological process of categorization that under pertinent conditions, can lead to inaccurate generalizations about individuals, often transformed into discriminatory behavior.<sup>9</sup>

[SHOW OVERHEAD TWO] Social scientists define categorization as "the process by which we classify items, objects, or concepts, placing them together in groupings on the basis of their similarities with each other." We also categorize people. We are proactive and reactive to them based on the category to which we have assigned them, and on how we expect people in that category to behave.

[SHOW OVERHEAD THREE] The categorization of people leads to stereotypes about them. Stereotypes, both benign and pernicious, evolve to describe categories of people. Stereotypes are a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group.

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<sup>9</sup>Brief of the American Psychological Association in *Price Waterhouse v. Hopkins*, on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, June 18, 1988, at 4.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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[SHOW OVERHEAD FOUR] Descriptive stereotypes tell how most people in the group supposedly behave, what they allegedly prefer, and where their competence supposedly lies. Prescriptive stereotypes tell how certain groups should think, feel, and behave.

A stereotype is controlling simply because it exists as an anchor or starting point in the mind of one person dealing with another. Anyone in the culture, whether actively biased or not, potentially knows the contents of the stereotype, so it becomes an implicit anchor for everyone. Stereotypes are limiting and constitute a form of social control.

[SHOW OVERHEAD FIVE] Social scientists differentiate among stereotyping, prejudice, and discrimination. Stereotyping is cognition or thought about someone from a different group. Prejudice is affect or feelings about such a person. Discrimination is the legally proscribed behavior. Discrimination results not just from prejudice, but also from stereotyping. Apparently decent people, who are not hostile bigots, can discriminate on the basis of stereotypes.

Having categorized someone as coming from a different gender, race, or broad age group than oneself, a decision-maker will be automatically biased by the in-group advantage, which mentally says: “we” are automatically good, and “they” are not so good. This means that people automatically judge their own group as “better.”

[SHOW OVERHEAD SIX] Decision-makers are likely to have a bias to maintain their stereotypes. The stereotype-matching advantage indicates that information that fits one’s stereotypes is automatically processed; it is easy to take in, making stereotypes seem to fit automatically. The stereotype-matching advantage is evident in several respects. First, when information is ambiguous, decision-makers are perceptually biased to fit information into stereotypical expectations, making it easy to think the information supports their stereotypes. Second, decision-makers most efficiently take in stereotypical information, which confirms their stereotypes, especially when they are under time pressure. Third, given the choice, people seek stereotype confirming information.

The category in which an individual is placed can have significant consequences because the stereotypical beliefs associated with the category create the foundation for discriminatory behavior. Whether realized or not, stereotypical beliefs create expectations about a person before that person is encountered and lead to distorted judgments about behavior. Therefore, stereotypes become the basis for faulty reasoning leading to biased feelings and actions, disadvantaging (or advantaging) others not because of who they are or what they have done, but because of the group to which they belong. As a result, people treat members of an in-group preferentially, whether in assigning positive traits or in allocating rewards.

People can be taught to recognize categorization, to resist evaluating individuals in categorical terms, and to break the link between categorization processes and judgmental consequences, thus reducing the likelihood that stereotypical thinking will be transformed into discriminatory action.

[SHOW OVERHEAD SEVEN] Three conditions contribute to the reduction of stereotypical thought and discriminatory action: (1) additional information; (2) increased attention to that information; and (3) motivational incentives that support increased attention and indicate disapproval of stereotyping. None of these conditions, by itself, is sufficient; they must be present in concert.

The key process in using information about potentially stereotyped groups is *not* to attempt to be color-blind or gender-blind, nor to suppress one's knowledge of the person's social category. Research documents that any attempt to suppress knowledge of the person's category typically backfires, causing the stereotype to rebound with double impact. The key instead is a motivation to gather accurate additional information, while not attempting to forget the person's social category. Having an explicit motivation to be accurate reliably decreases stereotypical thinking. When accuracy is the goal, individuals tend to use controlled processing, pay close attention, and set aside preconceptions. Likewise, being motivated to think in a scientific, well-validated way undermines stereotypes.

### **Discussion and Application:**

*Ask the group to apply this information about how to interrupt stereotyped thinking by providing examples of situations in which they have or could use controlled processing. Ask them to describe mental processes they can use to insure that, particularly under stress, they don't fall back into stereotypical thought. Remind participants of the article in the Primer about this likelihood, "Controlling Other People: The Impact of Power on Stereotyping," by Susan Fiske. Remind them that the motivational incentive to make this effort is the Code of Judicial Conduct. Examples of controlled processing include:*

- *Switch the sex, race, age or class of the parties before you (e.g. Judge Sklar's sentencing story described in the Pre-Program Primer at page 7.)*
- *Realize you are dealing with an area where stereotyping can be a problem.*
- *Be able to explain your response and that it is not based on a stereotype.*
- *Question your assumptions.*
- *Obtain more information.*

*Ask participants to talk themselves through their mental process aloud for the benefit of the group. This is a critical part of the program so that participants will know how to apply this material.*

#### **IV. The Hiring Committee Role Play and Discussion (25 minutes)**

##### **Judge/Moderator's Introduction**

Now that we have reviewed the concepts of cognitive process and stereotyping described in the Pre-Program Primer, let's explore how they work in real life. We are going to show you a role-play featuring several fine actors. [name the participant actors] Call it, an episode in the life of a Black, female judge.

##### **The Players:**

Two White Male Judges  
Two White Female Judges  
One Black Female Judge

*Assign these roles and distribute the script (a copy is in the Overheads & Handouts tab) in advance of the program, if possible, so the players do not give a flat reading.*

##### **The Setting:**

The five judges are seated around a table. They all have folders in front of them. They are talking amongst themselves, waiting for the meeting to begin.

##### *White Male Judge A:*

"Let's call this meeting to order. As you all know, we're here to hire a new Chief Administrator for the Administrative Office of the Courts. We've all reviewed the candidates' credentials. We've all participated in all the rounds of interviews. From our preliminary discussions, we've narrowed down the field to two: Mary Catherine Kennedy and Luther Johnson. It's good that our choice is between a white woman and an African-American man. No one can say we stuck to the "old boy" network. Any comments about either candidate?"

##### *Black Female Judge:*

"I have a real problem with Mary Catherine Kennedy. During the course of our panel interviews with her, I noticed that she referred to each of you as "Judge" and your last name, but she consistently referred to me by my first name. I don't know her. More to the point, she doesn't know me. Even if she did, that kind of familiarity is inappropriate in that situation."

*White Male Judge B:*

“Aren’t you being overly sensitive? She’s eminently qualified for the position. Isn’t that the main issue? Besides, maybe she was just trying to be friendly. You’re not exactly the most approachable judge on the bench.

*White Female Judge A:*

“I noticed that she did that, but I’m sure she didn’t mean anything by it. I think you’re making too much of this. Really, Shirley, you’re overreacting.”

*White Female Judge B:*

“I think Mary Kennedy is charming. I was very comfortable with her. I think she’d fit in very well around here.”

*Black Female Judge:*

“Well, if we’re going to have “comfort level” as a qualification, I was much more comfortable with Luther Johnson. He’s also eminently qualified. He’s got strong ties to the court management community. And he seems very capable of dealing with many different kinds of people, on many different levels. I can’t say that about Mary Kennedy. If she disrespects me, in an interview, no less, how will she treat the secretaries who are Black women? Or the Black women attorneys she comes in contact with? Or the various County Commissioners of color?

*White Male Judge A:*

“Is this Johnson fellow a friend of yours?”

*Black Female Judge (wearily):*

“No. And before you even go there, he’s not a relative, either.”

*White Male Judge A:*

“How do the rest of you feel about Mr. Johnson?”

*There’s a brief, awkward silence.*

*White Female Judge A:*

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

“He didn’t relate very well.”

*White Male Judge B:*

“Well, I think we can all agree that Mr. Johnson and Ms. Kennedy are both qualified for the position. But looking at it objectively, I have to give the edge to Ms. Kennedy. Frankly, Shirley, I have to wonder if you can be truly objective in this situation.”

*White Male Judge A:*

“Then it’s settled. I’ll call Mary Kennedy to let her know when she can start.”

**End of Role Play**



## Discussion Guide

### 1. The Judge/Moderator should ask the following questions as a basis for the initial discussion about the role play:

- Q. Judge Shirley complains that during an interview a candidate for Chief Court Administrator who was a stranger to her repeatedly called her by her first name while addressing the other judges by their titles and surnames. Did anyone have the initial reaction that this would never actually happen, that this story was a figment of someone's imagination?

#### *Note to Judge/Moderator:*

*The role play is a reenactment of an incident that actually happened in 1996.*

*At the first pilot test of the curriculum, some judges were adamant that in this day and age, no one would be so obtuse as to insult the person who could give him or her a job. At the second pilot, several judges said they found it hard to believe that anyone would be so foolish and insulting. Point out that this situation did, in fact, happen to a Black female judge in 1996, and that you will be discussing what it reveals about the power of stereotyped thinking.*

*There is an important difference between those who deny the possibility of such an incident and those who dispute whether it is a manifestation of bias. Participants who deny that an incident like this could have occurred cut off discussion. Participants who accept that the incident took place but have differing perspectives on whether bias was the cause or effect leave the door open for discussion.*

- Q. Let's discuss what happened at the meeting? How did Judge Shirley's colleagues deal with her concerns?

The Black female judge was clearly upset that one of the candidates addressed her by her first name, while addressing the other judges by their titles. This was clearly inappropriate behavior by Mary Catherine Kennedy. Moreover, historically in the United States, some whites pointedly addressed people of color, particularly African-Americans, by their first names, even if they were doctors or lawyers, as a way to underscore the social order. As a result, people of color may be especially offended when people they do not know refer to them by their first names rather than by their titles and surnames. Rather than taking her concerns at face value and acknowledging the issue, the judges accused the Black female judge of being overly sensitive, overreacting, and not being objective. The Black female judge is a colleague of the other judges on the committee. What is their/do they have an obligation to recognize the validity of her perceptions and experiences, even though those perceptions and experiences may differ from their own?

*Ask participants what they would have said if they were in this meeting. **Have them role play it and say it in character.** Don't let them just say, "I would be sensitive to Judge Shirley's concerns." Have them use the words they would use to respond to Judge Shirley's initial statement. What would they say to a judge who said this was not important? This is again an opportunity to apply the principles of controlled processing.*

## **2. How this role play reveals the power of stereotypes**

The Judge/Moderator should ask the following questions and try to elicit the following points and information. The Judge/Moderator should take care to keep the discussion focused on the stereotypes about Judge Shirley as a woman of color and how those stereotypes were evidenced by the actions of the various judges.

Q. What stereotypes do the judges in this scene believe about African-American women, and how did those beliefs shape their interaction with the Black female judge?

After the Black female judge detailed the strong points of Luther Johnson, Judge A assumed that Johnson must be a friend of hers, demonstrating his belief in the stereotype that all Black people know each other. He then looked for validation of his opinion from the other judges. His comments undermined Judge Shirley's credibility, and demonstrated a profound lack of respect for the Black female judge.

Judge Shirley's objectivity was called into question and she was presumed to be overreacting and overly sensitive in this situation. People of color commonly face this reaction when commenting on/dealing with situations with racial overtones. African-American attorney/author Gwendolyn M. Parker explains, "If it's something that happens to you over and over again, you're not being sensitive."

Q. How were the judges biased by the in-group advantage?

The white judges questioned Shirley's objectivity when she stated her preference for Luther Johnson, despite the reasons she documented for her preference. In noting their "comfort level" with Mary Catherine Kennedy, the judges noted that she would "fit in very well." The judges did not stop to consider that their preference for her may have come out of their own bias based on the in-group advantage. You will recall from the Pre-Program Primer that the "in-group advantage" means that people automatically judge members of their own group as better than members of other groups. The white judges assumed that Judge Shirley's preference for Luther Johnson was based on the in-group advantage, but did not think about how it may have affected their preference for Mary Catherine Kennedy.

Q. What stereotypes did the interviewee hold about African-American women, particularly with reference to Judge Shirley?

You will recall from the Primer that category-based expectancies lead us to assume that members of a particular category of people will behave in similar and consistent ways. Mary Catherine Kennedy seemed to have a category-based expectancy about judges that precluded the existence of a Black female judge. At the same time, common descriptive stereotypes about Black women do not allow for the authority, intelligence, and competence associated with judges. The Black female judge is a member of two categories which are perceived to be incompatible and mutually exclusive, i.e. Black woman and judge. The interviewee, faced with this dichotomy, automatically took in the information which confirmed her stereotypes, which made it easy for her to “forget” to refer to Shirley by her title. The assumption that a Black woman cannot be a judge was so powerful that it overrode the most basic rule about how to behave during an interview.

### **3. Judge Shirley’s efforts to apply controlled processing**

The point of this vignette is that the white judges, male and female, did not take seriously the concerns of the Black female judge. We have seen the role that the automatic processes of stereotyping and categorization played to bring about this situation. Judge Shirley tried to interrupt the stereotyped thinking of her colleagues. [SHOW OVERHEAD SEVEN] You will recall from the Primer that three conditions contribute to the reduction of stereotypical thought:

- (1) additional information - she pointed out the disrespect she was accorded by the interviewee;
- (2) increased attention to that information - she noted the implications of the interviewee’s attitude should she be hired; and
- (3) motivational incentives that support increased attention and indicate disapproval of stereotyping.

Judge Shirley ran into trouble with the third prong. Rather than acknowledging that the interviewee may have been engaging in stereotyped thinking, and indicating their disapproval of it, the judges chose not to pay attention to their colleague’s concerns, a choice which may have come out of their own stereotyped thinking about Judge Shirley.

Without that third prong - remember that all three conditions must be present in order to reduce stereotyped thinking and discriminatory action - Judge Shirley didn’t stand much of a chance of having her concerns addressed. So the question becomes, how could these judges have indicated their disapproval of stereotyping? How can you as judges create the motivational incentives that support increased attention?

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

These questions are important for all women of color who interact with the justice system, not only those who are judges.

*Ask participants what they think it takes to motivate judges to be attentive to the way they interact with their colleagues. What will make them listen to women of color in any kind of meeting rather than ignoring or just “not hearing” them? Invisibility is a major complaint of women of color, and often for white women and men of color as well.*

**V. Possible panel discussion by women of color (20-30 minutes)**

*At one pilot several of the women of color judges attending said they would have liked a specific time in the program to present their own experiences as an antidote to the denial that the kind of discrimination depicted in the role play is real and current. This preference surprised the authors of the curriculum because at both pilots there were women of color judges present who specifically declined to speak publicly about their experiences because of concern about the presence of colleagues who were the offenders. We used their stories without labeling them as theirs. Thus, we suggest the following:*

*If there will be several women of color judges participating in your program as faculty and attendees, consider contacting them to ask whether they wish to constitute a panel at the program to discuss their own experiences. Whatever their preference with respect to a formal panel, apprise them of the “Judge Shirley” role play and encourage them to speak out during the discussion to make these situations real for their colleagues.*

**VI. Documented Need: Implications of Stereotypes for Women of Color in the Courts (30 minutes)**

*In this segment the judge/moderator discusses the third reason for this program: the research documenting that the stereotypes about women of color are producing disparate treatment in the courts. The judge/moderator:*

- *introduces this research with quotations about the problem generally;*
- *conducts a plenary discussion with the group about specific problem areas; and*
- *presents a short lecture on the specific areas covered in the Discussion Guide, infra, to cover any topics not elicited during the discussion.*

*Following is a suggested script for this section. Augment the information given with research from your state’s task forces on race, ethnic, and gender bias.*

**A. Documented Need: Overview**

The third reason for today's program is the documented need for judicial education about women of color in the courts. Since the early 1980s supreme court task forces across the country have examined the nature and extent of gender, racial and ethnic bias in their own jurisdictions. All have found similar serious problems. A thread running through their reports is that although there has been insufficient research into the particular problems confronting women of color in the courts, what is clear at even the current level of knowledge is that whatever the problems are for white women or for men of color, they are that much more complex for women of color.

In 1994 the American Bar Association Multicultural Women Attorneys Network issued a report based on the findings of the gender, race and ethnic bias task forces, regional conferences in New York and San Francisco and a series of roundtable discussions with women of color attorneys in six geographically diverse cities. The report, which is included in the Readings for this unit, states:

Perhaps the most shocking reports reviewed by the Network involve the disrespect toward multicultural women lawyers in the courts. From judges to court personnel, multicultural women lawyers are treated like inferiors rather than officers of the courts.<sup>10</sup>

*Show participants where this report is and encourage them to read it.*

In 1991 the Special Committee of the State Bar of Georgia on the Involvement of Women and Minorities in the Profession wrote in its Report entitled "The Effect of Gender and Race on the Practice of Law in Georgia,"

The Race and Gender survey results indicate that there are issues that must be addressed before minorities and women are truly afforded the same opportunities as whites and men in the legal profession. Of particular concern is the status of minority women who, differing from the traditional norm in both race and gender, are most likely to encounter and perceive discrimination and most likely to perceive their status in the profession negatively.<sup>11</sup>

In 1997 the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts wrote in its Final Report, "women of color encounter dual barriers of racism and sexism in the justice system and legal profession ... whether as litigant, lawyer, judge, witness, court personnel or law student" and that there should be "programs specifically aimed at relieving and eliminating the

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<sup>10</sup>Report of the American Bar Association Multicultural Women Attorneys Network, THE BURDENS OF BOTH: THE PRIVILEGES OF NEITHER 25 (1994) [hereinafter ABA MWAN REPORT].

<sup>11</sup>Report of the Special Committee of the State Bar of Georgia on the Involvement of Women and Minorities in the Profession, THE EFFECT OF GENDER AND RACE ON THE PRACTICE OF LAW IN GEORGIA 153 (1991).

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

burdens imposed on women of color in all aspects of the legal and justice system.” These statements echoed the recommendations from the 1995 National Conference on Racial and Ethnic Bias in the Courts attended by over 400 state chief justices, judges, court administrators, judicial educators, lawyers and law professors. The concerns expressed at that conference about women of color are discussed in the article by Judge Ben Aranda, “Women of Color: The Burdens of Both, The Privileges of Neither,” in the Readings for this unit. (*Again, show participants where the report is and encourage them to read it.*)

*Add pertinent material from reports from your own state’s gender, race, and ethnic bias task forces and similar studies.*

## **B. Plenary Discussion and Lecture: Problems for Women of Color in Specific Areas**

*This section includes a discussion and a lecture. A Discussion Guide follows these instructions.*

***This is a critical part of the curriculum. If the specific ways in which stereotypes affect women of color in the courts are not detailed, participants may not understand the problem or why they need to deal with it as something apart from race bias or gender bias.***

### *Discussion:*

*Have a flip chart at the front of the room on which a facilitator records the issues raised.*

*Ask participants to share examples of specific cases, court interactions, and court employment situations they have encountered or heard about in which stereotyped thinking about women of color influenced the situation or outcome. The participants should note the specific stereotype illustrated, and how the parties involved were affected by it. The presenter should tie the cases and incidents cited by participants to the research and cases cited in the Discussion Guide, and elaborate on participants’ points. Do not let participants focus only on women of color lawyers and judges. Insist on discussing substantive law issues. If you are presenting the unit on violence at your program, also limit the discussion around domestic violence by pointing out that this will be the focus of an entire unit later in the program.*

*The moderator and facilitators should be prepared to break the ice by offering some examples such as those enumerated in the Discussion Guide on the following pages, in case the group does not readily respond.*

*The Discussion Guide cites research documenting disparate treatment of women of color under the following topic headings:*

- I. How Stereotyped Thinking Affects Women of Color as Victims of Crime or as Plaintiffs
  - A. Victims of Domestic Violence
  - B. Rape Victims
  - C. Poor Plaintiffs
  - D. Implications for Damages Awards
  - E. Lack of Credibility and Value
- II. How Stereotyped Thinking Affects Women of Color as Defendants
  - A. Battered Women Syndrome
  - B. Prostitution
  - C. Juvenile Justice System
- III. How Stereotyped Thinking Affects Women of Color as Mothers in the Court System
- IV. How Stereotyped Thinking Affects Women of Color as Potential Jurors
- V. How Stereotyped Thinking Affects Women of Color as Attorneys
- VI. How Stereotyped Thinking Affects Women of Color as Court Personnel

**Lecture:**

*To the extent these issues are not raised by participants, the judge/moderator should be prepared to present them in a short lecture.*

**Fact Sheets**

After the group discussion, and the short lecture if one is necessary, tell participants that in their packets is a set of Fact Sheets on Women of Color in the Courts and the Community which provides the facts on issues such as welfare and briefly presents a number of areas where stereotypes are damaging to women of color in the courts. These Fact Sheets are included as handouts at the Overheads & Handouts tab for this unit.

## **DISCUSSION GUIDE**

The following discussion guide lists various situations by category: women of color as victims of crime, plaintiffs, defendants, mothers, potential jurors, court personnel and attorneys. The facilitators can also spark discussion by asking such questions as “Does the stereotype of the Latina as a sexy vixen affect a Latina’s interactions with the courts? If so, how?” or “How are victims of domestic violence who are women of color affected by the stereotypes about them and their communities?”

### **Note About Possible Issues and Underlying Assumptions on the Part of Participants**

Be aware of the following possible responses from participants.

Some participants may evidence a certain amount of incredulosity about the scope or even the existence of the problems and issues faced by women of color in the courts. They may express outright disbelief that various examples actually happen. They may proclaim that various anecdotes are “isolated incidents,” attributable to isolated individuals. The moderator should point out that the participants’ failure to take the issues of women of color seriously and at face value is indicative of the larger problem. The moderator should ask the incredulous participants how the various stereotypes about women of color play into their perceptions that the complaints and concerns are exaggerated or trivial.

Some participants may protest that the problems at issue happen to all women, or to all people of color, and are not specific to women of color. The moderator should acknowledge the truth of this protestation, but point out that it begs the question. The moderator should reiterate that for women of color, it is impossible to separate the racism they experience from the sexism they experience; that is the meaning of intersectionality. Point out that even if the problems discussed illustrate “just” sexism or “just” racism, they affect access to justice for the individuals involved, and should still be eradicated.

## **I. How Stereotyped Thinking Affects Women of Color as Victims of Crime or as Plaintiffs**

### **A. Victims of Domestic Violence**

Battered women of color may encounter judges and court personnel who believe minority communities are “naturally” violent, so nothing can or should be done.<sup>12</sup> Manavi, a New Jersey organization that works with battered women from South East Asia, reports a case in which a judge

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<sup>12</sup>Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origins and Gender Differentials*, 14 B. C. THIRD WORLD L. J. 231 (1994).



declined to continue an order of protection granted to a Pakistani woman, saying, “How do we know [the violence] is not part of your culture?”<sup>13</sup> During public hearings on racial and ethnic bias in the state courts, a prominent California attorney testified about judicial attitudes toward African-American and Asian-American victims. She stated that “judges appeared to believe that in the African American community, violence was much more acceptable ‘culturally’ and, therefore, there was not the same seriousness paid to the testimony of African American women.”<sup>14</sup> She further stated “that some judges consider Asian American women to be more submissive than White women, and therefore the domination of the woman by her male partner is expected and culturally accepted, even if it involves violence.”<sup>15</sup>

### ***Implications***

If a judge decides not to grant or continue a restraining order or other form of protection to a woman of color because of his or her perception that violence against her is somehow acceptable, the consequences for her bodily integrity, her state of mind, her socioeconomic status, and possibly her life are obvious and serious. The credibility problems often faced by women of color, and the lack of English language fluency of immigrant women of color, also affect these women’s access to justice. (For further discussion of women of color as victims of domestic violence, see the expert presentation in Unit III: Women of Color as Victims of Gender-Based Violence)

Women of color domestic violence and rape victims whose assailants are men of color - the vast majority of the cases - are often criticized by their own communities for putting their men into the criminal justice system because of its maltreatment of men of color. Only by reforming the system for men of color can the courts achieve safety and fairness for women of color.

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<sup>13</sup>Telephone interview with Dr. Shamita Das Dasgupta, Executive Director, Manavi (June 2, 1997).

<sup>14</sup>FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 140 (1997), citing testimony of Sheila Kuehl, current member of the California Assembly [hereinafter CALIFORNIA REPORT].

<sup>15</sup>*Id.* at 141.

## **B. Rape Victims**

African-American women are stereotyped as being promiscuous and, by extension, unrapeable. They are perceived as being less harmed by sexual assault. Recently in Westchester, N.Y., after an acquittal in a case where a Black woman was raped on the examining table by a white doctor, a juror wrote to the prosecutor, “We thought a Black female like that would be flattered by the attention of a white doctor.”<sup>16</sup> In a case involving the rape of a thirteen-year-old Black girl, a juror argued that “a girl her age from ‘that kind of neighborhood’ probably wasn’t a virgin anyway.”<sup>17</sup>

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<sup>16</sup>Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, NY (April 21, 1992).

<sup>17</sup>Gary LaFree, RAPE AND CRIMINAL JUSTICE 219-220 (1989).

Another indicator is the misuse of the cultural defense to excuse the rape, molestation, and murder of women and girls of color.<sup>18</sup> Sexual assault and kidnapping have been defended as part of a marriage ritual in “marriage-by-capture” cases. Bludgeoning a wife to death after learning of her infidelity was excused as a normal reaction in a more violent culture. (For further discussion of women of color and cultural defenses, see the expert presentation in Unit V: The Cultural Defense and Cultural Evidence.)

### ***Implications***

A study of 331 jurors in Indianapolis rape cases revealed jurors’ adherence to stereotypes about Black women as promiscuous and less harmed by forced sex,<sup>19</sup> resulting in extreme dismissiveness of Black victim’s claims.<sup>20</sup> Even where guilt is found, the injury to rape victims of color may be devalued. A study of sentencing in Dallas, which employs jury sentencing in noncapital crimes, found that while the median sentence for a Black man who raped a white woman was 19 years, the median sentence for a white man who raped a Black woman was 10 years, the median sentence for white/white rape was 5 years, for Latino/Latina rape 2.5 years, and for Black/Black rape 1 year.<sup>21</sup>

In addition, Black rape victims are less likely than their white counterparts to report their assaults, because they are aware, as described above, of the stereotypes that devalue the rape of Black women, and they are aware of the bias inherent in the criminal justice system.<sup>22</sup> (For further discussion of women of color as victims of rape, see the expert presentation in Unit III.)

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<sup>18</sup>E.g., Yxta Maya Murray, *The Battered Woman Syndrome and the Cultural Defense*, 7 FEDERAL SENTENCING REPORTER 197 (1995); Rivera, *supra* note 12, at 251.

<sup>19</sup>Gary LaFree et al., *Jurors’ Response to Victims’ Behavior and Legal Issues in Sexual Assault Trials*, 32 *Soc. PROBS.* 389 (1985).

<sup>20</sup>Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983).

<sup>21</sup>Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1.

<sup>22</sup>Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of*

### **C. Poor Plaintiffs**

A disproportionate number of poor women are women of color; thus a disproportionate number of welfare recipients are women of color. These women face overt bias in their interactions with the courts. An urban male attorney wrote to the New York Task Force on Women in the Courts:

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*Color*, 43 STAN. L. REV. 1241 (1991); Gail Wyatt, "The Sociocultural Context of African American and White American Women's Rape," 48 J. OF SOC. ISSUES 77, 86 (1992).

Most of my clients are Black and Hispanic welfare recipients, often single mothers. It is clear to me that judges and court personnel have a profound lack of respect for these clients. . . manifested by rude comments, clear expressions of dislike. . . [At] the very least, [this behavior] convinces my clients that they cannot expect to find justice in such a courtroom.<sup>23</sup>

The stereotypes about poor women of color as not being hard working and as having children just to get a bigger welfare check are daily hardened by the media, whose “exclusion of the diversity of poor women and the complexity of their experience . . . creates a deviant image perpetuating the concept of individual moral fault and driving legal debate.”<sup>24</sup> These stereotypes affect courts’ views of these women in multiple ways, including the availability of services from administrative agencies and decisions about custody, foster care and abuse and neglect.

The California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts notes in its Final Report that an overwhelming majority of the litigants in family courts appear in propria persona (pro per), without the assistance of counsel. The report continues:

California Assemblywoman Sheila Kuehl noted that 85 percent of the pro pers in Los Angeles are women. While gender and poverty should not affect the family court’s processing of divorces, one witness testified that a ‘divorce just languishes’ when pro pers cannot afford mandatory mediation fees.

. . . Assemblywoman Kuehl described the parties in pro per as ‘primarily women of color’ who ‘were consistently treated with less respect and given insufficient information to carry out the roles that were assigned to them in representing themselves.’<sup>25</sup>

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<sup>23</sup>*Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 122 (1986-1987).

<sup>24</sup>Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation and Debate*, 22 FORDHAM URB. L.J. 1159, 1196 (1995).

<sup>25</sup>CALIFORNIA REPORT, *supra* note 14, at 165-166.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

In addition, the perception that communities of color are by definition poor often means that women of color in divorce actions are not granted alimony,<sup>26</sup> and that women of color are not granted restitution in domestic violence situations because judges and other relevant court personnel presume, with little or no further inquiry, that men of color have no money.<sup>27</sup>

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<sup>26</sup>Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L. J. 2481 (September 1994).

<sup>27</sup>Interview with Jenny Mulgrav, New York Victims' Services Agency (April 1997).

#### **D. Implications for Damages Awards**

The devaluation of women of color, combined with the “blame the victim” mentality toward the poor, can impact findings of comparative negligence and damages awards in civil cases. The Florida case of Wright v. CTL Distribution, Inc. is contained in the Readings for this unit. In this negligence case arising out of an automobile accident, brought by an African-American woman, a juror reported that several members of the jury said they did not want to award anything to the plaintiff because “she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo or the dog track.”<sup>28</sup> Unreported in the case is the fact that the plaintiff was not on welfare, but rather was receiving worker’s compensation at the time of the accident. The stereotypes about Black women are so strong that her being unemployed automatically marked her as being on welfare.

#### **E. Lack of Credibility and Value**

The perception that women of color are not credible or intelligent or competent affects the weight of their testimony as witnesses in their own and others’ cases, their testimony as expert witnesses, and their arguments as attorneys. This perception and the problems it engenders are exacerbated for immigrant women who either do not speak English or speak it with an accent. In addition, women of color in court “are being addressed by first names, terms of endearment (honey, sweetheart, dear) and diminutives (girl, little lady),” while their white male counterparts are routinely addressed by their surnames and titles.<sup>29</sup> This is perceived as particularly disrespectful in the African-American community.

The general devaluation of women of color is evidenced by sentences meted out for convictions of criminal acts against them. Sentencing in rape convictions was discussed above. The death of Latasha Harlins, a 15-year-old Black girl, provides another example. She was shot in the back of the head by a female Korean merchant who had unjustly accused her of stealing a container of orange juice. Her assailant was convicted of voluntary manslaughter and sentenced to 400 hours of community service, a \$500 fine, reimbursement of funeral costs, and 5 years’ probation.<sup>30</sup>

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<sup>28</sup>Wright v. CTL Distribution, Inc., 650 So. 2d 641, 642 (Fla. App. 1995).

<sup>29</sup>ABA MWAN REPORT, *supra* note 10, at 26, citing a summary of the various race and gender bias studies prepared by the National Judicial Education Program to Promote Equality for Women and Men in the Courts.

<sup>30</sup>Wanda Coleman, *Blacks, Immigrants and America: Remembering Latasha*, THE NATION, February 15, 1993, p. 187.

## II. How Stereotyped Thinking Affects Women of Color as Defendants

Stereotypes of women of color, particularly African-American women, as aggressive and hostile adversely affect them as defendants in the court system.

### A. Battered Woman Syndrome

Stereotypes about African-American women directly contradict the images that many hold about battered women as white, blonde, small, meek, and economically dependent on their husbands. In a comprehensive article on this issue, Professor Shelby Moore observes:

These images work against African American women to such an extent that they must struggle to rise above them. If judges and jurors view them as strong and domineering, they are unlikely to believe that African American women suffer psychologically as a result of being battered. Again, they are more likely to be viewed as deserving of, or in some way the cause of, the violence perpetrated against them. These images prevent judges and jurors from viewing African American women in the same way they view the mythical white woman: virtuous and fragile; worthy of being protected and respected.<sup>31</sup>

### B. Prostitution

Perceptions of women of color as promiscuous impact their experience of the justice system. The Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts notes the following statistics:

[A]n estimated 40 percent of all prostitutes are women of color, but 55 percent of those arrested and 85 percent of those who serve time in jail are women of color. These percentages do raise general questions about the perception of ‘deviancy’ when women and not their clients are arrested; they also raise specific questions about the disproportionately large numbers of minority women jailed compared to White women.<sup>32</sup>

The Advisory Committee also cites the following statistics from the Florida Supreme Court Racial and Ethnic Bias Study Commission:

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<sup>31</sup>Shelby A. D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW L.J. 297, 333-334.

<sup>32</sup>CALIFORNIA REPORT, *supra* note 14, at 146.



Nationally, although the number of women in the criminal justice system is much lower than men, the racial disproportions are similar. For women in their twenties, 1 out of every 37 Black women, compared to 1 out of every 100 White women, [is] incarcerated or otherwise under criminal justice control. The corresponding rate for Hispanic women is 1 in 56.<sup>33</sup>

### **C. Juvenile Justice System**

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<sup>33</sup>*Id.* at 147.

The disparate experiences of women of color in the court system as defendants begins in the juvenile justice system. A lack of cultural sensitivity and knowledge among juvenile court personnel can often result in girls of color not being afforded the same presumptions of femininity and innocence that are often extended to white girls. African-American girls may be seen as aggressive or showing a lack of remorse when they act assertively rather than deferentially. Thus, they often receive harsher punishment than girls who act more conventionally feminine. By contrast, Asian-American, Native American, and Latina girls, often taught to show deference to adults, may exhibit subdued conduct that is perceived as evidence of guilt or rudeness.<sup>34</sup>

### **III. How Stereotyped Thinking Affects Women of Color as Mothers in the Court System**

During public hearings on racial and ethnic bias in the California state courts, various individuals raised the concern that people of color are judged through the filter of white, middle-class values.<sup>35</sup> This filter combines with stereotypes about women of color as “bad mothers” to negatively impact outcomes in cases involving allegations of abuse and neglect, and other situations involving these women and their children.

For example, the overwhelming majority of pregnant women prosecuted for exposing their babies to drugs while pregnant are Black.<sup>36</sup> In her article on the punishment of pregnant drug addicts, located in the Readings for this unit, Dorothy E. Roberts notes:

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<sup>34</sup>Girls Inc., *Prevention and Parity: Creating Solutions for Girls in Juvenile Justice* at 20-21 (Summer 1996).

<sup>35</sup>CALIFORNIA REPORT, *supra* note 14, at 161.

<sup>36</sup>Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, in CRITICAL RACE FEMINISM 127 (Adrienne K. Wing, ed., 1997).

A *New England Journal of Medicine* study of pregnant women in Pinellas County [Florida] found that only about 26 percent of those who used drugs were Black. Yet over 90 percent of Florida prosecutions for drug abuse during pregnancy have been brought against Black women. . . .

It is unlikely that any of these individual actors [government officials, hospital staff, prosecutors, legislators] intentionally singled out Black women for punishment based on a conscious devaluation of their motherhood. The disproportionate impact of the prosecutions on poor Black women does not result from such isolated, individualized decisions. Rather, it is a result of two centuries of systematic exclusion of Black women from tangible and intangible benefits enjoyed by white society.<sup>37</sup>

Another result of this systematic exclusion is the forced medical treatment of pregnant women. In 1987, the *New England Journal of Medicine* reported the results of a national survey of obstetricians. The survey showed that twenty-one court orders had been sought for the medical treatment of pregnant women without their consent. Seventeen of the orders were sought against Black, Latina, or Asian women. The court issued orders in eighteen of the twenty-one cases.<sup>38</sup>

Lisa C. Ikemoto describes the “negative stereotypes forming a picture of the bad mother:”

She has little education. Perhaps she does not understand the nature of her refusal to consent. She is unsophisticated, easily influenced by simple religious dogma. She is pregnant because of promiscuity and irresponsibility. She is hostile to authority even though the state has good intentions. She is unreliable. She is ignorant and foreign. She does not know what is best. The cases ascribe these characteristics to the bad mother; this is the subtext, the things that can nearly be said. They make it easier to assume that the woman’s will should be overridden. They also offer moral grounds for intervention. The expressions of anger, frustration, and righteousness in the case reports and opinions strongly evoke the things that can nearly be said. Not stated is that these assumed characteristics are particular to stereotypes of poor women of color. So, what goes unsaid is that she is Black; she is Hispanic; she is Asian; and she is poor.<sup>39</sup>

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<sup>37</sup>*Id.* at 131.

<sup>38</sup>Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, in *CRITICAL RACE FEMINISM* 137, 140 (Adrienne K. Wing, ed., 1997).

<sup>39</sup>*Id.* at 140.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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Karen Aileen Howze, an attorney experienced in abuse and neglect cases in the Family Division of the Superior Court of the District of Columbia, cites several situations in which women of color were disadvantaged due to the ignorance or lack of understanding of their cultural practices and norms on the part of white social workers, attorneys, and other court personnel. One psychologist recommended that an African-American mother should not have physical custody of her daughter because, during an unsupervised visit, the woman applied a chemical to the child's hair. The judge in this case was an African-American woman, who understood that using chemical straighteners on the hair of African-American girls is standard practice in that community and makes grooming easier. Otherwise, the psychologist's conclusion might have led to a result not in the best interests of the child.<sup>40</sup>

***Other Implications***

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<sup>40</sup>Karen Aileen Howze, Esq., *Cultural Context in Abuse and Neglect Practice for Judges and Attorneys*, ABA Center on Children and the Law, 45-46 (1996) [hereinafter "Cultural Context"].

In an article entitled “Self-Fulfilling Stereotypes,” located in the Readings for the Pre-Program Primer, Mark Snyder describes psychological research which indicates that “people treat others in such a way as to bring out behavior that supports stereotypes.”<sup>41</sup> Negative assumptions on the part of court personnel, attorneys and social workers fuel the anger and resistance of women of color. Their anger inhibits their ability to fully participate in the process.<sup>42</sup> It also reinforces stereotypes about certain women of color as hostile, unsympathetic, and undeserving. In addition, parents without resources and parents without education to fight back, who are disproportionately people of color, become resigned to being treated as nonentities in their and their children’s cases.<sup>43</sup>

#### **IV. How Stereotyped Thinking Affects Women of Color as Potential Jurors**

Attorneys’ perceptions about women of color affect whether these women are chosen to sit on juries. An African-American male prosecutor characterized overweight African-American women as “really dangerous to me” and refused to seat three of them as jurors in a criminal case.<sup>44</sup> The same prosecutor considered Black women with braided hair as “radical,” and typically used his peremptory strikes to preclude them from jury panels as well.<sup>45</sup>

In a drug distribution case in New Jersey, the U.S. Attorney’s office struck from the venire an African-American woman who described herself as a postal employee, a college student, a single

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<sup>41</sup>Mark Snyder, *Self-Fulfilling Stereotypes* in RACE, CLASS AND GENDER IN THE UNITED STATES 370, 375 (Paula S. Rothenberg, ed., 1994).

<sup>42</sup>Cultural Context, *supra* note 40 at 2.

<sup>43</sup>*Id.* at 49.

<sup>44</sup>Tanya Schevitz, *Appeals Court Backs Banning of Fat Jurors; Black Attorney’s Challenge of Three Black Women Upheld*, THE SAN FRANCISCO EXAMINER, February 8, 1995, p. A-1.

<sup>45</sup>*Id.*

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

mother of two, and a licensed cosmetologist with tennis and aerobics as hobbies. She lived in rental housing in Newark. She was challenged as a potential juror based on the idea that “it’s a person that may be involved in a drug situation where she lives.”<sup>46</sup> Stereotypes which depict African-Americans as poor, criminal, promiscuous, and living in the ghetto underlie the assumptions upon which this peremptory strike was based.

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<sup>46</sup>U.S. v. Uwaezhoke, 995 F.2d 388 (1993)

### ***Implications***

The issues dealt with in Batson v. Kentucky and in J.E.B. v. Alabama ex rel. T.B. are implicated when women of color are struck from jury panels because of perceptions about them as women of color. Can people of color receive fair trials before juries of their peers if women of color are excluded based on stereotypes about them?

## **V. How Stereotyped Thinking Affects Women of Color As Attorneys**

Since the stereotypical lawyer is presumed to be both white and male, attorneys who are women of color often show up in court or for depositions and are assumed by judges, court personnel, and other lawyers to be the court reporter, the defendant, the defendant's mother, wife, or sister, or a social worker. At the various round-tables held by the American Bar Association Multicultural Women Attorneys Network in preparation for their report entitled The Burdens of Both, The Privileges of Neither, located in the Readings for this unit, numerous women reported having experienced this problem. An African-American woman attorney described the time that a white female judge addressed her white female client, who was dressed in tattered jeans, as "Counsel," even though the attorney wore a suit and carried a briefcase.<sup>47</sup> Another similarly attired woman of color attorney was mistaken for a janitor.<sup>48</sup>

This problem is also documented in findings of the task forces on gender, racial and ethnic bias in the courts. The Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race and Ethnic Bias reported that 1% of white men, 10% of minority men, 9% of white women and 33% of minority women experienced nonrecognition of their attorney status by federal judges.<sup>49</sup> Similarly, 3% of white men, 31% of minority men, 39% of white women and 50% of minority women experienced nonrecognition of their attorney status by opposing counsel.<sup>50</sup> The Final Report of the

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<sup>47</sup>ABA MWAN REPORT, *supra* note 10 at 26.

<sup>48</sup>*Id.*

<sup>49</sup>*Report of the Special Committee on Gender Prepared for the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L. J. 1651, 1743 (1996)

<sup>50</sup>*Id.* at 1743 note 92.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, excerpted in the Readings for this unit, cites the testimony of a former President of the Black Women Lawyers Association:

“‘I’ve also been asked was I the social worker, and although I was a social worker many years ago, I certainly was not in court in that capacity, and my colleagues [White], both female and male, were not asked those same questions.’”<sup>51</sup>

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<sup>51</sup>CALIFORNIA REPORT, *supra* note 14 at 150.



When multicultural women attorneys successfully establish their identity as attorneys, judges and other court personnel often challenge their credibility and assume that they are incompetent. For example, a judge asked an African-American woman attorney with the antitrust division of the U.S. Department of Justice if she “really understood all the economics involved in the case she was handling.”<sup>52</sup> The Working Committees of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts reported that “women minority attorneys in private practice are significantly more likely than their male counterparts to report . . . having their competence challenged (51% and 4%, respectively) or [being] mistaken for a non-attorney (62% and 4%, respectively).”<sup>53</sup> This attitude is evidenced by the widespread disrespect shown toward multicultural women lawyers in the courts. The Multicultural Women Attorneys Network reports that:

The Network reviewed race and gender bias studies commissioned by state supreme courts that examined discriminatory behavior within the court system. Study findings all indicate that multicultural attorneys strongly believe that judicial discretion is usually exercised against them, that gender-biased conduct or racial/ethnic discrimination is exhibited by opposing counsel on a regular basis, and these differences in treatment or attitude have an effect on the outcome of litigation.

For example, the Report of Gender Bias Study of the Massachusetts Courts concludes that multicultural female attorneys are more likely than white women to be subjected to inappropriate sexual comments or touching by court employees. In addition, multicultural women are more likely than any other group of attorneys to be berated by a judge for no apparent reason.<sup>55</sup>

### ***Implications***

In addition to the extra stress these problems place on attorneys preparing and presenting their cases, behavior by judges and court personnel which obviously devalues an attorney who is a woman of color may erode the confidence of a client in his or her attorney. When such behavior occurs in the

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<sup>52</sup>*Id.* at 149.

<sup>53</sup>DRAFT REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC FAIRNESS IN THE COURTS 62 (June 1997).

<sup>55</sup>ABA MWAN REPORT, *supra* note 10, at 25-26.

presence of the jury, it can affect their deliberations; they or the judge may give less weight to perfectly valid and credible arguments made by attorneys who are women of color.

## **VI. How Stereotyped Thinking Affects Women of Color as Court Personnel**

Task forces on racial and ethnic bias in the courts report that women of color are not hired in court administration or by judges in representative numbers when compared with their numbers in the general population. The Florida Supreme Court Racial and Ethnic Bias Study Commission noted that “because of benign neglect, political patronage, or otherwise, the judicial system in general simply has not seriously committed itself to extending opportunities for employment to minority women.”<sup>56</sup> A minority female who applied for a position with a judge in that state related the following incident:

When I arrived at the interview, the judge informed me that I was called because I had an interesting resume and he wanted to meet me. However, he went on to inform me [that] I had no chance of being hired because he always hires persons who are recommended by his buddies from law school.<sup>57</sup>

The Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts expresses similar concerns. In the California court system, women of color are over represented in clerical positions, but “the picture isn’t as bright when you start talking about the number of employees in supervisory, managerial, and executive positions . . .”<sup>58</sup>

### ***Implications***

Judges’ reluctance to hire women of color law clerks keeps them out of positions that are an important entree to the profession. The lack of women of color in policy-making and other positions

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<sup>56</sup>Florida Supreme Court Racial and Ethnic Bias Study Commission, *Special Concern: The Experiences of Minority Women in the Judicial System*, WHERE THE INJURED FLY FOR JUSTICE 49, 52 (1991).

<sup>57</sup>*Id.* at 54-55.

<sup>58</sup>CALIFORNIA REPORT, *supra* note 14, at 154, citing Judge Roger K. Warren, former Presiding Judge of the Sacramento County Superior Court, current President of the National Center for State Courts.

in court systems can exacerbate the feeling of consumers of the system who are also people of color that the system is biased against them and does not exist to meet their needs. In addition, the fact that there are so few women of color, who may be more sensitive to the needs of people of color, in policy-making positions may indicate that the court system in fact does not meet the needs of people of color.

### **End of Discussion Guide**

## **VII. Why the Courts Must Respond to this Need** (10 Minutes)

There are two reasons the courts must respond to the documented need to address women of color issues in the courts: the changing nature of the population and our obligations under the Code of Judicial Conduct.

### **A: Changing Nature of the Population**

*Following is a suggested script for this section. An overhead and a handout showing the demographic breakdown for the United States in 1990 and projected for 2010 are at the Overheads & Handouts for this unit. You will have to create an overhead and a handout showing a similar breakdown for your state.*

The changing nature of our population means that a growing percentage of our population is affected by the stereotypes about women of color that we have been discussing. [*Show population overheads*]. In your packets are handouts which show the demographic breakdowns of the population of the United States and of our state in 1990, and the projected breakdowns for the year 2010. As our population changes, consumer satisfaction with the courts and genuine access to justice require attention to the varying needs of different groups.

Women of color have particular needs, and these needs are sometimes different for women from different communities of color. Today, many court systems are involved in projects to improve those systems from the point of view of access to justice and consumer satisfaction—to make them fairer, more accessible and understandable. In our state [*insert your state projects, e.g. Commission on the Future of the Courts*].

### **B. Code of Judicial Conduct**

*Following is a suggested script. Overheads Ten and Eleven showing ABA Canons 3(B)(5) and (6) are located in the Overheads & Handouts tab for this unit. If your state has adopted these canons, make an overhead specific to your state. If not, make an overhead of your relevant canon.*

The fifth and overarching reason for this program is that without focusing our attention on women of color in the courts we cannot meet our obligations under the Code of Judicial Conduct. Canon 2 of the Code has always directed that “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” But in 1990 the American Bar Association, responding to the findings of supreme court task forces on gender, racial and ethnic bias in the courts throughout the country, amended the Model Code of Judicial Conduct to state explicitly in Canons 3B(5) and (6) that a judge may not manifest bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status

nor permit those under the judge's direction and control to do so. In 199\_ [your state] became one of the 38 states that has adopted these canons to date.<sup>59</sup> [or Our state adopted its version of these canons.]<sup>60</sup>

[SHOW OVERHEADS TEN AND ELEVEN WITH CANONS. THESE ARE CANONS 3(B)(5) AND (6)]

How can we carry out our obligations under these canons if we cannot recognize bias or prejudice in others or in ourselves?

All the data that we have documents that the bias confronting women of color in the courts is widespread but little acknowledged. It is clear that all judges—and I include both men and women and judges from every racial and ethnic background—need to explore these issues fully in order to understand the complexity of the biases facing women of color and how they operate in the courts.

## **VII. What Steps Can Judges Take to Insure Equal Justice for Women of Color in the Courts**

### **Suggested Time Frame:**

Role play of argument in a hypothetical case about voir dire questions, <u>Walker v. Blue Truck</u>	10 minutes
Small groups rule on and discuss the voir dire case and other types of proactive and reactive interventions that are appropriate for judges to take to minimize the impact of stereotypes on women of color in the courts	25 minutes
Report Back	15 minutes

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<sup>59</sup>As of June, 1997.

<sup>60</sup>If your state has not adopted the new canons, draft your text to indicate that the momentum is with the adoption of these canons and show an overhead of the ABA Model canons.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

**Note:** The Report Back is optional. Some people perceive reporting back as an important opportunity to share ideas. Others dislike it. A report back can be a problem at the end of a long program because there is invariably some repetition and participants are eager to leave. If you opt to include a report back, instruct the successive reporters not to repeat anything their predecessors said but only add new ideas. If you have a report back, adjust the time frame accordingly.

*Following is a suggested script.*

Let us now turn to what we as judges can do to prevent and minimize the stereotyping of women of color in the courts in order to insure these women equal justice. We are going to move into small group to discuss this, but first to prime everyone's thinking, we are going to ask you to make a ruling about asking certain types of questions in a voir dire.

Assume this is a jurisdiction in which judges conduct voir dire and invite the attorneys to submit questions for the judge's consideration.

The case is a personal injury suit, Walker v. Blue Truck. The plaintiff is an African American woman on welfare who claims her car was hit by a delivery truck and as a result she sustained serious injuries. Given the make up of the community, the jury pool is largely white and working class.

Plaintiff's attorney has submitted certain questions to the judge, to which the defendant's attorney objects. Please listen to the arguments. The transcript is also in your folders if you want to read along. Then, in your small groups at your tables, discuss how you would rule and why.

In your small groups you are first to rule on Walker v. Blue Truck, then answer the other questions about the case on the worksheet in your folders.

As Part Two of the small group discussion, explore whatever steps you think are appropriate for a judge to take in the courtroom, the courthouse and the wider community to minimize if not eliminate the bias women of color encounter in the courts, in any type of case or context.

Think about the specific types of cases and court interactions we identified as problematic for women of color in the earlier discussion. What can/should a judge do about these kinds of problems.

Record your ruling and your answers on the sheet provided in your folders. [Optional: After 30 minutes we will have a report back and discuss these issues as a group.]

At the end of the exercise we will collect everyone's worksheets, compile them and distribute them to all of you.

**Optional Report Back Instructions:** *In the small group the facilitator appoints a reporter to take notes and make the report back. This can be the person to the facilitator's left to avoid losing time in finding a volunteer. If the judicial educator and judicial faculty prefer, they can also choose the reporters for each group ahead of time, based on who in the group will be most able to quickly and effectively synthesize and present the group's findings.*

### **Role Play: WALKER v. BLUE TRUCK**

**Players:** Judge  
Plaintiff's Attorney  
Defense Attorney

*Assign members of the group other than the facilitators to these roles before or at the start of the program so they can act their parts with energy. Give them the script, which follows the instructions for this exercise.*

*Also give the script to participants in their folders so they can follow along during the role play and refer to it during the exercise.*

*At the conclusion of the role play, Judge/Moderator repeats the directions for the small group discussion, asking participants to remove the worksheet for Walker v. Blue Truck from their folders and make their notes on it.*

### **WALKER v. BLUE TRUCK**

#### **Hearing on an Issue of Voir Dire**

**JUDGE:** Well, Mr./Ms. Plaintiff's Attorney, I see from these papers that you want me to voir dire the jury pool about their attitudes toward Black women on welfare. I also see that the defendant's attorney is objecting strenuously. I'm going to hear from him/her first. Go ahead Mr./Ms. Defense Attorney.

**DEFENSE ATTORNEY:** Your honor, this is not a case about race. It is not a case about welfare. It's a simple, straightforward personal injury case about an alleged car accident. Plaintiff's attorney is trying to play some kind of race card. Perhaps s/he thinks bringing this up will make any jurors who might feel negatively about a Black woman on welfare -- and I don't concede that there are those kind of people in the jury pool -- feel guilty so they'll bend over backward to find my client liable and give the plaintiff big damages. Injecting race into this case is totally uncalled for and I object to the proposed questions.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

---

**JUDGE:** How do you answer that Mr./Ms. Plaintiff's Attorney?

**PLAINTIFF'S ATTORNEY:** Your honor, I am not trying to play the race card. I am trying to ensure that my client has a fair hearing. That simply is not possible without addressing these issues squarely. People have strong feelings about welfare recipients, especially Black women on welfare. There is an enormous stigma on these women. They are seen as lazy, shiftless layabouts who have babies just to get bigger welfare checks. Look at what happened when Justice Clarence Thomas denounced his sister as a welfare queen during his confirmation hearings. The negative stereotypes about Black women on welfare are so strong that no one cared about the fact that she was a woman who normally worked two jobs and who went on welfare briefly in order to nurse the dying aunt who had raised her. Even though numerous commentators and news stories tried to make the truth of her situation clear, she was labeled a welfare drone in the public mind and it stuck.

**DEFENSE ATTORNEY:** Judge, this is ridiculous. The only relevance plaintiff's welfare status has to this case is with respect to damages -- if we ever get to that. If she also works, she gets lost wages, and that relates strictly to what the plaintiff proves her wages are -- not to anyone's attitudes about her.

**PLAINTIFF'S ATTORNEY:** Your honor, this is not ridiculous. If you don't voir dire this jury pool about their attitudes toward Black, female welfare recipients, my client is not going to get a fair hearing. And if we learn afterward that the jury deliberations were tainted, there will be an enormous waste of everyone's time and resources -- including this court's, because we'll have to appeal and then have a retrial.

**JUDGE:** A retrial! That's going pretty far. We haven't even tried this case. What makes you think we might have to retry it?

**PLAINTIFF'S ATTORNEY:** Judge, I look at what is going on around the country and I see that we can't let stereotypes that can undermine fairness simmer without putting them out on the table at the start of a trial. We must eliminate the jurors who can't get past them, and alert all jurors to pay attention to the fact that these stereotypes may influence them, however unwittingly, and however fair these jurors believe they can be.

In 1995 the Florida Court of Appeals had to remand two personal injury cases for retrial because of the jurors' race bias. One case was exactly like the one we are about to try. In Wright v. CTL Distribution Inc., 650 So. 2d 644 (Fla. App. 2 Dist. 1995) the plaintiff was a Black woman on welfare injured when a truck hit her car. The jury found her seventy percent negligent in the accident. After trial a juror reported that during deliberations several jurors said "they did not want to award anything to [the plaintiff] because she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo or the dog track." *Id.* at 642. We may not want to admit it, but this is the way many people think, and we have to deal with it before they become deliberating jurors.



DEFENSE ATTORNEY: Your honor, I, too, want to call the court's attention to a case. In Stanton By Brooks v. Astra Pharmaceutical Products, 718 F. 2d 553 (3rd Cir. 1983) the plaintiff was a Black child from a poor family. In his opening statement the plaintiff's attorney said that he was "concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people." *Id.* at 578-579. The Third Circuit said that this was beyond the realm of appropriate advocacy, and that "'there must be restraints against blatant appeals to bias and prejudice.' Justice must not be based on racial sympathy or animosity." *Id.* at 579.

Plaintiff's proposed voir dire questions are just this kind of blatant appeal. Canons 3 (B) (5) and (6) of the Code of Judicial Conduct state that a judge shall not manifest bias or prejudice based on race and shall require the lawyers appearing before them to refrain from manifesting that kind of prejudice. Plaintiff's attorney is violating that canon with these questions and trying to get you to violate the canons by asking them.

PLAINTIFF'S ATTORNEY: Your honor, let me respond to defendant's comments on both the Stanton case and the Code of Judicial Conduct.

In Stanton. There the lawyer said in his opening argument that they had confronted their concerns about race and class in voir dire and felt that the jurors' answers indicated that they could try the case "not on the basis of passions, or prejudice, or economic basis, but on the facts and the law." *Id.* at 579. So it's apparent that the Stanton trial judge permitted the lawyers to ask on voir dire the questions they felt they needed to ask about race and class, and that there was no objection to this on appeal. That is all we are trying to do here. And I also submit to you that in the fourteen years since Stanton was decided, we have learned a great deal more about how stereotypes about sex and race and class operate in an individual's mind and in the community, and I wonder whether the Third Circuit would today find this opening statement inflammatory or rather a necessary way to get jurors to attend to their possible biases and overcome them.

DEFENSE ATTORNEY: (Interrupting) I think today they would find it even more inflammatory.

PLAINTIFF'S ATTORNEY: (Overriding the interruption) With respect to the Code of Judicial Conduct, the code bars bias not only on the ground of race, but also on the grounds of sex and socioeconomic status. Canon 3 (B) (5) says that a judge may not permit anyone subject to the judge's direction and control to manifest any of these biases. Jurors are persons subject to your direction and control. This case brings together all three of these kinds of bias, which makes it even more imperative that you ask the questions I propose. The jurors need to be alert to their possible bias on grounds other than race. For women of color like my client, their status as women of color creates a compound of race and sex bias. Here this is further compounded by my client's economic status as a welfare recipient. I repeat that the bias against Black women on welfare among white jurors is a problem the courts have clearly had to deal with before, and we must bring it out during voir dire if my client is to have a fair trial. I request again that you ask the voir dire questions I have submitted.

**When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts**  
**Unit I**

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JUDGE: You have both raised some interesting issues and given me much food for thought. I am going to reserve judgment for a day. Court is adjourned.

**End of Role Play**

**Closing:**

At the conclusion of the report back, the Judge/Moderator closes the unit with a succinct review of the five reasons to have a program on women of color (see list in Introduction to the Program) and some highlights from the discussion. **It is essential to formally conclude this and every unit to create a sense of closure.** Don't let the units just trail off or end without it.

Handout

***WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE  
FOR WOMEN OF COLOR IN THE COURTS***

**Voir Dire Ruling: WALKER v. BLUE TRUCK**

Would you voir dire the jury on attitudes toward Black women on welfare as plaintiff requests?

Yes \_\_\_\_\_ No \_\_\_\_\_

What are the reasons for your decision?

Assuming you said Yes, what do you consider appropriate questions?

What kinds of answers would you consider grounds to strike for cause?

Handout

**WHAT STEPS CAN JUDGES TAKE TO INSURE EQUAL JUSTICE FOR WOMEN OF  
COLOR IN THE COURTS?**

*Refer to reverse of this page for a reminder of the topics discussed.*

**IN THE COURTROOM:**

**IN THE COURTHOUSE:**

**IN THE COMMUNITY:**

Handout

**Problems for Women of Color in Specific Areas**

- I. How Stereotyped Thinking Affects Women of Color as Victims of Crime or as Plaintiffs**
  - A. Victims of Domestic Violence**
  - B. Rape Victims**
  - C. Poor Plaintiffs**
  - D. Implications for Damages Awards**
  - E. Lack of Credibility and Value**
- II. How Stereotyped Thinking Affects Women of Color as Defendants**
  - A. Battered Women Syndrome**
  - B. Prostitution**
  - C. Juvenile Justice System**
- III. How Stereotyped Thinking Affects Women of Color as Mothers in the Court System**
- IV. How Stereotyped Thinking Affects Women of Color as Potential Jurors**
- V. How Stereotyped Thinking Affects Women of Color as Attorneys**
- VI. How Stereotyped Thinking Affects Women of Color as Court Personnel**

**When Bias Compounds:**  
**Insuring Equal Justice for**  
**Women of Color in the Courts**

**UNIT II**

**CONTROLLING THE COURTROOM**  
**AND THE COURTHOUSE**

**A Model Judicial Education Curriculum**  
**Developed by the**

**National Judicial Education Program**  
**to Promote Equality for Women and Men in the Courts\***

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*\* A project of the NOW Legal Defense and Education Fund  
in cooperation with the National Association of Women Judges.*



## UNIT II. CONTROLLING THE COURTROOM AND COURTHOUSE

**Learning Objectives:** As a result of this unit, participants will be able to:

1. Recognize how stereotyped thinking about women of color can adversely affect their interactions with the court system as litigants, lawyers, and employees.
2. Take action to prevent and correct inappropriate behavior toward women of color by lawyers, court personnel, and others under the judge's direction and control.

**Overview:** This unit is built around a series of scenarios demonstrating actual courthouse interactions involving women of color. The scenarios are presented by actors or role-played or read by participants. Participants then discuss why the approaches demonstrated adversely affect the women of color involved, and what can be done to prevent or rectify these situations.

*Note: These scenarios are actual incidents or composites of actual incidents reported to the task forces on gender, racial and ethnic bias and the ABA Multicultural Women Attorneys Network. At the pilots some participants perceived that these scenarios were too blatant, but they could not suggest anything more subtle. If you have ideas for more subtle scenarios, feel free to use them and please send a copy to the National Judicial Education Program.*

**Recommended Length:** 60 minutes

**Faculty:** A moderator to introduce the unit and moderate the discussion.

*If the scenarios are presented by actors:*

A judge to take notes on the discussion and help the actors revise the play for the second version. This can be one of the facilitators.

11 actors to play the various roles.

**Format:** A plenary session lecture with scenarios and group discussion.

The moderator introduces the unit, states its objectives, and either introduces the actors or asks participants to role play or read the scenarios.

After the scenarios, the moderator leads a discussion about the problems illustrated. If the program uses actors, the actors then put on the new and improved version based on suggestions made during the discussion.



## Presentation Format for Scenarios

The scenarios can be presented in one of several ways:

- **As a play with actors cast to type and rehearsed beforehand**

In this format the actors present Play 1, “The Wrong Way,” followed by group discussion of the scenes and Play 2, “The Right Way,” based on suggestions made during the discussion. This is the optimal format because casting to type lends a visual reality which enhances the power of each scene, and Play 2, “The Right Way,” models the way these interactions should be handled. If you are presenting the scenarios as a pre-rehearsed play, give both scripts to the actors.

- **As role plays using participants as actors**

In this format it is doubtful that all eleven roles could be filled by participants cast to type. Thus, the roles will have to be assigned to whomever is willing to participate. You can cast deliberately against type and give the players lightweight “sandwich boards” to wear which will identify them. If you are having participants role play the scenarios, give them both scripts.

- **As scripts that participants read to themselves**

This is the format utilized at the two pilots for the curriculum and it was effective in stimulating discussion. If you choose this format, place the script of Play 1, “The Wrong Way” for each scenario in participants’ program packets or binders.

No matter which format you choose, follow these four directions:

1. Tell participants that **these scenarios are based on actual recent events in the courts.** While some of the scenes are composites (i.e. not all the incidents happened to one person at one time), these incidents are real.

At the pilots some judges were put off by these scenarios until they realized they are true stories. Thus, it is critical to state this early and often— some participants simply will not hear it the first time.

2. Present the scenarios and discussion in the following order:

**Scene 1 & Scene 2-** Court Employees: “Korean Intern” and “Black Prospective Law Clerk” followed by discussion.

**Scene 3 & Scene 4-** The Courtroom: “Latina Attorney” and “Latina Attorney and Latina Witness,” followed by discussion.

**Scene 5-** “Voir Dire” followed by discussion.

3. After each scenario ask what the players in the scenario did wrong, why it was inappropriate, and what the players should have done instead. The problem areas to be discussed are presented in bold type in the scenarios in the Instructor’s Manual followed by a discussion guide for each scene.
4. In the discussion following the scenarios about the right way to handle these incidents, require participants to do more than make general statements such as “I would/the judge should talk to her.” Insist that participants role play their responses, actually saying what they would say in that situation. ***This application of general ideas is key.***
5. If you present the scenarios as a play, conclude with a presentation of Play 2, “The Right Way.”

**Equipment:** A flip chart at the front of the room to announce the scene changes.  
Marking Pens

**Handouts:** Scripts of *Play 1, “The Wrong Way”* and *Play 2, “The Right Way”*  
  
Worksheets for each scene for participants’ program packets .

### **Casting and Preparation for the Play:**

Cast: White Male Judge  
White Female Secretary  
Asian, preferably Korean, Female Intern  
Black Female Clerkship Applicant with a braided hairstyle  
Black Male Bailiff or other court personnel  
White Female Bailiff or other court personnel  
Latino Defendant  
Latina Plaintiff who speaks in heavily accented English  
White Male Attorney  
Latina Attorney  
Black Female Attorney

Preparation for the Play:

Optimally this play will be organized before the program. It should be cast and rehearsed in advance for two reasons. First the cast is made up of ten people of both sexes and specific racial and ethnic backgrounds. The Black Female Clerkship Applicant must wear braids. Precisely this cast cannot be found at the last minute. Second, the players are going to present the play twice: first, according to

Play I, “The Wrong Way,” then according to Play 2, “The Right Way,” and the suggestions participants make after watching Play I.

The players must know in advance what is going to happen and be versatile enough to make it work.

It is likely that the audience will suggest changes similar to those in Play 2, but the cast must be able to incorporate anything else that comes up in discussion.

Have a signal for the players so that after the discussion, they can indicate whether they want to launch into Script II, or have two minutes of discussion about changes they will make in response to audience suggestions.

### **Prologue by the Judge/Moderator**

Despite the seriousness of these issues, this unit should be introduced with a light touch to convey that the moderator “knows” that participants will immediately see where the players go wrong. The purpose of this approach is to clearly communicate the problems documented in the various gender/race/ethnic bias task force reports without being overly negative, making the audience defensive, or having them perceive these scenarios as so extreme that they are discredited as aberrational.

The moderator should say the following in his or her own words as an introduction to the play. Be very clear that each scenario is based on a true story:

We wanted to demonstrate to you some of the situations that women of color have to deal with every day in the courtroom and the courthouse, as documented in the reports of the supreme court task force on gender, race and ethnic bias across the country. So we put together some real-life examples to be acted out for you in several scenarios. I repeat, the incidents you will see are drawn from actual events that occurred recently in courts across the country. Some of these scenes are composites—that is, not everything happened at one time—but all these scenarios are drawn from real life events.

As you watch our play, it will become very clear very quickly that the characters don’t behave as well as they should because they haven’t moved beyond their stereotyped thinking.

In your program packets, you have worksheets where you can take notes during each scene. Make suggestions about what the various characters should do differently, or better, or not at all.

**Play One - “The Wrong Way”**

**Scene I - Korean Intern**

**The Players:**

White Male Judge  
Asian, preferably Korean, Female Intern

**The Setting:**

The judge’s chambers. The judge and the intern are talking.

*Intern:*

“I really appreciate the opportunity you’ve given me to intern with you during the school year, Judge. The placement office raves about you - some of the staff have been around since you were a student there.

“Unfortunately, I don’t think I’m going to be able to finish out the semester with you. I’ve been having some problems with the women in the clerk’s office, and it’s affecting my ability to do my job.”

*Judge:*

“You mean Shaneequa (Sha - KNEE - kwa) and Ruth? What kind of problems?”

*Intern (reluctantly):*

“Well, um, they seem to take issue with the fact that I’m Korean.”

*Judge (clearly incredulous):*

“A couple of Black women have a problem with you being a minority? Come on.  
**You must be misinterpreting them.**”

*Intern (still reluctantly):*

“Well, Judge, they’ve asked me why I’ve bothered to go to law school when I’ll just end up working in the family corner market. They’ve asked me if my mother has

shot anyone who looks like them lately. They refer to me as Dragon Lady whenever they see me, and behind my back . . .”

*Judge:*

**“You’re being too sensitive. I know you’re probably used to being accommodating, and not making any waves. But if you’re going to be a lawyer, you have to learn to stand up for yourself.**

“Now, I don’t want to hear any more nonsense about you quitting over this.”

## DISCUSSION GUIDE

The group was asked to take notes during the role play and keep track of the ways the players (a) specifically bought into the various stereotypes about women of color, and (b) were generally insensitive to the needs and perceptions of women of color. After this and the next role play about court employment situations, ask the group members what they saw the judge and others do, and what they think he could have or should have done differently or better. Discuss each scene separately. Try to make sure that each of the following points is elicited.

### Scene I - Korean Intern

What The Judge Did	What The Judge Should Have Done
☞ disbelieved the intern's account	☞ taken seriously the intern's assertions and investigated further if necessary
☞ accused her of being "too sensitive "	☞ not called her names (which is what the court employees were already doing)
☞ bought into the stereotype of the accommodating Asian woman	☞ recognized the fallacy of the stereotype
☞ was willing to allow anti-Asian abuse by court personnel to continue unchallenged	☞ taken steps to address and eliminate any anti-Asian sentiment being expressed by court personnel

**What The Judge Did:**        *disbelieved the intern's account; accused her of being "too sensitive "*

In the face of the intern's assertion that the attitudes of the women in the clerk's office toward her ethnicity were problematic, the Judge said, "Come on. You must be misinterpreting them." When she elaborated on her experiences, the Judge told her she was being too sensitive, and told her not to "be such a baby." The intern, unlike the Judge, has been a woman of color all of her life, and has experienced racist and sexist discriminatory behavior. She knows it when she sees it. The Judge should recognize that the intern's perceptions and experiences may differ from his, but they are just as valid.

**What The Judge Did:**        *bought into the stereotype of the accommodating Asian woman*

The judge assumed that the intern was willing to quit her job rather than stand up to the women in the clerk's office because he assumed that as an Asian woman she was "used to being accommodating, and not making any waves." This assumption reflects stereotyped thinking about the personalities of Asian women. The situation at issue, in which a young, temporary intern must confront two adult, permanent court employees, might make anyone uncomfortable, regardless of their ethnicity or gender.

**What The Judge Did:**        *was willing to allow anti-Asian abuse by court personnel to continue unchallenged*

The Judge told the intern to handle any problems she was having with court personnel on her own. It did not occur to him that if the women in the clerk's office felt free to express their anti-Asian sentiments to other court personnel, they may have expressed the same sentiments to consumers of the court system. In the interest of equal access to justice, the Judge should investigate the intern's assertions, and take steps to address and eliminate any anti-Asian sentiments being expressed by court personnel.

***Other Points to Discuss:***

- Q. What is the judge's obligation regarding the bias of court personnel who are not directly under his or her supervision?
- Q. We previously discussed how stereotypes affect women of color in the courts. Did this scene remind anyone of other cases or court interactions involving Asian women and stereotypes about them? [Again, the facilitator should note the specific stereotype illustrated and how the parties were affected by it.] What could or should the judge have done in those situations?



## Scene II - Black Prospective Law Clerk

### The Players:

White Male Judge

Black Prospective Law Clerk with a neatly-coifed braided hairstyle

White Female Secretary

### The Setting:

The judge's chambers. The judge and the prospective law clerk are talking.

*Applicant:*

"Good afternoon, Judge. How are you today?"

*Judge:*

"Just fine, just fine. Have a seat.

"So, Felicia, I see from your resume that you're the editor of the Georgetown Journal on Fighting Poverty. **That's not the "main" law journal there, is it?"**

*Applicant:*

"No, sir, it isn't, but it is . . ."

*Judge (interrupting her but not looking at her):*

"I also see that you're in the top 15% of your class. **But at a big school like Georgetown, that's not really saying very much, is it?"**

*Applicant says nothing, but is clearly nonplussed.*

*Judge:*

"You got your undergraduate degree from Spelman? **That's a pretty good school, for a Black college. I'll bet being Black helped you get into Georgetown.**"

*Applicant begins to glare at the judge:*

“Having a 4.0 grade point average and LSAT’s in the 97th percentile didn’t hurt, either.”

*Judge:*

“Perhaps. You have to understand, though, that I prefer to have clerks from the Ivy League schools, top 10% of their classes, journal editors . . .”

*Applicant:*

“With all due respect, sir, I happen to know that all of your last three law clerks were local law school graduates, none of whom were editors of any of their school’s journals. One wasn’t even on the staff of a journal.”

*Judge (pauses thoughtfully, then continues):*

**“Well, yes, that’s true, but those boys were the sons of my frat brothers.”**

*Applicant (with subtle sarcasm):*

“I see. Well, thank you so *much* for taking the time to talk to me, Judge. If you change your mind about that whole Ivy League thing, I certainly hope you’ll keep me in mind.”

*She gets up to leave, shaking her head as she goes.*

*Secretary walks past her and over to the Judge:*

“What did you think about the last applicant?”

*Judge:*

**“At first, she seemed to be a really nice girl, but she really turned hostile on me. I don’t know what those people are always so angry about!”**

*Secretary:*

“And did you notice her hair? **Those braids look so unprofessional.**”

**Scene II - Black Prospective Law Clerk**

What The Judge Did	What The Judge Should Have Done
☞ put the interviewee on the defensive about her journal participation and class rank	☞ allowed the interviewee to discuss her qualifications without deprecating them
☞ disparaged her predominantly Black college	☞ allowed the interviewee to discuss her qualifications without deprecating them
☞ challenged her qualifications by assuming she was admitted to law school under “affirmative action” lower standards	☞ assumed she was admitted to law school on her own merits and assessed her abilities based on her grades and writing sample
☞ held her to a different, higher standard for eligibility for the clerkship position	☞ maintained the same standards for every applicant - including sons of friends
☞ practiced nepotism	☞ been an equal opportunity employer; hired outside his circle of friends
☞ bought into the “angry Black woman” stereotype	☞ recognized the fallacy of the stereotype; not provoked the interviewee
☞ allowed and agreed with the secretary’s comment about the woman’s hairstyle	☞ acknowledged that hairstyle, particularly a culturally expressive one, is not necessarily indicative of ability to do the job

**What The Judge Did:** *put the interviewee on the defensive about her journal participation and class rank; disparaged her predominantly Black college; challenged her qualifications by assuming she was admitted to law school under “affirmative action” lower standards*

The Judge disregarded the fact that the interviewee was the editor of a law journal, and instead focused on the fact that the journal she edited was not the “main” journal at her law school. He regarded her class ranking in the top 15% of her class as less than an accomplishment. In addition, he characterized her undergraduate alma mater as “a pretty good school, for a Black college,” and assumed that her skin color was a factor in her admission to law school. These comments and attitudes reflect the Judge’s belief in the descriptive stereotype that Black people are unintelligent. The Judge fit the information he had about the interviewee into his preconceived notions about women of color. The judge should recognize the automatic processing at work in his response to the interviewee, and attempt to consciously control his

reactions to her. This would allow him to discuss her qualifications without deprecating them.

**What The Judge Did:** *held her to a different, higher standard for eligibility for the clerkship position; practiced nepotism*

The Judge stated his preference for “clerks from the Ivy League schools, top 10% of their classes, main journal editors,” even as he acknowledged that none of his last three law clerks - sons of his frat brothers - met any of those qualifications. As discussed during the unit on cognitive processing, the Judge is biased by the in-group advantage. His white male law clerks were in the “we” category, and were automatically perceived as “good,” regardless of their actual qualifications. The Black female interviewee fell into the “they” category, and was automatically perceived as “not so good,” regardless of her actual qualifications. Again, it is important for the Judge to recognize the automatic processing at work, so that he can consciously maintain the same standards for every applicant and become a true equal opportunity employer.

**What The Judge Did:** *bought into the “angry Black woman” stereotype*

The Judge said that the interviewee “really turned hostile on me,” and wondered “what those people are always so angry about!” To the extent that the interviewee was demonstrably angry, she was provoked by the Judge’s behavior towards her. His attribution of her anger to the general attitude of “those people” reflects stereotyped thinking about Black women.

**What The Judge Did:** *allowed and agreed with the secretary’s comment about the woman’s hairstyle*

The Judge agreed with his secretary’s assessment that the interviewee’s “braids look so unprofessional.” The Judge would have done better to acknowledge that, so long as the applicant is well-groomed, hair *style* is not an indicator of ability to do the job. The way the interviewee chooses to groom her hair should not affect her consideration for the position. Braids are a cultural expression for African-American women which should not be held against them.

***Other Points to Discuss:***

- Q. What is the judge’s obligation regarding the bias of court personnel who are directly under his or her supervision?
- Q. This role play involved the stereotype that Black women are less qualified/less capable/ less intelligent than other law students and lawyers. What are other instances in which this stereotype about African-American women crops up in the court system? What can be done

to combat it?

Q. Often, the complaint is made in various arenas that “We’d like to hire more Blacks, but we can’t find any who are qualified.” How does an encounter like the one demonstrated here affect the future applicant pool? What is the obligation of the judge to actively reach out and encourage applications from communities of color?

### Scene III - Latina Attorney

#### The Players:

Black Male Bailiff or other court personnel  
White Female Bailiff or other court personnel  
White Male Attorney  
Latina Female Attorney  
White Male Judge

#### The Setting:

The bailiffs are standing together to the left of the tables in such a way as to represent the access to the tables. They are talking between themselves about the hearing that is about to begin.

*Male Bailiff:*

“What’s going on today?”

*Female Bailiff (badly mispronouncing the names):*

“Milagros Gutierrez v. Esteban Rodriguez. **Or however they pronounce these names. Why should I bother to figure it out? They move here, and they don’t bother to learn our language.**”

The defendant’s white male attorney approaches the bailiffs to get to the defendant’s table. They let him pass with a nod of the head, but without comment. The plaintiff’s Latina attorney then approaches the bailiffs, but they stop her.

*Male Bailiff looks the plaintiff’s attorney up and down:*

“I’m sorry, honey, but family members aren’t allowed past this point. **Why don’t you stay back here and talk to me?**”

*Female Attorney (very coldly, obviously disgusted with him):*

“I am the plaintiff’s attorney.”

*Male Bailiff* (with exaggerated, sarcastic politeness):

“Oh, of course. Excuse me.”

***He makes a big production out of taking her by the arm and escorting her to the plaintiff's table.***

*The female bailiff walks over to the judge's chambers.*

*Female Bailiff:*

“**Jose and Maria** and their attorneys have all arrived, your honor.”

*Judge:*

“Good. Let's get this show on the road.”

*The judge takes his seat behind the bench.*

*Female Attorney:*

“Excuse me, Judge, but I have to be in Judge Abernathy's courtroom in about 45 minutes, so since we're all here, . . .”

*Judge:*

“**Okay, miss, you don't have to be so pushy about it.** Judge Abernathy? Doesn't he have a big commercial fraud case this morning?”

*Female Attorney:*

“My name is Rita Moreno. I also answer to “counselor,” and yes, he does have a commercial fraud case.”

*Judge:*

“**Oh, are you going to watch your boss try the case?**”

*Female Attorney* (obviously disgusted):

“No. I'm trying it. Before we start, I'd like a brief sidebar, Your Honor.”

*She approaches the bench.*

*She points to the male bailiff.*

"I'm having a problem with him, Judge. He doesn't seem to believe that a Latina can be an attorney, and he thinks it's acceptable to put his hands on me."

*Judge:*

**"Well, find a way to handle it, Rita. You're a lawyer. Defend yourself."**



**Scene III - Latina Attorney**

What The Judge Did	What The Judge Should Have Done
☞ allowed the bailiff to disrespect the litigants (by referring to them as “Maria and Jose”)	☞ corrected the bailiff’s attitudes
☞ accused attorney of being “pushy” when she noted her other obligations	☞ politely acknowledged her time constraints
☞ assumed she was incapable of trying a commercial fraud case	☞ assumed she is a capable attorney
☞ allowed the bailiff to disrespect the attorney with inappropriate and unnecessary touching	☞ corrected the bailiffs’ attitudes

**What The Judge Did:** *allowed the bailiff to disrespect the litigants by referring to them as “Jose and Maria;” allowed the bailiff to disrespect the attorney with inappropriate and unnecessary touching*

The Judge allowed to go unchallenged the bailiff’s reference to the litigants as “Jose and Maria,” which are stereotypically Latino names, are not the names of the parties, and are first names. In addition, when the Latina attorney pointed out that the other bailiff “thinks it’s acceptable to put his hands on me” (a problem for women of color attorneys specifically identified in the Report of Gender Bias Study of the Massachusetts Courts), the Judge told her to “find a way to handle it.” The attitudes and behaviors of the bailiffs and the Judge reflect their general devaluation of Latinas and Latinos. The Judge should counteract this devaluation process by pointing out the bailiffs’ attitudes, and insisting that they correct them. In these ways, the Judge can begin to equalize access to justice for the litigants, and equalize the playing field for Latina attorneys.

**What The Judge Did:** *accused attorney of being “pushy” when she noted her other obligations*

Even though attorneys typically have matters before multiple judges, particularly on motion days, the Judge characterized the Latina attorney as “pushy” when she tried to explain her situation to him. His attitude is indicative of a general negative attitude toward assertive behavior in women.

**What The Judge Did:**        *assumed she was incapable of trying a major commercial fraud case*

In response to her comment that she was due in another judge's courtroom for a major commercial fraud case, the Judge asked, "Oh, are you going to watch your boss try the case?" His assumption that she was incapable of trying such a case reflects his belief in the stereotype that Latinas are unintelligent. The judge should recognize the automatic processing at work in his attitude.

***Other Points to Discuss:***

Q. We previously discussed how stereotypes affect women of color in the courts. Did this scene remind anyone of other cases or court interactions involving Latinas and stereotypes about them? [Again, the facilitator should note the specific stereotype illustrated and how the parties were affected by it.] What could or should the judge have done in those situations?

### Scene IV - Latina Attorney and Latina Witness

#### The Players:

Latina Witness  
White Male Attorney  
Latina Female Attorney  
White Male Judge

#### The Setting:

The Latina Witness is on the witness stand, being cross-examined by the White Male Attorney. The Latina Female Attorney is seated at the plaintiff's table. The Judge is on the bench.

*Male Attorney:*

"Now, **Milagros**, did Mr. Brown tell you that you saw the white Ranger at 10:15 or 10:20, or did you tell him?"

*Latina Plaintiff, in heavily accented English:*

"All I said was that it was after 10:00."

*Male Attorney:*

"So, **Millie**, you don't know how long after 10:00, correct?"

*Latina Attorney:*

"Objection, your honor. Please instruct counsel to address Ms. Gutierrez by --"

*Judge:*

**"Overruled."**

*Male Attorney:*

"I'll repeat the question for you, **Millie**. You don't really know how many minutes after 10:00 you claimed to have seen the Ranger, correct?"

*Latina Attorney:*

"Your honor, I object. Counsel has referred to every other witness so far by his title and his last name. My client deserves the same respect."

*Judge:*

"Look, **honey**, I'd appreciate it if you would focus on presenting your case, **and not bother me with these little petty details. Now, your objection is overruled.**"

*Male Attorney:*

"I'll try this one more time, **Millie --**"

*Latina Attorney:*

"Your honor, I will instruct my client not to answer until she is addressed correctly."

*Judge:*

**"If you do that, I'll hold you both in contempt."**

*Latina Attorney says nothing.*

*Male Attorney (exasperated, with a clearly sarcastic tone):*

"So *Ms. Gutierrez*, you don't really know how many minutes after 10:00 you claimed to have seen the Ranger, correct?"

*Latina Witness:*

"No, sir."

*Male Attorney:*

"So Mr. Brown is the one that first suggested 10:15 or 10:20, correct?"

*Latina Witness:*

"If that is what he is saying, fine."

*Male Attorney:*

“So during the conversation you had with Mr. Brown, you would give times and he would give other times, isn’t that right, Millie -- I mean *Ms. Gutierrez?*”

*Latina Witness:*

“If you say so, sir.”

*Male Attorney:*

“Nothing further, your honor.”

### Scene IV - Latina Attorney and Latina Witness

What The Judge Did	What The Judge Should Have Done
☞ interrupted the Latina attorney's objection	☞ allowed her to finish her sentence
☞ referred to the Latina attorney as "honey"	☞ refrained from using a term of endearment to refer to the Latina attorney; referred to her as Counselor or Attorney Moreno
☞ allowed the Male Attorney to address the Latina witness by her first name	☞ insisted that the Male Attorney address all witnesses by their titles and surnames
☞ threatened to hold the Latina attorney and the Latina witness in contempt	☞ regarded the situation with more appropriate perspective

**What The Judge Did:** *interrupted the Latina attorney's objection; referred to the Latina Attorney as "honey;" threatened to hold the Latina Attorney and the Latina witness in contempt*

When the Latina attorney first tried to voice her objection to the way her adversary referred to her client, the Judge overruled her before she could even finish her sentence. The second time she objected, the Judge said, "Look, *honey*, I'd appreciate it if you would focus on presenting your case . . ." Ultimately, the judge threatened to hold her and her client in contempt when she instructed her client not to answer any questions until she was properly addressed. These interactions demonstrate a lack of respect on the Judge's part for the Latina attorney. In addition, his threat to hold her in contempt was out of proportion to the issue at hand, and illustrated the finding in the Report of the Gender Bias Study of the Massachusetts Courts that multicultural women are more likely than any other group of attorneys to be berated by a judge for no apparent reason. The Judge has a responsibility to preside over his courtroom in a more evenhanded manner.

**What The Judge Did:** *allowed the Male attorney to address the Latina witness by her first name*

All the task forces on gender bias in the courts have criticized the inappropriate use of women attorneys' first names and explained why it undermines credibility. For women or color, this form of devaluation is even more troubling.

Historically in the United States, some whites pointedly addressed people of color, particularly

African-Americans, by their first names, even if they were doctors or lawyers, as a way to subtly underscore the social order. As a result, people of color may be especially offended when people they do not know refer to them by their first names rather than by their titles and surnames. In Ex Parte Hamilton, 156 S.2d 926 (Ala. 1963), for example, an African-American female witness was held in contempt of court when she refused to answer questions posed by an attorney who addressed her as “Mary” after she asked him to address her as “Miss Hamilton.” (This case was ultimately reversed by the U.S. Supreme Court, Hamilton v. Alabama, 376 U.S. 650 (1964).)

The Judge has a responsibility to set a professional tone for the proceedings in his courtroom. By addressing all attorneys as “Counselor,” “Attorney,” or by their title and surname, the Judge can demonstrate that respect is due to all attorneys, regardless of their ethnicity or gender. By insisting that all witnesses be addressed by their title and surname, the Judge can demonstrate that respect is due to all witnesses, regardless of their ethnicity or gender.

***Other Points to Discuss:***

- Q. What stereotypes about Latinas are triggered by the accent of the witness?
- Q. How do the witness’ accent and immigrant status affect the judge’s and the jury’s assessment of her credibility?
- Q. How is the witness’s access to justice affected by her non-American cultural background?
- Q. What is the judge’s obligation regarding the bias of attorneys toward other attorneys or toward witnesses?

## **Scene V - Voir Dire**

### **The Players:**

Black Male Judge  
White Male Attorney  
Black Female Attorney  
Black Female Prospective Juror with Braids

### **The Setting:**

The White Male Attorney is seated at the prosecutor's table. The Black Female Attorney is seated at the defendant's table. The Judge is seated on the "bench." The Black Female Prospective Juror is seated in a chair next to the bench on the "witness stand." Voir dire is underway.

*White Male Attorney:*

"Good morning. My name is Fred Rogers. I'm the prosecuting attorney in this case. Have you ever met me or my opposing counsel before?"

*Black Female Juror:*

"No, sir."

*White Male Attorney:*

"Have you ever met the defendant in this case?"

*Black Female Juror:*

"No."

*White Male Attorney:*

"This case involves allegations of the importation and distribution of heroin and cocaine. Have you or anyone you're close to ever had a problem with drugs?"



*Black Female Juror:*

“No.”

*White Male Attorney:*

“I see from the information you provided to the court that you’ve lived at your present residence, an apartment you rent, for five years. You’ve been a postal employee for four years. You’re a single parent of two children. Your hobbies are aerobics and tennis. You have a cosmetology license and a high school diploma, and you go to college at night. Is that about right?”

*Black Female Juror:*

“That pretty much sums it up.”

*White Male Attorney:*

“And what are you studying in college?”

*Black Female Juror:*

“I plan to be a pre-law major.”

*White Male Attorney:*

“So this must be very interesting and exciting for you, since you have an interest in the law and lawyers.”

*Black Female Juror:*

“Definitely. I may want to be a litigator one day, so it would be fascinating to see a trial from start to finish.”

*White Male Attorney:*

“So you must be particularly excited about seeing my opposing counsel in action. **You probably admire and identify with her. Will that keep you from objectively analyzing the evidence presented by both sides in this case?**”

*Black Female Attorney stands up, hands on her hips:*

“Objection, your Honor. That question is offensive and demeaning to this potential juror. There have been any number of potential jurors in the pool who look like Mr. Rogers, and he certainly wasn’t concerned about them overidentifying with him.”

*Black Male Judge:*

“She has a point, **Fred**. I’m going to sustain the objection. **But, Geneva, I wish you’d be a little less aggressive with your objections. When you put your hands on your hips that way, you look just like my ex-wife.**”

Black Female Attorney sits down, rolling her eyes at the judge.

*White Male Attorney:*

“In any event, I request that this juror be excused.”

*Black Male Judge:*

“All right. (To the prospective juror:) Thank you very much.”

*Black Female Attorney stands up, puts her hands on her hips, then self-consciously drops them to her sides, then folds them in front of her:*

“I want to be heard at sidebar, if your Honor please.”

*Black Male Judge:*

“All right.”

The two attorneys approach the bench.

*Black Female Attorney:*

“Your Honor, this is obviously racial. People sat in that seat time and again. Everyone was approved. The moment a Black person sits down there is a targeted thrust at that particular person. I realize that it’s peremptory, but the Supreme Court ruled that if there is an indication of racial selectivity, that is illegal and is to be prohibited. That was as clear as a bell.”

*Black Male Judge:*

“**Fred**, what was the basis for the challenge?”

*White Male Attorney:*

“I challenged her because it’s a general policy. She was a postal employee, and we usually don’t like to have postal employees on the jury. It has nothing to do with anything racial.”

*Black Female Attorney:*

“Judge, I’ve tried cases in this courthouse for a long time. If it’s a policy to challenge postal workers, it’s a brand new policy. As a matter of fact, the practical approach has been that these people favor the federal government because they are employed by them. But to say that there is a policy to challenge postal employees . . .

*Black Male Judge:*

“Is that what you’re saying, **Fred**?”

*White Male Attorney:*

“Well, no, it’s not a policy *per se*.”

*Black Female Attorney:*

“I’d like to have what he said read back.”

*Black Male Judge:*

“No, that won’t be necessary. **Fred**?”

*White Male Attorney:*

“We have a Black juror that has been on from the initial panel. Nobody challenged her.”

*Black Male Judge:*

“I want to know why you challenged this particular juror.”

*White Male Attorney:*

“This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases. It is a person that is a single parent, it’s also a person that rents, **it’s a person that may be involved in a drug situation where she lives. And, frankly, I’ve always regarded braided hair as somewhat radical.**

“There is a lot going to this other than the fact that she is Black, and there is a Black juror on that nobody touched.”

*Black Female Attorney:*

“That’s the point.”

*Black Male Judge:*

**“I feel the same way about those braids. I’m going to accept the explanation.”**

*Black Female Attorney:*

“But, Judge, I challenge the concept that postal workers -- ”

*Black Male Judge:*

“Other reasons were given. We’ll stand on the record.”

*Black Female Attorney:*

“There were no other reasons. The neighborhood? Her hairstyle?”

*Black Male Judge:*

“The record will speak for itself.”

*Black Female Attorney:*

“Yes, it will, and I want to go on the record objecting and asking for a mistrial based upon a deliberate use of a prejudice and racial challenge.”

*Black Male Judge:*

“Motion denied.”

**Scene V - Voir Dire**

What The Judge Did	What The Judge Should Have Done
☞ addressed both attorneys by their first names	☞ addressed both attorneys by the proper form of address
☞ bought into the stereotype of the overly aggressive Black woman	☞ recognized the fallacy of the stereotype
☞ compared the Black Female Attorney to his ex-wife	☞ ruled on her objection with no editorial comments about her posture as she made it
☞ accepted the White Male Attorney's assumption that a Black single mother who rents her apartment lives in a drug-infested neighborhood	☞ pointed out the fallacy of the stereotype, and recognized the racial undertones of using the assumption as the basis for a peremptory challenge
☞ allowed and agreed with the White Male Attorney's comment about the juror's hairstyle	☞ recognized the racial undertones of using assumptions about the hairstyle as the basis for a peremptory challenge
☞ accepted pretextual explanations for a racially-motivated peremptory challenge	☞ probed further for valid reasons for the challenge, or sustained opposing counsel's objection to it

**What The Judge Did:** *addressed both attorneys by their first names*

The Judge has a responsibility to set a professional tone for the proceedings in his courtroom. By addressing all attorneys as "Counselor," "Attorney," or by their title and surname, the Judge can demonstrate that respect is due to all attorneys, regardless of their ethnicity or gender.

**What The Judge Did:** *bought into the stereotype of the overly aggressive Black woman; compared the Black Female Attorney to his ex-wife*

The Judge asked the Black Female Attorney to be "a little less aggressive" in forming her objections. By comparing the Black Female Attorney when she raised her voice and stood up with her hands on her hips to his ex-wife, he reinforced a common

stereotype about African-American women. His attitude is indicative of a general negative attitude toward assertive behavior in women.

**What The Judge Did:** *accepted the White Male Attorney's assumptions that a Black single mother who rents her apartment lives in a drug-infested neighborhood; allowed and agreed with the White Male Attorney's comment about the juror's hairstyle; accepted pretextual explanations for a racially-motivated peremptory challenge*

The White Male Attorney knew from the juror's responses to the questionnaire that she had lived in her apartment with her two children for five years. From little more information than this, and even though she specified that neither she nor anyone she was close to had ever had a problem with drugs, the White Male Attorney assumed that the juror "may be involved in a drug situation where she lives." Would he have made the same assumption about a white apartment-dwelling single mother?

In addition, the White Male Attorney noted that he "regarded braided hair as somewhat radical," a statement with which the Judge agreed. A hairstyle does not automatically telegraph the wearer's political leanings. Braided hairstyles are worn almost exclusively by Black women. By targeting braid-wearers for peremptory strikes, the attorney was targeting Black women. The Judge should have recognized and pointed out the racial undertones underlying these assumptions, and probed further for valid, non-pretextual reasons for the peremptory challenge, or sustained opposing counsel's objection to it.

### **End of Discussion Guide**

## **Play Two - "The Right Way"**

### **Scene I - Korean Intern**

#### **The Players:**

White Male Judge  
White Female Secretary  
Asian Female Intern  
Black Female Clerkship Applicant

#### **The Setting:**

The judge's chambers. The judge and the intern are sitting in the chairs and talking.

*Intern:*

"I really appreciate the opportunity you've given me to intern with you during the school year, Judge. The placement office raves about you - some of the staff have been around since you were a student there.

"Unfortunately, I don't think I'm going to be able to finish out the semester with you. I've been having some problems with the women in the clerk's office, and it's affecting my ability to do my job."

*Judge:*

"You mean Shaneequa and Habiba? What kind of problems?"

*Intern (reluctantly):*

"Well, um, they seem to take issue with the fact that I'm Korean."

*Judge (clearly concerned):*

"A couple of Black women have a problem with you being a person of color? What kinds of experiences have you had with them?"

*Intern (still reluctantly):*

"Well, Judge, they've asked me why I've bothered to go to law school when I'll just end up working in the family corner market, and if my mother has shot anyone who

looks like them lately. They call me Dragon Lady whenever they see me, unless they're calling me Slant Eyes . . ."

*Judge:*

"These kinds of comments are completely unacceptable, not to mention rude and uncalled for. I'll get their supervisor on the phone and talk to him about this.

"I understand how upsetting this must be for you, but I'd hate to see you leave us over something like this."

*Secretary:*

"Judge, your 2:00 interview is here."

*Judge:*

"Send her in, Sally."

*(Then to intern):*

"Let's see if we can work this out before you make any final decisions."

*Intern:*

"Okay. Thanks for your help, Judge."

*The intern gets up and leaves. The Judge picks up a folder (off the floor) containing the resume and references of the applicant.*



## **Scene II -Black Prospective Law Clerk**

A Black woman with neatly-coifed braids pulled back into a pony-tail walks over, shakes the Judge's hand, and sits down. They exchange pleasantries.

*Applicant:*

"Good afternoon, Judge. How are you today?"

*Judge:*

"Just fine, just fine. Have a seat.

"So, Miss Connors, I see from your resume that you're the editor of the Georgetown Journal on Fighting Poverty. I also see that you're in the top 15% of your class."

*Applicant:*

"Yes, sir. Georgetown is a competitive school, and I've worked very hard to keep my grades up. I chose to focus my attention on the Georgetown Journal on Fighting Poverty, rather than the numerous other journals at Georgetown, because it deals with issues that are important to me."

*Judge (nodding approvingly):*

"And you got your undergraduate degree from Spelman. I'm impressed with your academic credentials, Miss Connors, as well as your references. Please leave a writing sample with my secretary. We'll let you know when we've made a decision."

*Applicant:*

"I'll do that. Well, thank you *so much* for taking the time to talk to me, Judge. I hope to hear from you soon."

*She gets up to leave.*

*Secretary walks past her and over to the Judge:*

"What did you think about the last applicant?"

*Judge:*

“She looks good on paper, and she presents herself very well. She’s a definite contender for the clerkship position.”

*Secretary:*

“But what about her hair? Those braids look so unprofessional.”

*Judge:*

“Her hair has nothing to do with her ability to do the job, Sally. If she can think analytically, and write clearly and concisely, then I’ll consider her for the position.”

**Scene III - Latina Attorney****The Players:**

Black Male Bailiff or other court personnel  
Black Female Bailiff or other court personnel  
Latino Defendant  
Latina Plaintiff who speaks in heavily accented English  
White Male Attorney  
Latina Female Attorney  
White Male Judge

**The Setting:**

The bailiffs are standing together to the left of the tables in such a way as to represent the access to the tables. They are talking between themselves about the hearing that is about to begin. The Defendant is seated at one table, and the Plaintiff at another.

*Female Bailiff:*

“What’s going on today?”

*Male Bailiff:*

“Milagros Gutierrez v. Esteban Rodriguez. Remember what the judge said about respecting her attorney.”

*The defendant’s white male attorney approaches the bailiffs to get to the defendant’s table. They let him pass without comment. The plaintiff’s attorney then approaches the bailiffs. They let her pass without comment.*

*She goes and sits with the plaintiff. The female bailiff walks over to the judge’s chambers.*

*Female Bailiff:*

“Jose and Maria and their attorneys have all arrived, your honor.”

*Judge:*

“If I’m not mistaken, the parties first names are Milagros and Esteban. All Latinas are not named Maria, and all Latino men are not named Jose. Do I make myself clear?”

*Female Bailiff:*

“Yes, sir.”

*The judge takes his seat behind the bench.*

*Judge (to Female Attorney):*

“Good morning, Ms. Moreno. How are you?”

*Female Attorney:*

“Very well, thank you, sir .”

*Judge:*

“And you, Mr. Rogers?”

*Male Attorney:*

“Just fine, Judge.”

*Female Attorney:*

“Judge, I have to be in Judge Abernathy’s courtroom in about 45 minutes, so if it’s at all possible . . .”

*Judge:*

“I’ll do what I can to move this along.”

**Scene IV - Latina Attorney and Latina Witness**

The moderator/facilitator explains to the group that Scene IV takes place the following day. The trial is underway, and the defense attorney is about to begin cross-examining the plaintiff.

*Judge:*

"Before we begin, I want to reiterate what I said at the beginning of the trial:

"All individuals are to be addressed and referred to by their titles and surnames. The title for a woman who is not an attorney, and who does not have a title such as professor or doctor, is "Ms." unless she specifically requests otherwise. Lawyers will be addressed and referred to as Attorney or Counselor.

"Your witness, Mr. Rogers."

*Male Attorney:*

"Now, Miss, um, Ms. Gut-, um, Goot . . . Do you mind if I call you Milagros? Or how about Millie for short?"

*Judge:*

"You mean Ms. Gutierrez, don't you, Mr. Rogers? Even if the witness doesn't mind, I do."

*Male Attorney:*

"Sorry, your honor. Ms. Gutierrez, did Mr. Brown tell you that you saw the white Ranger at 10:15 or 10:20, or did you tell him?"

*Latina Witness:*

"All I said was that it was after 10:00."

*Male Attorney:*

"So you don't know how long after 10:00, correct?"

*Latina Witness:*

"No, sir."

*Male Attorney:*

"So Mr. Brown is the one that first suggested 10:15 or 10:20, correct?"

*Latina Witness:*

"If that is what he is saying, fine."

*Male Attorney:*

"So during the conversation you had with Mr. Brown, you would give times and he would give other times, isn't that right, Ms. Gutierrez?"

*Latina Witness:*

"If you say so, sir."

*Male Attorney:*

"Nothing further, your honor."

### **Scene V - Voir Dire**

#### **The Players:**

Black Male Judge  
White Male Attorney  
Black Female Attorney  
Black Female Prospective Juror with Braids

#### **The Setting:**

The white male attorney is seated at the prosecutor's table. The Black female attorney is seated at the defendant's table. The judge is seated on the "bench." The prospective juror is seated in a chair next to the bench on the "witness stand." Voir dire is underway.

*White Male Attorney:*

"Good morning. My name is Fred Rogers. I'm the prosecuting attorney in this case. Have you ever met me or my opposing counsel before?"

*Black Female Juror:*

"No, sir."

*White Male Attorney:*

"Have you ever met the defendant in this case?"

*Black Female Juror:*

"No."

*White Male Attorney:*

"This case involves allegations of the importation and distribution of heroin and cocaine. Have you or anyone you're close to ever had a problem with drugs?"

*Black Female Juror:*

"No."

*White Male Attorney:*

"I see from the information you provided to the court that you've lived at your present residence, an apartment you rent, for five years. You've been a postal employee for four years. You're a single parent of two children. Your hobbies are aerobics and tennis. You have a cosmetology license and a high school diploma, and you go to college at night. Is that about right?"

*Black Female Juror:*

"That pretty much sums it up."

*White Male Attorney:*

"And what are you studying in college?"

*Black Female Juror:*

"I plan to be a pre-law major."

*White Male Attorney:*

"So this must be very interesting and exciting for you, since you have an interest in the law and lawyers."

*Black Female Juror:*

"Definitely. I may want to be a litigator one day, so it would be fascinating to see a trial from start to finish."

*White Male Attorney:*

"So you must be particularly excited about seeing my opposing counsel in action. You probably admire and identify with her. Will that keep you from objectively analyzing the evidence presented by both sides in this case?"

*Black Female Attorney stands up, hands on her hips:*

"Objection, your Honor. That question is offensive and demeaning to this potential juror. There have been any number of potential jurors in the pool who look like Mr. Rogers, and he certainly wasn't concerned about them overidentifying with him."

*Black Male Judge:*



“She has a point, Counselor. I’m going to sustain the objection.

Black Female Attorney sits down.

*White Male Attorney:*

“In any event, I request that this juror be excused.”

*Black Male Judge:*

“All right. (To the prospective juror:) Thank you very much.”

*Black Female Attorney stands up, puts her hands on her hips:*

“I want to be heard at sidebar, if your Honor please.”

*Black Male Judge:*

“All right.”

The two attorneys approach the bench.

*Black Female Attorney:*

“Your Honor, this is obviously racial. I wanted to make another objection. People sat in that seat time and again. Everyone was approved. The moment a Black person sits down there is a targeted thrust at that particular person. I realize that it’s peremptory, but the Supreme Court ruled that if there is an indication of racial selectivity, that is illegal and is to be prohibited. That was as clear as a bell.”

*Black Male Judge:*

“Mr. Rogers, what was the basis for the challenge?”

*White Male Attorney:*

“I challenged her because it’s a general policy. She was a postal employee, and we usually don’t like to have postal employees on the jury. It has nothing to do with anything racial.”

*Black Female Attorney:*

“Judge, I’ve tried cases in this courthouse for a long time. If it’s a policy to challenge postal workers, it’s a brand new policy. As a matter of fact, the practical approach has been that these people favor the federal government because they are employed by them. But to say that there is a policy to challenge postal employees . . .

*Black Male Judge:*

“Is that what you’re saying, Mr. Rogers?”

*White Male Attorney:*

“Well, no, it’s not a policy *per se*.”

*Black Female Attorney:*

“I’d like to have what he said read back.”

*Black Male Judge:*

“No, that won’t be necessary. Counselor?”

*White Male Attorney:*

“We have a Black juror that has been on from the initial panel. Nobody challenged her.”

*Black Male Judge:*

“I want to know why you challenged this particular juror.”

*White Male Attorney:*

“This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases. It is a person that is a single parent, it’s also a person that rents, it’s a person that may be involved in a drug situation where she lives. And, frankly, I’ve always regarded braided hair as somewhat radical.

“There is a lot going to this other than the fact that she is Black, and there is a Black juror on that nobody touched.”

*Black Female Attorney:*

"That's the point."

*Black Male Judge:*

"Okay, counselor. First, you say there is a policy to exclude postal workers, then you say there is no policy. You say that this juror is a single parent who rents, but there have been white panelists who were single parent renters whom you didn't strike. You don't know where this juror lives, but you assume she's involved with drugs where she lives. And you don't like her braids. You seem to be making certain assumptions about this potential juror based on her race. You can't strike her based on those assumptions."

*White Male Attorney:*

"But, Judge, the reasons I gave have absolutely nothing to do with her race."

*Black Male Judge:*

"Find another reason or keep her on the panel."

### **End of Play**

### **Closing:**

At the conclusion of the unit, the Judge/Moderator closes with a succinct review of the key points made and some highlights from the discussion. It is essential to formally conclude this and every unit to create a sense of closure. Don't let the units just trail off or end without it.

**When Bias Compounds:  
Insuring Equal Justice for  
Women of Color in the Courts**

**UNIT III**

**WOMEN OF COLOR AS VICTIMS OF  
GENDER-BASED VIOLENCE**

**A Model Judicial Education Curriculum  
Developed by the**

**National Judicial Education Program  
to Promote Equality for Women and Men in the Courts<sup>\*</sup>**

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*<sup>\*</sup>A project of the NOW Legal Defense and Education Fund  
in cooperation with the National Association of Women Judges*



### **UNIT III. WOMEN OF COLOR AS VICTIMS OF GENDER-BASED VIOLENCE**

**Learning Objectives:** As a result of this unit participants will be able to:

1. Understand and prevent or ameliorate the specific problems confronting battered women of color who seek protection in the courts.
2. Understand and prevent or ameliorate the specific problems confronting battered immigrant women who seek protection in the courts.
3. Understand and prevent or ameliorate the specific problems confronting African-American women utilizing the battered woman syndrome defense.
4. Understand and prevent or ameliorate the specific problems confronting women of color and immigrant women who are complainants in rape trials.

**Overview:** This three part unit uses a variety of exercises to explore the particular court-related problems confronting women of color and immigrant women victimized by domestic violence and rape, such as interpreters' bias and social and cultural impediments to reporting or following through with prosecution. The focus is on what judges can do to eliminate or minimize these problems.

One or more parts of this unit can be presented as part of a program on women of color in the courts. The entire unit can be a program in itself.

**Recommended Length:** Depends on how many of the three topics are presented, see suggested time frames on page 3.

**Faculty:** Judge/moderator to introduce unit and expert, team lead with the expert the discussion on solutions, and close unit.

Judge/facilitator to note issues and solutions on flip chart.

An expert on women of color and immigrant women as victims of domestic violence and rape, for example, a crisis counselor from a shelter or crisis intervention center serving a community of color.

*Give the expert the materials below to prepare for the presentation.*

**Format:** A plenary session with a full group exercise, expert presentation and an action planning session.

**Equipment:** Flip chart to record responses to issue spotting exercise and for action planning report back.  
Marking Pens

**Overheads:** Overheads for the expert presentation.

**Handouts:** Domestic Violence

- Case Study: Ortiz v. Ortiz (battered immigrant woman)
- Case Study Worksheet
- Domestic Violence Power Wheel
- Domestic Violence Power Wheel for Immigrant Women
- Overheads for the expert presentation
- Abstract: Center for Public Policy Studies, *A Judge's Guide to Culturally Competent Responses to Latino Family Violence*
- Brochure: AYUDA, *Questions and Answers for Immigrant and Refugee Women*
- Abstract: ABA Judicial Immigration Education Project, *A Judges' Introduction to Immigration Law*

Battered Woman Syndrome

- Case Study: State v. Givens (African-American woman kills abuser and presents battered woman syndrome defense)
- Case Study Worksheet

Rape

- Materials for the rape voir dire exercise

**Readings:** Readings for this unit follow the Readings tab.

## Outline and Time Frames For Different Models of this Unit:

### If presenting the Domestic Violence Material Only:

#### If presenting the Battered Woman Syndrome Materials:

Judge/Moderator Introduction and Outline  
minutes

#### **Battered Woman Syndrome:**

**30 minutes**

Expert Presentation:  
minutes

[Exploration of African-American women's use of the Battered Woman's  
some defense with exercise and group discussion on issues this raises for judges.]

study

ence

45 m

10 m

#### If presenting the Rape materials:

Small Group Exercise: Action Planning\*

Report Back (optional)

#### **Rape:**

**30 minutes**

Expert Presentation and Group Discussion

[Exploration of issues specific to women of color integrated  
with group discussion and voir dire exercise]

*\* If you are presenting all three topics, move the Action Planning Session to the end.*

### **INTRODUCTION BY JUDGE/MODERATOR**

*Introduces Expert. Outlines unit format.*

*States general objectives for unit and offers brief remarks putting this program in the context of the overall issue of domestic violence. Following is a suggested script.*

### **Suggested Introduction by Judge/Moderator**

All battered women, no matter what their race, ethnic origin or social class, face many problems in common. They must contend, for example, with the myths that paint battered



women as provoking and enjoying the violence. They must deal with the skeptics who think battered women could leave if they really wanted to, even though these women know intuitively what all the studies show: that leaving is the most dangerous time because it directly challenges the batterer's need to coerce and control his victim. These issues have been the focus of many judicial education programs, and we are coming to a much more informed understanding of domestic violence and how we as judges should deal with it.

Battered women of color and immigrant women face unique problems that have not been the subject of judicial education, although they are of direct relevance to us as judges. This is our focus today, and as we move through this unit, it is essential to keep this focus. If discussion moves to an issue affecting battered women generally rather than our specific topic and I stop you, please understand that it is only because time is short and we need to focus on the women of color issues that will be new to most of us, and are so important for us to understand and apply.

**Note: Keeping the Discussion Focused on Women of Color/Immigrant Women**

It is critical to keep the program focused on women of color/immigrant women issues. Given the nature of the material, there will be a tendency to discuss issues that affect all battered women. For example, at one of the pilots, there was a lengthy discussion of the effects of domestic violence on children prompted by the request for supervised visitation in the case study. Children as secondary victims of domestic violence is an extremely important issue, but this program is not the place for a full-fledged discussion because it takes too much time away from the issues unique to women of color.

An appropriate response in this situation is for the expert or judge/moderator to say to the judge who initiated this discussion something along these lines. "The issue you raise is extremely important. There is now a significant literature documenting that children who live in homes where there is battering are likely to be physically abused themselves, and even if they are not, to suffer severe psychological and somatic symptoms from exposure to the violence. They do need protection, including at visitation, which is also often a time that the batterer uses to again assault the children's mother. After our program I will see to it that you receive information on this point. Today, however, we need to keep our attention focused on the issues unique to women of color and immigrant women, so we are going to move on with our program."

The judge/moderator must be alert to keep the program on track because the expert may be reluctant to cut off a judge's question, especially if it raises extensive responses from other judges.

## **EXPERT PRESENTATION**

*Give these materials to the expert to prepare for the program.*

This is an expert presentation on the specific issues confronting women of color and immigrant women who seek court protection from domestic violence, who are indicted for killing their abusers, and who are victims of rape. The focus is on actions judges can take in the courtroom, the courthouse and the community to minimize or eliminate the problems identified.

The substance of the presentation and the actions that judges can take are detailed below. The expert should tailor the presentation to include her own direct experiences in the courts.

The presentation of this material should be as interactive as possible. An interactive format is outlined below.

### **Note: Keeping the Discussion Focused on Women of Color/Immigrant Women**

It is critical to keep the program focused on women of color/immigrant women issues. Given the nature of the material, there will be a tendency to discuss issues that affect all battered women. For example, at one of the pilots, there was a lengthy discussion of the effects of domestic violence on children prompted by the request for supervised visitation in the case study. Children as secondary victims of domestic violence is an extremely important issue but this program is not the place for a full-fledged discussion because it takes too much time away from the issues unique to women of color.

An appropriate response in this situation for the expert or judge/moderator to say to the judge who initiated this discussion something along these lines. "The issue you raise is extremely important. There is now a significant literature documenting that all children who live in homes where there is battering are likely to be physically abused themselves, and even if they are not, to suffer severe psychological and somatic symptoms from exposure to the violence. They do need protection, including at visitation, which is also often a time that the batterer uses to again assault the children's mother. After our program I will see to it that you receive information on this point. Today, however, we need to keep our attention focused on the issues unique to women of color and immigrant women, so we are going to move on with our program."

If you will not feel comfortable cutting off judges' questions and discussion, make this clear to the judge/moderator beforehand so she or he will be alert to step in.

## **DOMESTIC VIOLENCE: SPECIFIC ISSUES FOR BATTERED WOMEN OF COLOR AND IMMIGRANT WOMEN**

### **I. Issue Spotting Exercise: Ortiz v. Ortiz**

The discussion of immigrant women is built around the case of Ortiz v. Ortiz. This case study is on the following pages.

Tell participants this exploration is built around the case of Ortiz v. Ortiz. Ask them to remove this case study and the case study worksheet from their folders and read it closely. Ask them to note the issues raised in these two contexts:

- From the point of view of Elena Ortiz, what are the issues that affect her access to justice?
- From your point of view as a judge, what issues are relevant to your concerns and responsibilities?

Allow about five minutes for this part of the exercise.

Have two or three flip charts next to each other at the front of the room. Ask participants to tell you all the issues they noted. Begin with Elena Ortiz's concerns. Follow with the judges' concerns. As the judges call out their answers, a member of the faculty (not the expert who should stay focused on the discussion) writes them on a flip chart. At this point do not encourage long statements. Ask for just the gist of the issue.

After these issues are listed, ask:

Q. Would this be a good case for mediation?

Take a show of hands or use the electronic responder.

Q. Assuming the evidence adduced at the hearing supports Elena Ortiz's version of the events, what relief would you grant her?

Let people call out an answer, then ask how many agree.

The point here is to see whether the judges themselves award her custody, supervised visitation, child support and restitution, and whether they expunge her arrest record, which, uncleared, exposes her to the risk of deportation.

Raise any issues not raised. At the end of this discussion you should have answers to these questions.

Issues for the Judge:

Do you grant the order of protection?

Is the fact that she hasn't followed through twice before an issue? How do you handle it?

Who gets custody of the children?

Do you award supervised visitation?

Do you award child support?

Do you grant the restitution?

Do you expunge her arrest record?

Handout

**DOMESTIC VIOLENCE CASE STUDY**

**Ortiz v. Ortiz**

Background Information:

My name is Elena Ortiz. I came to this country from the Dominican Republic in 1990. I am 27 years old. I have been married for six years. I have a 5-year-old son, and a 3-year-old daughter. My husband, Julio, has U.S. citizenship, and he is a good friend of my sister's husband. I speak very little English. I want to take English classes, but my husband would never let me. He always said that between my job with the cleaning service and the kids, I barely had enough time to keep the apartment clean and cook for him as it was.

My husband has beaten me since before we got married. It continued throughout my pregnancies. I thought my brother-in-law would get him to stop, but he didn't want to get involved. I went to the priest who married us. He counseled me about the sanctity of marriage, and my duty as a wife to accept my husband's will.

I know my duty as a wife. I was raised to know it. I watched my mother and my aunts submit to my father and my uncles. But it's getting worse and worse. What will happen to my kids if he kills me? My sister and her husband agreed to let me and the kids stay with them, but I don't know for how long. When I told Julio I was moving out, he cut up my clothes, including my uniform for work.

I am here to get an order of protection against him, custody of the children, child support, and restitution to replace my clothes. If he wants to see the kids, the visits should be supervised.

My husband also wants custody of the children. He told me that if I go to court he's going to get an order of protection against me. He's twice my size! When he tried to take the kids away from me, I called the police. When they finally came, Julio said I hit him first, and they arrested both of us, even though I was the only one with the bruises and the black eye.

This is the third time I've tried to get an order of protection against him. I didn't show up the first time. I don't like coming here. No one speaks my language. People are mean to me because I don't understand them, and they don't understand me. But I understand enough to know that they think I'm not worth helping. A woman I met in the waiting room at

Victims' Services - she's Dominican, too - told me they don't care about immigrants here. They think our men beat us up because that's our culture, and the courts should stay out of it.

### Handout

The second time, I was here, but the interpreter wasn't. The interpreter I was assigned is a member of our church. He told me a little while ago that I should be ashamed of myself for bringing such a private matter to public attention. I wonder if he will interpret my words correctly for the judge. I also wonder if he, or the judge, or my husband, will call the INS, and if they will deport me. Even if they don't call, after my arrest, who knows what will happen?

Maybe things will get better soon. Maybe Father Rodriguez and the interpreter are right. Or maybe now that Julio knows that I'm serious about this—I never moved out before—he'll change. We've been together since I moved here, and he is the children's father . . .

## EXPERT PRESENTATION

### Ortiz v. Ortiz

*Use the case study and the issues cited by the judges to make the points presented below. Use the power and control wheels in your presentation. The original and adaptation detailing the issues confronting immigrant women are provided as handouts for the judges. Overheads for the points below are at the Overheads & Handouts tab for this unit.*

## I. ASSUMPTION THAT THERE IS MORE VIOLENCE IN COMMUNITIES OF COLOR THAN IN WHITE COMMUNITIES

### **Assumption that African-Americans and Latinos are naturally violent so the court system should not be concerned with them**

***Ortiz v. Ortiz: Elena Ortiz says another Dominican woman told her that the courts don't care about immigrant women. "They think our men beat us up because it's our culture and the courts should stay out of it."***

Assumptions about "natural" or "culturally accepted" violence in communities of color are widespread and result in less protection for women from these groups. Task forces on gender bias in the courts, domestic violence shelter workers and others report that some judges and court personnel tend to minimize abuse against women of color and see violence as normative or culturally conditioned behavior in which they will not interfere.<sup>1</sup>

The California Judicial Council Advisory Committee on Gender Bias in the Courts received an extensive report from California Women of Color Against Domestic Violence. Among its findings was that "Judges may have cultural biases that prevent women from obtaining relief. For example, a judge may believe that violence is part of the woman's culture and not take it as seriously. The system's protection of the victim is simply not as vigorous if she is a minority person."<sup>2</sup>

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<sup>1</sup>E.g., Sarah Eaton and Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on women in the Courts: An Evaluation and Assessment of New York City Courts*, 19 FORDHAM URB. L.J. 391,480 (1992).

<sup>2</sup>FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS 428 (1997) [hereinafter CALIFORNIA REPORT].

Domestic violence affects all race, class and educational groups and affects people of all religions, immigration statuses and cultural backgrounds. According to the Department of Justice, white, Black and Latina women experience comparable rates of family violence: about 5 per 1000 persons for white and Black women, and 6 per 1000 for Latina women.<sup>3</sup>

Although some data indicate a higher level of family violence in communities of color, it is important to remember two points that raise questions about these data:

1. Communities of color are often poorer than white communities and the stresses of poverty exacerbate violence. The intersection of race and poverty in this context leads people to the mistaken belief that the violence is a function of the race of the parties rather than their economic status. See **Fact Sheet** data showing highest rates of domestic violence for women with family incomes below \$10,000 and lowest rate for women with family incomes above \$30,000.
2. The data about domestic violence are largely based on reported cases, which causes a skew. White families, who generally have greater financial resources than families of color, often do not enter the system, turning instead to private lawyers, doctors and therapists. The system itself often pushes certain groups to report and go forward in the courts, while allowing those who have private resources to avoid the public exposure.

Studies that go beyond the reported cases indicate that more affluent battered women do not come forward as often as women lower on the economic scale, and when they do they go to private psychotherapy and do not come to the attention of community groups.<sup>4</sup> Professional career women often do not report abuse due to feelings of guilt, a desire not to damage their abuser's career or their own, or a fear they will not be believed because society views the professional man as less likely to resort to violence. When Roberta Cooper Ramo was president of the American Bar Association in 1995-1996 and initiated the ABA Commission on Domestic Violence, she found that as she spoke about this issue at professional events across the country, after her speech there were inevitably women lawyers and sometimes even judges who talked to her in the hall or called her at her hotel to tell her about the violence in their families of origin or their current relationships.

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<sup>3</sup>US Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics: Selected Findings - Domestic Violence*, November 1994.

<sup>4</sup>Lenore Walker, *ABUSED WOMEN AND SURVIVOR THERAPY*, 62, 63 (1994).





### **White Community's Attitudes Toward Domestic Violence in the Latino Community**

Professor Jenny Rivera writes of the dominant culture's attitude toward domestic violence in the Latino community in an article in the Readings:

Historically, Latinos have been stereotyped as violent and alien. This misrepresentation of the "Latino character" has developed during this past century, and non-Latino society today continues to express and explain inaccurate images of Latinos and Latino family life.

Popular myth has become accepted as truth; Latino males are believed to be irrational and reactive. The standard description of Latino males as hot-blooded, passionate and prone to emotional outbursts is legendary. "Macho" is the accepted - and expected - single-word synonymous with Latino men and male culture. Consequently, it is natural to expand and apply this construct to the entire Latino community, and thereby justify assumptions that Latinos are violent.<sup>5</sup>

In one notable example of Professor Rivera's observations, a California judge was censured in 1982 for stating that "Spanish persons live by different standards than we do: ...wife abuse is common and more acceptable for them."<sup>6</sup>

### **White Community's Attitudes Toward Domestic Violence in the Asian Community**

**Assumption that Asian women are naturally passive and submissive and it is therefore culturally appropriate for their male partners to use physical violence against them.**

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<sup>5</sup> Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240 (1994); This article is in the readings for this unit.

<sup>6</sup> *In re Stevens*, 31 CAL. 3d 403,405 (1982).

With respect to judges' assumptions about violence as a cultural norm in Asian families, California Assemblywoman Sheila Kuehl testified that:

Asian American women could tell you exactly what it feels like to try to testify about violence and to be treated as though it's somehow either more acceptable or culturally acceptable for there to be much more domination of husbands over wives . . .<sup>7</sup>

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<sup>7</sup>1991-1992 Public Hearings on Racial and Ethnic Bias in the [California] State Courts at 222-223.

Manavi, a New Jersey organization that works with battered women from South East Asia reports on a case in which a judge declined to continue an order of protection granted to a Pakistani woman saying, “How do we know [the violence] is not part of your culture.”<sup>8</sup>

### **Cultural Defenses**

This notion that violence against women is an acceptable part of someone’s culture in their country of origin is implicated in the concept of “cultural defenses.” Cultural defenses excuse criminal behavior altogether or mitigate criminal liability due to a lack of requisite *mens rea* based on the defendant’s claim that the act is accepted behavior in his or her culture and community. This is a complex area of the law on which we can only touch here.<sup>9</sup> It is important to note, however, that it has been invoked in an array of cases involving violence against immigrant women, resulting in minimal sentences for men who murdered wives,<sup>10</sup> sexually assaulted stepdaughters,<sup>11</sup> and raped women in a so-called “marriage by capture” ritual.<sup>12</sup>

For example, on March 30, 1989, a Brooklyn Supreme Court Judge sentenced a batterer to five years probation for second-degree manslaughter in the hammer-beating death of his wife. Relying on the use of a “cultural defense,” his lawyer successfully argued that traditional Chinese values accounted for his extreme reaction to his wife’s alleged infidelity. The ruling sent shock waves through the Asian community and a simple, but clear message: the law will not protect Asian women from domestic violence, even unto death.<sup>13</sup>

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<sup>8</sup>Telephone interview with Dr. Shamita Das Dasgupta, Executive Director, Manavi (June 2, 1997).

<sup>9</sup>If there is time in your program, this curriculum provides a complete unit on cultural defenses- see unit V.

<sup>10</sup>See e.g., *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

<sup>11</sup>*Molester’s Probation Shocks Kin*, CAPITAL TIMES, August 29, 1996, at 3A.

<sup>12</sup>See e.g., *People v. Moua*, No. 315972-0 (CAL. SUP. CT. Feb 17, 1984).

<sup>13</sup>*People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

Advocates for immigrant women are deeply concerned that cultural defenses are unfair, especially to women of color, because they eliminate the limited progress achieved in areas such as domestic violence. Because violence against women of color is still so widely accepted and approved in cultures across the world, just as it was until very recently in our own culture, cultural background can be used easily to justify or excuse the perpetrator's actions. Members of immigrant communities who should otherwise be protected by the law are at risk of further violence. Victims of immigrants, particularly their partners and children, would receive unequal and less protection in comparison to the white male and even female population. Immigrant communities often express their concern that crimes with immigrant victims are punished less severely than cases in which the victim is white.

***What Judges Can Do:***

Take the lead in assuring that judges and court personnel receive thorough training in the myths and facts about domestic violence and the necessity to treat everyone in the court with respect and every instance of domestic violence as a crime. If the judge hears comments from court personnel, lawyers, or others dismissing the seriousness of violence against women from a particular community because "that's how those people are," the judge should correct this misapprehension immediately.

## **II. FAILURE TO LOOK FOR EVIDENCE OF BATTERING OF WOMEN OF COLOR**

Some judges and court personnel treat physical evidence of violence as the *sine qua non* of battering. If they do not see bruising, they assume nothing happened. Bruises show up much less vividly on Black women and other women of color than on white women, putting these women at a disadvantage in proving the battering. The gender bias task forces and other commentators note that when judges who take this position do not see bruising on women of color, they make no effort to look for other evidence of abuse, such as the many non-physical forms of coercion discussed in the self-test.

***What Judges Can Do:***

Be aware that certain physical signs of battering are less visible on women of color than on white women, and that physical violence is only one aspect of battering. If a woman of color who alleges physical violence presents with no visible evidence of bruising, do not conclude that nothing happened without a comprehensive inquiry.

## **III. COMMUNITY NORMS THAT INHIBIT WOMEN OF COLOR FROM REPORTING DOMESTIC VIOLENCE**

***Ortiz v. Ortiz: Priest counsels battered woman to stay in marriage. Interpreter shames her for going public.***

For any battered woman, telling others about their partners' violence against them is humiliating. But women of color and immigrant women often face cultural barriers to making this kind of disclosure that makes them even more reluctant to report or to go forward once they do. Given that women's failure to follow through on the protective orders they initiate is enormously frustrating to judges and court personnel, it is important to understand the forces constraining these particular women.

While concern about the religious implications of leaving one's husband, even when he is violent, affect women from every background,<sup>14</sup> this is a particularly inhibitory factor for **Latina** women, as in this case. Professor Jenny Rivera writes:

Those within the Latino community expect Latinas to be traditional, and to exist solely within the Latino family structure. A Latina must serve as a daughter, a wife, and a parent, and must prioritize the needs of family members above her own. She is the foundation of the family unit. She is treasured as a self-sacrificing woman who will always look to the needs of others before her own. The influence of Catholicism throughout Latin America solidifies this image within the community, where Latinas are expected to follow dogma and to be religious, conservative, and traditional in their beliefs.<sup>15</sup>

Chicago Judge Sheila Murphy became so concerned by the number of seriously abused Latina women for whom the religious issue was an insuperable barrier that, when asked for advice by a domestic violence group that serves the Latina community, she suggested they make a film in Spanish with a Catholic theologian explaining why it was acceptable to leave a marriage to protect oneself and one's children from violence. The film they made is called *Yo Hablo*, (I Speak).

An excellent source of further information on domestic violence in the Latino community is *A Judge's Guide to Culturally Competent Responses to Latino Family Violence* (1998)<sup>16</sup> for which there is a flyer in your materials. The authors point out that in domestic violence cases involving Latinos,

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<sup>14</sup>Rev. Katherine Hancock Ragsdale, *The Role of Religious Institutions in Responding to the Domestic Violence Crisis*, 58 ALB. L.REV. 101 (1995).

<sup>15</sup>Rivera, *supra* note 5, at 241.

<sup>16</sup>Available from the Center for Public Policy Studies, 999 18th Street, Suite 900, Denver, CO 80202. Contact David Price at (303) 863-0900 or fax (303) 295-0244.

First, in light of the numerous pressures on some Latinas to endure family violence, the justice system needs to recognize the potential that a “first offense” is very serious, even where there is no prior arrest or court record. What appears to be a first offense may have been preceded by a substantial amount of prior abuse, even of many years’ duration. The court needs to investigate how long the abuse has been going on. This should be investigated with particular care in cases where the family was brought into the justice system by a neighbor or other person outside the family rather than by the wife.

In addition, judges may need to assess lethality more broadly than just looking at the severity of physical assaults against the wife. Domestic violence is a process, with a history and repeat instances, and not just one event. This may be especially true for the Latino family. The judge must look for emotional abuse leading up to the physical abuse and for other violent behavior of the husband, such as property destruction.

This may be especially difficult because some of the evidence of lethality may not be available to the court. When the prosecution is proceeding without the wife, evidence of past violence or threats may not come into the court. The judge will not see the cycle of violence. Further, some evidence of past acts may not be admissible. For example, Arizona’s domestic violence statute applies only to sentencing. There is no domestic violence charge, so the perpetrator is charged with assault or criminal damage, and past acts are not admissible to prove guilt or the severity of the present charge.<sup>17</sup>

Professor Kimberle Crenshaw observes in “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” in the Readings for this unit that many in the **African American** community seek to suppress public knowledge of domestic violence in that community in an attempt to forestall racial stereotyping, i.e., the assumption criticized above that African Americans are naturally violent.

Activists who have attempted to provide support services to battered **Pacific-Asian** women have experienced intense resistance from the community for two reasons. Some in the

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<sup>17</sup>Steven Weller and John A. Martin, Center for Public Policy Studies, *A Judge’s Guide to Culturally Competent Responses to Latino Family Violence* 39 (1998).

community do not want the image of the “model minority” tarnished.<sup>18</sup> Others are motivated by the belief that saving the honor of the family from shame takes priority.<sup>19</sup>

Traditionally Pacific Asians conceal and deny problems that threaten group pride and may bring on shame. Because of the strong emphasis on obligations to the family, a Pacific Asian woman will often remain silent rather than admit to a problem that might bring disgrace for her family.

A **Filipino** commentator writes that many immigrant women from her country do not seek or follow through on orders of protection because they are shunned and made to feel ashamed by family and friends for talking about the abuse and seeking help:

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<sup>18</sup>Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991). This article is in the Readings for this unit.

<sup>19</sup>Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991).



[T]he reporting of cases of spousal abuse is still a very strange and foreign practice for Filipino women. Losing face or “hiya” is a big obstacle and a deep sense of loyalty to the family exacerbates this feeling of shame....[T]he Filipino male is constantly fearful of being “*under the saya*” (literally under the skirt). On the other hand, Filipino women continue to be measured by the “Maria Clara” yardstick - demure, patient, forgiving and understanding....Given this Filipino male/female dynamic, it is not surprising that the community has accepted it as fact that men may beat their wives occasionally to establish their control and self-respect.<sup>20</sup>

***What Judges Can Do:***

Become knowledgeable about the different reasons women from various communities of color find reporting domestic violence and going forward with the court process difficult. Support their efforts to protect themselves in ways that reflect your understanding of their situation within their own communities. However, be careful not to let cultural sensitivity become the basis on which violence against women of color is minimized or excused.

**IV. RELUCTANCE OF WOMEN OF COLOR TO REPORT DOMESTIC VIOLENCE  
BECAUSE OF THE ABUSE OF MEN OF COLOR IN THE JUSTICE SYSTEM**

As the numerous reports from the state supreme court task forces on race and ethnic bias in the courts and other sources make abundantly clear, there is a widespread, well-founded belief in the communities of color that men in those communities repeatedly face police brutality and racial and ethnic bias in the courts. Battered women from these communities are often reluctant to use the courts because although they fear for their own safety, they also fear what will happen to their partners in a justice system that they know to be biased against men of color as well as women.

***What Judges Can Do:***

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<sup>20</sup>Leni Marin, *A Very Private Pain: Violence in the Filipino Immigrant Home*, 2 KATIPUNAN 6-7 (1989).

Take a leadership role in eliminating all types of bias in the courts and the justice system so that all potential court users believe they can avail themselves of the courts' protection without feeling that they are betraying their communities.

## **V. IMMIGRANT WOMEN HAVE SPECIAL CONCERNS BECAUSE OF THEIR IMMIGRATION STATUS<sup>21</sup>**

**Note to Presenter:** For this section, use the *Power and Control Wheel* as adapted by the *Family Violence Prevention Fund* to show some of the many ways battered immigrant women can be abused in the context of their immigrant status. This wheel and the original from which it is adapted are at the end of this unit and should be placed in participants' program packets.

All battered women:

- believe promises that the abuser will reform;
- suffer from damaged self-esteem;
- bear physical and/or psychological scars from abuse;
- fear retaliation or stalking if they leave.

In addition, battered immigrant women need help surmounting barriers posed by:

- culture
- language
- immigration status

Although violence against women is common across cultures, the psychological, emotional, economic and legal needs of victims fleeing violence can only be met successfully in a culturally appropriate manner. Immigrant victims of domestic violence need multilingual services, shelters that are not culturally alienating, victim advocates with whom they can relate, lawyers who understand the intersection of immigration and family law, and judges and court personnel trained to understand domestic violence and the related cultural and immigration law issues.

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<sup>21</sup>This material is quoted or adapted from Minty Siu Chung and Leslye E. Orloff, Cultural Issues and Diversity in The American Bar Association Commission on Domestic Violence, *The Impact of Domestic Violence in Your Legal Practice* II-10 to II-13 (1996) and OVERCOMING CULTURAL BARRIERS, unpublished manuscript prepared for the American Medical Association (1996); Family Violence Prevention Fund, *Issue Paper on Domestic Violence Cases Involving Immigrant and Refugee Communities: The Response of the Courts* (1991). Both are in the Readings for this unit.

To help state judges understand how actions they take under state law can have consequences under federal immigration law, the American Bar Association in Spring 1998 published *A Judges' Introduction to Immigration Law*. Information about this book and how to order it are included in your handouts for this unit.

There are many barriers to immigrant women's seeking protection from violence from the courts. Some of these barriers are beyond the ability of the courts to affect, but there are actions judges and court personnel can take to support and protect immigrant women fleeing their partners' violence.

### **A. Fear of Deportation Because of Immigrant Status**

***Ortiz v. Ortiz: Elena Ortiz wonders whether the judge, the interpreter or her husband will call the INS and whether she will be deported.***

Battered immigrant women fear that taking legal action will lead to their deportation. Batterers commonly threaten deportation to control and manipulate their immigrant spouses. Until the Violence Against Women Act was enacted in 1994, citizen and lawful permanent resident batterers had the ability to influence their spouses' immigration status. If the husband is a legal resident and the wife has only a conditional residency, she may be dependent on her husband for her ability to remain in the United States. She may not be aware of her legal rights or status. The husband may tell the wife that he has filed papers on her behalf when he has not. The Violence Against Women Act (VAWA)<sup>22</sup> allows an illegal immigrant who is a battered wife to apply for permanent residency without her husband's signature, but she may not be aware of this and it is reported that INS does not tend to inform women about the act.<sup>23</sup> Judges and court personnel should tell women about this option. Fear of deportation inhibits them from coming into the system, or going forward if they do.

### ***What Judges Can Do:***

State clearly that the concern of your court is protecting people from violence, not their immigrant status. Make clear that your court does not report people seeking protection to the INS. Stating this will impact both the people who hear your statement in the courtroom and those to whom they will repeat it in their community. It may make it possible for the battered women in the courtroom and others in the community to seek court protection when they are in danger.

Advise battered immigrant women that the Violence Against Women Act (VAWA) allows an illegal immigrant who is a battered woman to apply for permanent residency without her

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<sup>22</sup>P.L. No. 103-322, 108 STAT 1796 (1994) codified at 42 U.S.C. §13701 (1994)

<sup>23</sup>8 U.S.C. SS 1154(1)(A),(B), 1186(c)(4), 1254, 1254(a), 1154(a)(2)(d).

husband's signature. Have your court distribute to immigrant women the brochure in your handout folder titled, "Questions and Answers for Immigrant and Refugee Women," which explains how to use this VAWA provision. The handout provides information about obtaining copies of the original in Spanish, Chinese, Arabic, Korean, Russian, Vietnamese and Tagalog.

***Note: Although any citizen who thinks that someone should be deported can make a report to the INS, there is no affirmative obligation on a judge or nonjudicial court officer to make such a report.***

## **B. Fear of Deportation Due to Arrest, Indictment and Conviction.**

***Ortiz v. Ortiz:* Julio Ortiz told police that Elena initiated the violence and both were arrested.**

Criminal convictions may have grave immigration consequences.<sup>24</sup> Persons convicted of crimes of moral turpitude, aggravated felonies, drug offenses and domestic violence may face deportation. Under the new immigration law, a person convicted for a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. In addition, persons found by a court, including civil courts, to have violated a protection order are deportable. The standard for the deportation decision is the highly subjective “good moral character” rule. Batterers are often aware of this rule and deliberately press charges against a spouse who calls the police, claiming that she has assaulted them.

### ***What Judges Can Do:***

Judges need to be alert for frivolous charges made in this context and understand that even a conviction for a misdemeanor assault can ruin the immigrant woman’s life. Being deported for many women from developing nations means a return to a life of extreme poverty, disease and few or no opportunities because of their sex. In addition, the social stigma of having “failed in America” or having “failed in their marriage” may cause them to be ostracized when they return to their community.

Given the erroneous claim by some commentators that women and men engage in equivalent violence toward one another, and the readiness of some police to arrest both parties when called to a domestic violence dispute, the court should take particular care before sustaining an indictment for even a misdemeanor assault.

Judges also need to be aware that attorneys handling state law domestic violence cases may not be familiar with the potential consequences under federal immigration law. Thus, if a battered woman indicted in a domestic violence-related matter offers to take a plea, the judge should inquire before accepting it whether client and attorney are aware that having this conviction on her record may lead to deportation.

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<sup>24</sup>For more information about the complex area of immigration and criminal law, see IMMIGRATION LAW AND CRIMES, published by Clark, Boardman Callaghan. To order, call 1-800-221-9428.

### **C. Fear of Justice System.**

Many immigrants fear the justice system. Based on their experiences in their native countries, they believe that court systems are partial, and favor men and the economically powerful. Since immigrant women are often totally economically dependent on their husbands, they see themselves as doubly disadvantaged in trying to deal with the courts.

### **D. Unfamiliarity with U.S. Law.**

Many immigrant women come from civil law countries where cases are decided based on written affidavits. They are not aware that here their testimony about what happened has value. Many immigrant women do not know that domestic violence is against the law in the U.S.

### **E. Fear of Losing Custody.**

**Ortiz v. Ortiz: Elena Ortiz fears she will lose custody.**

Many immigrant women also assume, based on their own cultural norms, that custody of their children will automatically be given to their male partners in cases of separation or divorce.

If the women are undocumented, they fear this will be held against them in deciding what is best for the child. These women also fear that their husbands will abduct the children and return to the country of origin.

**Note:** Some judges report that in domestic violence cases like Ortiz v. Ortiz immigrant mothers are more likely to have their children placed in foster care than white women, the perception of the system being that these women cannot protect their children from possible abuse from the fathers.

Ask participants whether they would consider placing the Ortiz children in foster care and respond accordingly.

### ***What Judges Can Do:***

Tell immigrants that their testimony has value in U.S. courts, and that the justice system is intended to assist them, without regard to their sex or economic status.

### Best Interests Standard

Tell immigrants that custody is awarded based on the best interests of the child and not automatically ordered to the father. If you are in one of the forty states with a statutory presumption against awarding custody to a batterer, advise the woman that this is the standard against which the father's request for custody will be judged. Ensure that mediators and others involved in custody and visitation determinations understand that immigration status should not be a factor in considering what is in the best interests of the children. Undocumented mothers are not necessarily going to be deported from the United States. Even if a battered immigrant woman must return to her home country, the court should not assume it is in the best interests of the children to award custody to the father.

### Child Abduction

If the abusive father is an immigrant, craft custody and visitation orders to prevent international child abduction. Children's passports should be in the possession of the primary custodial parent or held by the court, and passport offices should be notified not to reissue passports for the children. Order supervised visitation in cases where there is potential for child abduction. Lodge custody orders with the embassy of the father's home country to prevent issuance of visas for the children.

### Civil Protection Orders

Orders of protection are particularly useful for immigrant women. For women who are fearful of using the criminal justice system, getting a protection order from the civil court may be a good intermediate and effective step to ensuring her safety. If the batterer is also an immigrant, an order from an authority even without criminal consequences may by itself be an effective deterrent. Special orders may be issued to provide additional protection for immigrant women such as:

- Orders not to interfere with her immigration status;
- Orders to provide her with important documents she may need for her immigration case;
- Orders guarding against child abduction.

### Community Outreach

Take a leadership role in the development of community education and outreach efforts aimed at immigrant communities which emphasize that domestic violence is a crime and

that legal protection and services are available through the courts in domestic violence cases.

Take a leadership role in developing culturally appropriate informational material about the court system and family violence written in the languages of all minority populations in the local community.

## **VI. IMMIGRANT WOMEN FACE LANGUAGE BARRIERS THAT ARE NOT ONLY THOSE OF ALL NON-ENGLISH SPEAKING WITNESSES, BUT ARE SPECIFIC TO BATTERED IMMIGRANT WOMEN**

***Ortiz v. Ortiz: Elena Ortiz was prevented from learning English by her husband as a means to control her. Interpreter's hostility makes her fear he will not translate her words accurately. She states that court personnel are mean to her because she doesn't speak English.***

### **Why some battered immigrant women do not learn English**

When a woman has been in the U.S. for several years and still speaks little or no-English, some court personnel and judges feel harshly toward her. Understand that many immigrant women would like to learn English but are prevented from doing so either deliberately or by circumstance. Often the batterer seeks to isolate and increase control over his wife by preventing her from learning English. Even if this is not a deliberate ploy, when immigrant women work twelve and fourteen hour days in sweatshops and factories and must then care for children, husbands and households, there is no opportunity to attend language classes.

### **Abuses by Interpreters**

For any non-English speaking person, a well-trained interpreter competent in that individual's language and dialect and pledged to impartiality is an essential component of access to justice. Much has been said and written about the critical need to upgrade interpreters. In 1995, the National Center for State Courts published Court Interpretation: Model Guides for Policy and Practice in the State Courts, funded by the State Justice Institute. Chapter 6, the "Judge's Guide to Standards for Interpreted Proceedings," is in the Readings for this unit.

Following that Chapter is the Code of Professional Responsibility for Interpreters in the Judiciary. Canon 3 is titled "Impartiality and Avoidance of Conflict of Interest." It is in this area that women of color are experiencing particular difficulties with interpreters. There are numerous reports that in cases of domestic violence, interpreters openly side with defendants and urge women to drop their cases.



For example, Manavi is a New Jersey organization that works with women from South Asia victimized by domestic violence. Manavi reports that too often interpreters have no training in or sensitivity to domestic violence and attempt to dissuade victims from seeking the protection of the court. These interpreters are more concerned with the community's image than the victim's safety and tell the victim not to go forward because she is shaming her community.<sup>25</sup>

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<sup>25</sup>Telephone interview with Dr. Shamita Das Dasgupta, Executive Director, Manavi (June 2, 1997).

Similarly, Sakhi is a New York City organization started in 1989 to end violence against women within the Asian Indian, Pakistani, Bangladeshi, Nepali and Sri Lankan communities in the New York metropolitan area. Sakhi reports numerous complaints about untrained interpreters who come from the defendant's community and openly side with him. For example, before a hearing the interpreter is in the waiting room chatting with the batterer about the case. Sakhi reports that although it has complained to judges and court administrators about this complete breach of ethics, it has had no success in stopping it. The magnitude of these abuses has lead Sakhi to obtain a grant to launch a gender equity campaign to protest the current system of court appointed interpreters within the New York City Family Courts.<sup>26</sup>

### ***What Judges can do:***

Train and require courtroom personnel to be on the alert for misconduct by interpreters in the waiting room and the courtroom. Court personnel should take appropriate action if the judge is not present and alert the judge if something happens in the courtroom that the judge may not have seen. Canon 3 of the Code of Professional Responsibility for Interpreters to the Judiciary states:

During the course of the proceedings, interpreters should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official duties.

This means that interpreters should not be talking or chatting with any party before a hearing. Making court personnel aware of this as a firm rule and directing them to assist in its enforcement will help eliminate the problems reported by Manavi and Sakhi.

### **Need for interpreter fluent in the witnesses' language and dialect as she speaks it.**

Having an interpreter who truly speaks the same language and dialect as the witness is crucial. In one case a Cuban battered woman tried to tell the judge shed had been "stabbed" with a knife. The interpreter who was from Uruguay and spoke a different form of Spanish said that she had been "scratched" with a knife.

### **Do not use the battered woman's companion or child as an interpreter.**

The companion may be the abuser or a friend or family member who comes with his or her own biases and may filter what the battered woman says. For example, the companion

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<sup>26</sup>Telephone interview with Prema Vora, Project Director, Sakhi (May 28, 1997).

may be the victim's aunt who believes it is shameful for women to complain publicly about their husbands' actions and who therefore edits some of her niece's answers.

The victim may edit herself because she feels ashamed and concerned that the friend or family member will repeat her story to others in her community.

Most importantly, never allow the victim's children to act as interpreters. This is a tempting option because minor children often accompany their mothers to court and are frequently the most fluent, or only, bilingual persons present. Succumbing to this temptation disserves both the child and the victim. The child is surviving the trauma of living in an abusive household, with all the travail that brings. The mother may edit her story so as not to put her child in the position of having to retell the mother's account of physical, sexual and emotional abuse. Without the full story, the judge may perceive the violence as less serious than it is.

**Do not use volunteer interpreters.**

Volunteers are usually tied to the community and highly subject to retaliation by the batterer and his family. Their fear may lead them to edit the victim's testimony.

**VII. IMMIGRANT WOMEN'S DISTRESS AT FINDING NO COURT PERSONNEL THAT SPEAK THEIR LANGUAGE**

***Ortiz v. Ortiz: Elena Ortiz says she does not like coming to court because the people are mean and no one speaks her language.***

The lack of bilingual personnel is a key reason non-English speakers fear using the court system. This problem is compounded by court documents that are not translated into the parties' language. The overall problems of a court system lacking in bilingual, culturally aware staff are captured in the following statement from the Asian American Bar Association of the Greater Bay Area, quoted in the Report of the California Task Force on Racial and Ethnic Bias in the Courts.

Additional barriers arise in the court system from the lack of culturally sensitive staff and judges. These barriers are commonly felt by Asian women in the family law system. For example, the family court services staff rarely are bilingual, [and] usually are not sensitive to cultural concerns. Counselors have large caseloads and are required to apply some pressure on the parties to compromise. Such goals and methods fail to accommodate the quiet, nonconfrontational style of dispute resolution and concerns about negative impacts on

extended families. Asian women will often agree to compromises that are really unacceptable, in order to avoid confrontation and discussion of unpleasant personal matters in front of strangers . . . If staff and judges were trained to handle matters with the culture of the litigants in mind, some of the barriers could be reduced.<sup>27</sup>

### ***What Judges Can Do:***

Take the lead in insuring that your court employs bilingual, bicultural staff throughout the system, particularly in public positions which assist litigants with the court system. Bilingual, bicultural personnel should be hired in sufficient numbers to address the needs of each significant language minority community in the local population.

In cases where the language spoken by the parties is not a major language in the local community, a qualified interpreter should prepare a written order in the language of the party before the court and should translate the order in open court to the party.

When court orders are not available in a litigant's language, it is recommended that judges use qualified interpreters to go over every aspect of the court order on the record with the parties. The court should inquire whether each party understands the terms of the order and whether they would like to ask any questions of the court. If the litigants indicate that they understand the order, the court should inscribe on the top of the court order the following language: "This order has been translated in open court to the parties with the assistance of a qualified interpreter. Each party demonstrated to the court that he or she understood the order." This notation will assist other judges when determining the party's comprehension level of the order should the parties return to court for enforcement. The court may also consider having the qualified interpreter prepare a copy of the court's order in the language of the parties and present that order to the court for its signature.

Ensure that all court forms, summons, subpoenas, notices of appearance, citations, and orders are translated into the language of all significant language groups in the community.

## **VIII. IMMIGRANT WOMEN'S ECONOMIC STATUS**

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<sup>27</sup>CALIFORNIA REPORT, *supra* note 2, quoting from 1991-1992 *Public Hearings on Racial and Ethnic Bias in the State Courts*, *supra*, at pp. 164-65. (Rina Hirai, attorney; member, Board of Directors, Asian American Bar Association of the Greater Bay Area.)

A compounding factor in the problems besetting immigrant women and other women of color as they try to use the courts is their poverty.

As the Fact Sheet on Women of Color in the Community that is part of this curriculum recounts, women of color occupy a disproportionately high percentage of the lowest paid jobs -- typists, clerks, nurses' aids, factory workers -- and are often concentrated in the contingent workforce.<sup>28</sup>

Immigrant women are often exploited in sweatshops and made to turn the little they earn over to their husbands.

The new Canons 3 (B) (5) and (6) of the Code of Judicial Conduct speak explicitly to bias based on socioeconomic status for good reason. Class is an enormously important factor in individuals' access to the courts. In California, for example, it was noted that gender, racism and poverty affect the family courts' processing of divorce cases. The majority of those appearing pro per are women of color who "were consistently treated with less respect and given insufficient information to carry out the roles that were assigned to them in representing themselves."<sup>29</sup> Mediators and evaluators impermissibly made custody awards based on the parties' economic status, to the repeated disadvantage of the women.<sup>30</sup>

## **IX. JUDGES SHOULD NOT MANDATE MEDIATION IN CASES WHERE DOMESTIC VIOLENCE HAS OCCURRED, PARTICULARLY WHEN THE VICTIM IS A MEMBER OF AN IMMIGRANT COMMUNITY**

**Note to Expert:** During the issue-spotting exercise there was a question as to who would order the Ortiz case to mediation. Tailor your remarks to the response to that question and present the following commentary.

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<sup>28</sup>The National Employment Lawyers Association Position Paper on Affirmative Action, <http://www.disgruntled.com/affirm.html>.

<sup>29</sup>CALIFORNIA REPORT, *supra* note 2, at 165-66.

<sup>30</sup>*Id.* at 167

In battering relationships, the victim knows that the perpetrator will use violence when she does not act in a manner deemed appropriate by the perpetrator. It is this constant, real threat of physical violence that enables the perpetrator to control what the victim says and does. In domestic violence cases, the victim's fear of further violence will prevent her from participating in mediation as an equal party with the perpetrator, thus making it impossible to reach an agreement that is truly "consensual."

For immigrant women, mediation becomes even more unworkable because of language barriers. The number of mediators fluent in certain languages is insufficient and the likelihood that qualified interpreters are available for mediation is slim. If the batterer has a greater command of English his partner is greatly disadvantaged. Furthermore, forcing an immigrant battered woman to work out an agreement with her abuser rather than requiring the court to make its own determination, feeds into her expectation that her abuser will be able to control the judicial system, just as he was able to do in the country of origin.

***What Judges Can Do:***

Do not mandate mediation in domestic violence cases.

Appoint bilingual attorneys to represent all parties in domestic violence cases. Whenever possible, courts should appoint bilingual attorneys to represent non-English-speaking litigants. Appointing attorneys who must rely on interpreters to communicate with the clients can significantly limit counsel's ability to adequately represent the client and can lead to long, drawn out trials which would be avoided if counsel and client could communicate directly. Furthermore, when the lawyer-client relationship does not take cultural differences into consideration, the client may not accurately understand what is happening in court and may

have difficulty  
understanding and  
complying with court orders.

**X. ORTIZ V. ORTIZ: ISSUE-SPOTTING EXERCISE CONTINUED: WHAT RELIEF DID PARTICIPANTS ORDER IN THIS CASE?**

**Note to expert:** Pick up here on your earlier question to the group about what relief they would grant in the Ortiz case, assuming the evidence adduced supports Elena Ortiz's testimony. (***It is essential to make this point about evidence supporting her version of the facts, or discussion cannot go forward.***)

Do you grant the order of protection?

Is the fact that she hasn't followed through twice before an issue? How do you handle it?

Who gets custody of the children?

Do you award supervised visitation?

Do you award child support?

Do you grant the restitution?

Do you expunge her arrest record?

Comment on each point. Here is where you can make points about issues common to all battered women. For example, with respect to custody and visitation, point out that children are secondary victims of domestic violence and that unsupervised visitation endangers battered women.

With respect to the financial issues, note that women from communities of color often are not awarded restitution because judges and other court personnel assume that men from their communities have no money. This is an offensive stereotype about men from communities of color, but those who suffer its effects are the women from these communities.

## **AFRICAN AMERICAN WOMEN AND THE BATTERED WOMAN SYNDROME**

**Note:** This discussion is built around the case study of State v. Givens which is on the next page.

### **State v. Givens Exercise:**

Ask participants to remove State v. Givens from their folders and read it closely, noting any issues raised that they think are relevant to a judge's concerns and responsibilities.

Ask participants to assume this is a jurisdiction where judges conduct voir dire based on questions submitted by the lawyers. Roberta Givens' lawyer asks you to voir dire the potential jurors as to their preconceptions about the type of woman who can believably assert a Battered Woman's Syndrome defense because she plans to introduce an expert witness on this issue. The lawyer points out that the stereotypical battered woman is white, blonde, small, meek and economically dependant on her husband. Roberta Givens is none of these. People create categories for other people, they look for information to support that categorization, and can become uncomfortable if given information that is inconsistent with that category.

- Q. Will you ask the voir dire questions concerning the stereotype of the battered woman and the fact that the defendant does not fit it?
- Q. Will you allow the expert testimony on Battered Woman's Syndrome?



Handout

**DOMESTIC VIOLENCE CASE STUDY**

**SELF-DEFENSE**

**State v. Givens**

Background Information:

My name is Roberta Givens. I am 32 years old. I am 5'11" tall, and I weigh 185 pounds. I am accused of first-degree murder in the death of my fiancé, Michael Tyler.

Mike started hitting me soon after I let him move into my house with me, when he got laid off from his job. Some men are insecure around women who have their own money, a decent job, a car, and a house. I thought Mike was different. I was wrong.

I probably should've reported him to the police the first time he hit me, although I doubt that it would've done any good. The police are notoriously lax about investigating violent crime in my neighborhood. Besides, there are already so many young Black men in prison or on parole. I didn't want him to be another statistic. Then, too, the whole neighborhood would've turned on me if I had called the police on him - my mother, his mother, and my sisters included. "He doesn't drink too often, or do drugs, or cheat on you, and he's looking for a job," they'd say. "He's just stressed. So he hits you occasionally. You can't ruin his life over something like that."

The beatings got worse and worse. I fought back, but that just made him angrier. One day, he got turned down for yet another job. He went out and got sloppy drunk, then came home and started taking his frustrations out on me. I was terrified and fought for my life. Now they're charging me with murder.

I plan to plead self-defense. My lawyer says she's going to introduce expert testimony about battered woman's syndrome.

Discussion Guide:

The Expert opens with the following commentary:

Before we talk about how you would rule in this situation, let's do a quick issue-spotting exercise. From the point of view of Roberta Givens, what are the issues that affect her access to justice? From your point of view as a judge, what issues are relevant to your concerns and responsibilities?

As was discussed this morning, people create categories for other people, then look for information to support that categorization, and can become uncomfortable if given information that is inconsistent with that category. The stereotypical battered woman is white, blond, small, meek, and economically dependent on her husband. Roberta Givens is none of these. In addition, she can't "just leave" her batterer, as victims of abuse are often told they should do, because he lives in her house. How will that affect how the jury perceives her? How will that affect the fairness of their deliberations and their ultimate verdict? How will that affect how you as the judge perceive her? What can you do as the judge to make sure that Roberta Givens gets a fair trial unaffected by the biases of the jury?

Ms. Givens points out that she had no support for her problem from the police, her community, or her family. What are your thoughts about the defendant's story? Should her background information play a part? In what way?

What other stereotypes about Black women might affect the jury in this situation?

Issues for the Judge:

Will you allow voir dire questions concerning the stereotypical battered woman, and the fact that the defendant doesn't fit the stereotype?

Will you allow the expert testimony about Battered Woman's Syndrome?

## **Trial and Sentencing Outcomes for Battered African-American Who Kill their Partners in Self-Defense**

**Note to Presenter:** This issue may have come up on the morning's discussion of stereotypes about women of color and how they play out in the courts. If it did, tie your presentation to that discussion.

Over the last fifteen years, expert testimony about battered woman syndrome (BWS) has been widely accepted in the courts to explain why some battered women kill their abusers when the women are not defending themselves against a deadly assault, the traditional pattern for a self-defense justification. The paradigm is that of the burning bed case; the woman who set her husband's bed afire while he slept because she was too terrified to take any defensive action while he was awake.

More recently, however, commentators have questioned the value of BWS because it creates a debasing female stereotype of abused women as "suffering" from a syndrome. Although BWS is intended to show the reasonableness of the battered woman's actions, it usually reinforces an image of women as weak, crazy, powerless "victims" in need of protection. The effect of asserting BWS in court has often been to treat battered women in a way that is demeaning by presenting them as people with a diminished intellectual capacity, rather than as reasonable people who act in self-defense to save their lives. It revives the conception of self-defense in this context as an excuse rather than a justification.

One group that has rarely benefited from BWS expert testimony is African-American battered women who kill in self-defense. The reasons are fully discussed in an article in your Readings by Linda Ammons titled "Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman's Syndrome."

Because many Black women do not fit the BWS paradigm of the small, fragile, helpless, weak victim who never fights back, they have been much less successful in presenting this form of defense. For example, Dr. Lenore Walker, who developed the BWS theory, has written of three cases in which African-American battered women who relied on BWS were convicted and sentenced to prison, one to a life term.

Racism and economic discrimination are inextricably linked to sexism in our culture, creating an ugly nexus in our courts of law...when a woman appears...defensive or hostile in court -- especially when she

is poor or Black -- there is a great likelihood that she will be judged severely and punished severely.<sup>31</sup>

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<sup>31</sup>Lenore Walker, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 210-128 (1989).

The Prison Activist Resource Center reports that African-American women are twice as likely to be convicted of killing their abusive husbands as white women.<sup>32</sup>

In a comprehensive article on this issue Professor Shelby Moore observes:

While battered women in general must overcome myths involving psychological disabilities and images of victimization, African American women must overcome stereotypes far more onerous. Specifically, African American women are viewed as angry, masculine, domineering and sexually permissive - characteristics which do not denote 'victim.' As a result, judges and jurors are less likely to believe African American women are 'victims' when they assert self-defense while relying on the battered woman syndrome as the justification for killing their abusers.<sup>33</sup>

....

These [stereotypical] images work against African American women to such an extent that they must struggle to rise above them. If judges and jurors view them as strong and domineering, they are unlikely to believe that African American women suffer psychologically as a result of being battered. Again, they are more likely to be viewed as deserving of, or in some way the cause of, the violence perpetrated against them. These images prevent judges and jurors from viewing African American women in the same way they view the mythical white woman: virtuous and fragile; worthy of being protected and respected.<sup>34</sup>

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<sup>32</sup>Prison Activist Resource Center, "Women in Prison," <http://www.igc.apc.org/justice/prisons/women/women-in-prison.html>. (June 1997).

<sup>33</sup>Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L. J. 297, 302-3 (1995).

<sup>34</sup>*Id.* at 333-334.

This image of the stereotypically angry African American woman serves to further subjugate African American women in the criminal justice system. When they are characterized as suffering from the battered woman syndrome, the stereotype is damaging. The jury is less likely to find credible an African American woman who kills in self-defense when it believes that she is angry at trial and not psychologically debilitated as the syndrome would suggest. This proves to the jury that her anger on the night on the homicide precipitated or in some way caused the death.<sup>35</sup>

***What Judges Can Do:***

If a BWS defense is proffered for a woman of color who does not fit your image of what the victim in such a case should look like or how she should behave, be alert to how stereotypes may be shaping your assessment of her credibility. Even if you are not the trier-of-fact, your assessment can “leak” to the jury in the form of nonverbal communication. Such stereotypes can also be a factor in sentencing and should be guarded against. With respect to the jury, consider a voir dire that inquires into jurors’ preconceptions about how a defendant using a BWS defense should look and behave. If jurors have an image of Farah Fawcett in “The Burning Bed” and the defendant is a large, feisty Black woman, query whether she will receive a fair trial.

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<sup>35</sup> *Id.* at 335.

## **RAPE**

### **Expert Presentation**

This expert presentation focuses on the specific issues confronting women of color, particularly African American women, who are complainants in rape cases. The focus is on actions judges can take to minimize or eliminate the problems identified.

The presentation of this material should be as interactive as possible. An interactive format is outlined below.

### **Instructions for Small Group Voir Dire Exercise**

Introduce the exercise by explaining that there are two particular problems confronting women of color - particularly African-American women, in rape trials. This segment begins with an exercise that attempts to reveal these problems through juror voir dire.

#### **Describe the Case:**

A 28-year-old African-American woman alleges she was raped by her 34-year-old African-American supervisor. Evidence will show that they lunched together frequently and he regularly gave her rides to her bus stop.

#### **EXERCISE: “What’s My Bias?” (7-10 minutes)**

At each table two participants are asked to be “judges” and two are asked to be “jurors.”

Each “juror” is given a folded piece of paper on which is written a “secret” or a “bias” and an identity written on a table tent to be placed in front of the “juror.”

The “judge” is asked to follow his or her normal voir dire practice to attempt to elicit the secret, which means it will be necessary to ascertain what that practice is before beginning.

Thus, if the “judge” normally practices very speedy group voir dire, the judge should not be allowed ten minutes to question a juror individually. This technique will highlight deficiencies in rapid group voir dire cases.

### **Juror 1**

**Identity:** Black Juror

**Secret 1:** I don't like a Black woman airing our dirty laundry. Cases like this just confirm white people's belief that Black men are a bunch of over-sexed savages who belong in jail.

### **Juror 2**

**Identity:** White Juror

**Secret 2:** I think Black women are promiscuous and I would be very skeptical of a Black woman who was so friendly with her supervisor claiming that he raped her.

### **Secret 1 - Opposition to Black Rape Victims' Reporting Black Rapists**

After the exercise, ask the group how many "judges" succeeded in eliciting "secret" 1 from the "jurors." Was it difficult? What questions worked? Explain the importance of eliciting this "secret" from the potential juror with the following information.

### **Women of Color Face Particular Barriers to Reporting**

Women of color, especially African-American and Native American women, face particular barriers to reporting.

#### **African-American Women - Barriers to Reporting**

Black women face strong pressures from their community not to report rape when the rapist is a Black man. In the vast majority of cases involving Black victims the rapist is also Black. Department of Justice data show that 88% of rapes are intraracial.<sup>36</sup> The abuse and bias that Black men experience in the criminal justice system, well documented in the reports of the race and ethnic bias task forces, as well as the oppression of Black men throughout American history, has made the Black community protective of its men and focused on antiracist strategies that support Black men, even at the expense of Black

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<sup>36</sup>Caroline W. Harlow, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME, NCJ-126826, at 10 (1991).



women.<sup>37</sup> The community is opposed to validating stereotypes about Black men as oversexed and animalistic.

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<sup>37</sup>Crenshaw, *supra* note 18 at 1266-1282.

In 1997 two rape crisis counselors who work with Black rape victims in Los Angeles reported that a significant problem in the African-American community is denial that rape is a problem in that community.<sup>38</sup> The former editor of a magazine for African-American women has written with respect to rape and sexual harassment cases involving Black women and men that:

[W]hen a woman steps forward and dares to bear witness to the misogyny and sexual terrorism that flourishes in our community, all hell breaks loose. She who dares speak about and hold black men accountable for the everyday acts of incest, battery, rape, domestic violence and sexual harassment risks becoming a pariah.<sup>39</sup>

This attitude in the African-American community, coupled with the skepticism of law enforcement personnel toward that community, has significant implications for those Black women who do go forward with a rape prosecution against a Black man. It will shape how these women behave in court and how they will be perceived by judges and jurors.

Whether, how soon and how well a rape victim recovers is strongly influenced by the response to her disclosure from family, friends, law enforcement personnel, and the courts, as well as the circumstances of her life situation. The rape victim who must go on living in a dangerous community and who receives no validation from police because of her race or economic class is far more likely to self-medicate with drugs or alcohol than the rape victim who can return to live with her family in a safe neighborhood and is fully supported and validated by those who know her and the police.<sup>40</sup> A study of Black and white rape victims in the Los Angeles area found that Black women more often live in high crime areas and

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<sup>38</sup>Lottie Joiner, *Healing the Scars*, EMERGE, May 1997 at 34, 40.

<sup>39</sup>Marcia Gillespie, *What's Good for the Race?* Ms. Jan./Feb. 1993 at 80, 81.

<sup>40</sup>Presentation by Dr. Carolyn Newberger, Director, Victim Recovery Study, Children's Hospital, to the 1992 All Court Conference on Gender Issues, Synchronic and Profile Evidence Workshop, Boston, MA (May 15, 1992).

often drop out of rape crisis therapy because they perceive that the therapeutic plan ignores aspects of their environment that they cannot change.<sup>41</sup>

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<sup>41</sup>Gail Wyatt, *The Sociocultural Context of African American and White American Women's Rape* 48 J. OF SOCIAL ISSUES 77, 86 (1992);

Rhonda Brinkley-Kennedy, Clinical Director of the Rosa Parks Sexual Assault Crisis Center in South Central Los Angeles reports, that the hostility African-American rape victims who report Black men often encounter from their own communities is so debilitating and infuriating that by the time these women get to court they are filled with anger, not simply at the rapist, but with everything that has happened to them. Their anger makes them appear to fit the "Sapphire" stereotype - "nagging, shrewish, castrating, dangerous, treacherous toward and contemptuous of Black men." Judges need to understand that the anger is just a facade to hide the fear and frustration the women feel at this point. They may appear to be in charge but they are not.<sup>42</sup> Understanding why an African-American woman in this situation may appear angry and strident is important because it has consequences for perceptions of her credibility.

Judges and juries have definite expectations about the way rape victims should behave on the witness stand, with grave implications for the credibility of those who do not attain the mythical ideal. Yet victims' behavior during trial will vary widely according to their personality, stage of recovery, life situation and many other factors.

About half of victims demonstrate a "controlled style," which means they hide their feelings and appear calm. The other half demonstrate an "expressive style," which means they display fear, anger and anxiety by crying, sobbing, smiling or acting restless or tense.<sup>43</sup>

Controlled style victims may be disbelieved when they do not cry because some tears are what the judge and jury expect. Expressive style witnesses who cry "too much" may be dismissed as hysterical. Expressive style witnesses who display anger are particularly suspect. Our culture is extremely uncomfortable with women of any race who display anger. But angry Black women are doubly burdened by the stereotypes about angry Black women cited above in the article by Shelby Moore about Black woman who attempt to utilize the Battered Woman Syndrome. Dr. Moore observes,

African American women are viewed as angry, masculine, domineering and sexually permissive - characteristics which do not denote "victim." As a result, judges and jurors are less likely to believe African American women are "victims" when they assert self-defense while relying on the battered woman syndrome as the justification for killing their abusers.<sup>44</sup>

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<sup>42</sup>Telephone interview with Rhonda Brinkley-Kennedy, Clinical Director, Rosa Parks Sexual Assault Crisis Center, Los Angeles, (May 16, 1997).

<sup>43</sup>Ann Burgess & Lynda Holmstrom, *Rape Trauma Syndrome* in THE RAPE VICTIM 122 (Deanne R. Ness ed., 1977).

<sup>44</sup>Moore, *supra* note 33 at 302-303.

In a New York case that received national attention, a Black female college student at St. John's University was raped and sexually assaulted by several white male students on the lacrosse team. The assault occurred after she was manipulated into coming to their apartment under false pretenses and forced to drink liquor until she was incapacitated. Several of the defendants admitted their guilt but some went to trial. Jurors disbelieved the victim because instead of appearing pathetic and helpless on the stand, she was angry and argumentative during cross-examination.<sup>45</sup>

Rape victims being disbelieved when they display anger is particularly disturbing because anger is the beginning of recovery.

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<sup>45</sup>Nicholas Varchaver, *Inside the Jury Room*, MANHATTAN LAWYER, Sept. 1991 at 17.

At the beginning of [therapy], the client often can feel only the pain of her victimization...As she begins to affirm her victimization, her anger begins to be revealed. Anger provides energy to the work of coping and drives her toward new ways of being in the world.<sup>46</sup>

### **Native American Women - Barriers to Reporting**

Judges in Public Law 280 jurisdictions<sup>47</sup> where rape and sexual assault cases arising in Indian Country are tried in state courts should be aware that Native American women also face particular barriers to reporting and going forward with cases of rape and sexual assault. The following list of barriers was developed by Mending the Sacred Hoop, an organization which provides sexual assault and domestic violence training for judges, attorneys and police as well as technical assistance to Department of Justice STOP Grants Tribal grantees.

#### COMMUNITY RESPONSE TO SEXUAL ASSAULT

Indian tribes have identified the following barriers to providing an effective community response to sexual assault:

- Communities are silent about sexual assault and in denial about its prevalence.
- Rape is not considered a violent crime.
- The community blames the victim.
- The police, the courts and service providers fail to collaborate.
- Punishment for perpetrators does not meet the gravity of the crime.
- Survivors do not report the attack for fear of shame and embarrassment.
- If the perpetrator's family has a social or political status, survivors are unwilling to prosecute.
- Communities lack rape awareness programs.
- Communities lack safe shelters for survivors.
- Communities lack 24-hour crisis services-- or any kind of services.
- Sexual assault cases tend to "disappear."
- Sexism in Native communities is equated with traditionalism.

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<sup>46</sup>Barry Burkhart, *Conceptual and Practical Analysis of Therapy for Acquaintance Rape Victims* in ACQUAINTANCE RAPE: THE HIDDEN CRIME 287, 299 (Andra Parrot & Laurie Bachkofer, eds., 1991).

<sup>47</sup>18 U.S.C. §§1161, 1162; 25 U.S.C. §§1321-1322; 28 U.S.C. §1360 (1953).

- Indian Health Services (IHS) is sometimes uncooperative.
- Survivors fear that their cases will not be handled with confidentiality.
- Communities are unaware that marital rape is unacceptable.
- Survivors are stigmatized in the community.
- It is considered acceptable, particularly among teens, to rape a woman who is intoxicated.
- Police and other service providers lack sexual assault training.
- Nobody wants to testify in a rape case.
- Survivors fear retaliation if they report the attack.
- The police are often the offenders or friends of the offenders.
- In small communities, survivors fear that the word will get around.
- Survivors fear their children will be taken away.
- Rapists are rarely prosecuted.
- An attack is considered rape only when the offender is a stranger.
- Survivors are blamed for destroying offenders' lives if they report the attack.
- Survivors distrust the system.
- If perpetrator was drinking, he is not considered responsible for his actions.<sup>48</sup>

## **Secret 2 - Assumption that Black Women are Promiscuous**

Ask participants how many “judges” succeeded in eliciting Secret 2 from the “jurors.” Was it difficult? What questions worked?

Explain the importance of eliciting this type of secret from a potential juror with the following information.

## **Stereotypes About African-American Women Affect Juror Deliberations and Sentencing in Rape Cases.**

A second problem confronting African-American rape victims at trial is the devaluation of their credibility because of stereotypes about Black women as sexually voracious. These attitudes also infect sexual harassment cases.

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<sup>48</sup>Mending the Sacred Hoop, Sexual Assault Information Packet (Draft), Dec. 1997 at 13.

Black women are acutely aware of their lack of credibility as victims of sexual assault. The 1990 study of Black and white Los Angeles women cited earlier found that Black rape victims were “significantly less likely to disclose incidents involving sexual assaults.” The author posited that Black women’s lesser credibility as rape victims together with their negative experiences with and expectations of the police (who both unfound Black women’s claims of rape more often than white women’s and show bias against Black male defendants in all types of cases) may be controlling factors in their willingness to report.<sup>49</sup>

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<sup>49</sup>Wyatt, *supra* note 41, at 86-87.



A 1997 survey on sexual assault by the Black newsmagazine Emerge queried readers about Black women and sexual assault. The majority of respondents were women, 89% perceived that Black victims report less often than white victims; 68% stated that Black women don't report because they will not be believed.<sup>50</sup>

The justice system's disbelief in Black rape victims' veracity is vividly illustrated by the following quotation from a Florida Supreme Court opinion.

What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.<sup>51</sup>

This case was decided in 1918, but the continuing viability of the attitude it expresses was documented in a major study of rape cases in the 1980s that paints a disturbing picture of white jurors' attitudes toward Black women rape victims.

In the early 1980's, a team of social scientists conducted in-depth 90 minute interviews with 331 men and women who had sat on juries in rape cases in Indianapolis.<sup>52</sup> The researchers found that jurors made their decisions based on the victim's "character" and lifestyle even where there was proof of use of a weapon or victim injury. Jurors were less likely to believe in the defendant's guilt when the victim reportedly drank or used drugs, was acquainted with the defendant, or engaged in sex outside marriage. Jurors disregarded the evidence and decided cases on the basis of their personal values. These values were so rigid with respect to appropriate behavior for women that they even

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<sup>50</sup>Sexual Assault Survey Results, EMERGE, July/August 1997 at S12.

<sup>51</sup>Dallas v. State, 79 So. 690 (Fla. 1918).

<sup>52</sup>Gary LaFree, RAPE AND CRIMINAL JUSTICE 140 (1989).

disbelieved women who held non-traditional jobs - including a woman who drove a school bus.

Another factor that emerged starkly in this study was the issue of race.

When we think about rape and race, most of us think about cases like the Scottsboro boys and the extreme animus toward Black men charged with raping white women. This aspect of the rape and race issue did emerge in this Indiana study. "Taken together, the results indicate that processing decisions in these sexual-assault cases were affected by the race composition of the victim-defendant dyad, and the cumulative effect of race composition was substantial."<sup>53</sup> "It is clear from the analysis that Black offender-white victim rapes resulted in substantially more serious penalties than other rapes. . . ." <sup>54</sup>

But what also emerged was a strong devaluation of African-American women as victims of sexual assault. In this Indianapolis study, "black intraracial assaults consistently resulted in the least serious punishment for offenders."<sup>55</sup>

This devaluation of women of color in sexual assault cases is also vividly demonstrated by a study of sentencing in Dallas, Texas. In Texas juries impose sentences in non-capital cases. A 1990 study by a local newspaper found that the median sentence for a Black man who raped a white woman was 19 years. The median sentence for a white man who raped a Black woman was 10 years. The median sentence for white on white rape was 5 years, for Hispanic/Hispanic rape 2.5 years, and for Black on Black rape, a mere 1 year.<sup>56</sup>

The origins of this devaluation of Black women who are victims of sexual assault go back to slavery. White men who raped their Black female slaves told themselves stories to avoid acknowledging, even to themselves, the truth of what they were doing. The story they told was the victim-blaming myth of the promiscuous Black woman who had seduced them. As Gary La Free wrote of the jurors he studied in Indianapolis:

Jurors were less likely to believe in a defendant's guilt when the victim was black. Our interviews with jurors suggested that part of the explanation for this effect was that jurors...were influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 145.

<sup>55</sup> *Id.*

<sup>56</sup> *Race Tilts the Scales of Justice Study: Dallas Punishes Attacks on Whites More Harshly*, DALLAS TIMES HERALD, Aug. 19, 1990 at A1.

assault. In a case involving the rape of a young black girl, one juror argued that a girl her age [she was thirteen] from ‘that kind of neighborhood’ probably wasn’t a virgin anyway.<sup>57</sup>

In the Readings for this unit is an article about this aspect of rape and race. We are clearly living with this attitude today. The comfort people feel with this attitude is such that some will even express it openly. Recently in Westchester, N.Y., after an acquittal in a case where a Black woman was raped on the examining table by a white doctor, a juror wrote to the prosecutor, “We thought a Black female like that would be flattered by the attention of a white doctor.”<sup>58</sup>

***What Judges Can Do:***

Conduct or permit a voir dire of the jury that seeks to elicit the biases exemplified in the voir dire exercise and strike for cause jurors who manifest these biases.

Be alert for defense efforts that seek to breach or skirt the rape shield law in order to play to stereotypes about women of color’s sexuality (e.g., the African-American Jezebel, the sexy vixen Latina). Even if prosecutors fail to object, Canon 3(B)(5) of the Code of Judicial Conduct requires judges not to permit this kind of biased behavior.

At sentencing, be alert for any comments from the defense or in the probation report devaluing the harm done to the victim.

**An Issue for Immigrant Women in Rape Trials: Abuses by Interpreters**

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<sup>57</sup>LaFree, *supra* note 52 at 219-220.

<sup>58</sup>Telephone interview with Barbara Eggenhauser, Assistant District Attorney, Westchester County, NY (April 21, 1992).

For immigrant women, interpreters pose special problems in rape as well as domestic violence cases. Pennsylvania Superior Court Judge Renee Hughes reports a case in which two Korean men were charged with the rape of a Korean woman. The defendants claimed not to understand English and demanded an interpreter. During the complainant's testimony the interpreter joined the defendants in making faces at the witness and dismissive hand gestures toward her. Judge Hughes called the interpreter into her chambers and admonished him. His visible misconduct stopped.<sup>59</sup>

### ***What Judges Can Do:***

Be alert to the behavior of interpreters in the courtroom, the courthouse, and the community (the latter because the interpreters often come from the alleged victim's community) and instruct court personnel to be alert as well. For interpreters to intimidate a victim or belittle her testimony is a violation of their Code of Professional Responsibility.

## **Closing**

At the conclusion of the unit, the Judge/Moderator closes with a succinct review of the key issues for women of color victims of gender-based violence and some highlights from the discussion. **It is essential to formally conclude this and every unit to create a sense of closure.** Don't let the units just trail off or end without it.

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<sup>59</sup>Interview with Judge Renee Hughes, (May 10, 1997).

## **Action Planning Session**

If the violence unit is presented as an independent program or there is no separate Action Planning Session slated for the end of the full-scale program, use the following format for an Action Planning Session on violence issues.

**Learning Objective:** To make specific plans for actions participants will take as a result of this program.

**Overview:** A small group action planning session possibly followed by a report back. All ideas generated to be compiled and circulated to all participants.

**Recommended Length:** 15-30 minutes.

**Faculty:** Judge/Moderator to explain exercise and moderate report back if there is one.

Judge/Facilitators for each small group.

**Format:** A plenary session with an exercise done at small tables.

An optional report back.

**Equipment:** Flip chart if you opt to include a report back.

**Handouts:** Action Planning Worksheets.

These worksheets are at the Overheads & Handouts tab for this unit.

These worksheets are to be collected at the end of the Action Planning Session. Participants need copies of their worksheets to take home. This can be accomplished in several ways:

- Give participants the worksheet on carbon sets and collect only the top sheet.
- Have participants put their names on the sheets and mail a copy back to them with the Action Plan Compilation.
- Have participants write their plans twice and turn in one copy.

**Report Back:** This is optional. Some people perceive reporting back as an important opportunity to share ideas. Others dislike it. A report back can be a problem at the end of a long program because there is invariably some repetition and participants are eager to leave. If you opt to include a report back, instruct the successive reporters not to repeat anything their predecessors said but only to add new ideas.

## **Compiling and Circulating the Action Plans**

### At the end of the Action Planning Exercise:

- Collect each participant's Action Plan.

### After the program:

- Compile the answers using the four questions as headings.
- Eliminate duplications.
- Create an Action Plan Compilation that presents everyone's ideas.
- Circulate the compilation to all program participants.

### Post-program phone interviews:

You may wish to conduct phone interviews a few months after your program to learn whether and how participants have acted on their action plans. If so, include in your exercise instructions a request that participants willing to be interviewed fill in the box on their Action Planning Worksheet asking for their name, phone and fax.

Handout

**ACTION PLANNING WORKSHEET**

*(Refer to the list of questions provided with these worksheets)*

**Actions I Will Take as the Result of this Program:**

*(Use additional sheets as necessary)*

**Interpreters and Translations:**

**Domestic Violence:**

**Voir Dire in Rape and Domestic Violence Cases**

Name:

Phone:

Fax:



### Handout

#### **Interpreters and Translations**

What actions will you take to insure that the court employs interpreters who are unbiased and competent and who adhere to their code of professional responsibility?

What actions will you take to insure appropriate behavior by interpreters outside the courtroom?

What actions will you take to insure appropriate behavior by interpreters in the courtroom?

What actions will you take to insure a reasonable complement of multilingual courthouse staff?

What will you do to encourage the development of culturally appropriate informational materials about the court system and family violence written in the language of the minority populations in your community?

How will you insure that all court forms, summonses, subpoenas, notices of appearance, citations, and orders are translated into the language of all significant language groups in the community?

#### **Domestic Violence**

What will you do to assure that judges and court personnel receive thorough training in the myths and facts about domestic violence as they relate to women of color and immigrant women?

What will you do if you hear comments from court personnel, lawyers, or others dismissing the seriousness of violence against women from particular communities because “that’s how those people are?”

What will you do to insure that physical signs of battering are not overlooked on women of color? What will you do to insure that non-physical signs of battering are not overlooked on women of color?

What will you do to increase the comfort level of immigrant women, particularly those who have not obtained a green card, who are seeking protection from domestic violence?

How will you support the efforts of women of color to report domestic violence and go forward with the court process, given your understanding of the unique difficulties these women may have in proceeding with these matters?

### **Voir Dire in Rape and Domestic Violence Cases**

How will you change the way you conduct or have lawyers conduct voir dire in cases involving women of color as victims of rape or domestic violence?

How will you change the jurors' questionnaire?

**When Bias Compounds:  
Insuring Equal Justice for  
Women of Color in the Courts**

**UNIT IV**

**ACTION PLANNING**

**A Model Judicial Education Curriculum  
Developed by the**

**National Judicial Education Program  
to Promote Equality for Women and Men in the Courts\***

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*\*A project of the NOW Legal Defense and Education Fund  
in cooperation with the National Association of Women Judges.*



## UNIT IV. ACTION PLANNING

**Learning Objective:** To make specific plans to implement actions participants will take to insure equal justice for women of color in the courts as a result of this program.

**Overview:** A small group action planning session possibly followed by a report back. All ideas generated to be compiled and circulated to all participants.

**Recommended Length:** 15-30 minutes.

**Faculty:** Judge/Moderator to explain exercise, moderate report back if there is one, and close program.

Judge/Facilitators for each small group.

**Format:** A plenary session with an exercise done at small tables.

An optional report back.

**Equipment:** Flip chart if you opt to include a report back.

Marking Pens

**Handouts:** Action Planning worksheets

### **Action Planning Exercise**

**Questions:** The Action Planning Exercise is built around the following four questions.

1. In the context of women of color in the courts, how can judges utilize controlled processing to minimize their own and others' natural tendency to decide/act based on stereotypes?
2. How can judges control the courtroom to prevent and minimize bias against women of color in the courts?
3. How can judges control the courthouse beyond their courtrooms to address bias against women of color as it affects or is practiced by court personnel?
4. How can judges address the biases that confront battered women of color and immigrant women when they seek protection through the justice system?

Depending on the length of time available, the exercise can be presented in one of two ways:

- Assign one question to each small group.
- Have each small group address all four questions.

**Worksheets:** Worksheets for the two different ways of doing this exercise follow this text and are at the Handouts tab for this unit. Whichever format you choose, give participants the Handout at page 7 listing the issues in detail.

Participants need copies of their worksheets to take home. This can be accomplished in several ways:

- Give participants the worksheet on carbon sets and collect only the top sheet.
- Have participants put their names on the sheets and mail a copy back with the Action Plan Compilation.
- Have participants write their plans twice.

**Report Back:** This is optional. Some people perceive reporting back as an important opportunity to share ideas. Others dislike it. A report back can be a problem at the end of a long program because there is invariably some repetition and participants are

eager to leave. If you opt to include a report back, instruct the successive reporters not to repeat anything their predecessors have said but to add only new ideas.

### **Compiling and Circulating the Action Plans**

#### At the end of the Action Planning Exercise:

- Collect each participant's Action Plan.

#### After the program:

- Compile the answers using the four questions as headings.
- Eliminate duplications.
- Create an Action Plan Compilation that presents everyone's ideas.
- Circulate the compilation to all program participants.

#### Post-program phone interviews:

You may wish to conduct phone interviews a few months after your program to learn whether and how participants have acted on their action plans. If so, include in your exercise instructions a request that participants willing to be interviewed fill in the box on their Action Planning Worksheet asking for their name, phone and fax.

### **Closing:**

At the conclusion of the Action Planning Session, the Judge/Moderator closes the unit and the program with a succinct review of the five reasons to have a program on women of color in the courts and some highlights from the day. **It is essential to formally conclude the Action Planning Session and the program to create a reuse of closure.** Don't let them just trail off or end.

Handout**ACTION PLANNING WORKSHEET**

The moderator will assign one of the following four points to your group for discussion and reporting back to the larger group. (Please circle the number in front of the point you are assigned to discuss.) Discuss with your group the actions you plan to take in your court as a result of this program. Use the back of this handout to write down your intentions.

1. With respect to women of color in the courts, how can judges utilize controlled processing to minimize their own and others' natural tendency to decide/act base on stereotypes?
2. How can judges control the courtroom to prevent and minimize bias against women of color in the courts?
3. How can judges control the courthouse beyond their courtrooms to address bias against women of color as it affects or is practiced by court personnel?
4. How can judges address the biases that confront battered women of color and immigrant women when they seek protection through the justice system? *(See list of detailed questions on the following pages.)*

Discuss your ideas with your group before recording them.

At the end of this program, please return your sheet to your judicial educator. Everyone's suggestions will be compiled and circulated among attendees.

Name:

Address:

Phone:

Fax:



Handout

**ACTION PLANNING WORKSHEET**

**1      2      3      4**

*Circle the number of the question from the reverse of this page that is assigned to your group.*

**Actions I Will Take as the Result of this Program:**

Handout**ACTION PLANNING WORKSHEETS**

Following are four worksheets that ask you to record the actions you will take as a result of this program, in the context of them your questions

1. With respect to women of color in the courts, how can judges utilize controlled processing to minimize their own and others' natural tendency to decide/act base on stereotypes?
2. How can judges control the courtroom to prevent and minimize bias against women of color in the courts?
3. How can judges control the courthouse beyond their courtrooms to address bias against women of color as it affects or is practiced by court personnel?
4. How can judges address the biases that confront battered women of color and immigrant women when they seek protection through the justice system? (*See the list of detailed questions on the following pages.*)
5. How can judges address the juror biases that confront women of color as victims of rape and domestic violence? (*See the list of detailed questions on the following pages.*)

Discuss your ideas with your group before recording them.

At the end of this program, please return your sheet to your judicial educator. Everyone's suggestions will be compiled and circulated among attendees.

Name:

Address:

Phone:

Fax:

Handout**Interpreters and Translations**

What actions will you take to insure that the court employs interpreters who are unbiased and competent and who adhere to their code of professional responsibility?

What actions will you take to insure appropriate behavior by interpreters outside the courtroom (e.g., in court waiting rooms, in the parties' community)?

What actions will you take to insure appropriate behavior by interpreters in the courtroom?

What actions will you take to insure a reasonable complement of multilingual courthouse staff?

What will you do to encourage the development of culturally appropriate informational materials about the court system and family violence written in the language of the minority populations in your community?

How will you insure that all court forms, summonses, subpoenas, notices of appearance, citations, and orders are translated into the language of all significant language groups in the community?

**Domestic Violence**

What will you do to assure that judges and court personnel receive thorough training in the myths and facts about domestic violence as they relate to women of color and immigrant women?

What will you do if you hear comments from court personnel, lawyers, or others dismissing the seriousness of violence against women from particular communities because "that's how those people are?"

What will you do to insure that physical signs of battering are not overlooked on women of color? What will you do to insure that non-physical signs of battering are not overlooked on women of color?

What will you do to increase the comfort level of immigrant women, particularly those who have not obtained a green card, who are seeking protection from domestic violence?

How will you support the efforts of women of color to report domestic violence and go forward with the court process, given your understanding of the unique difficulties these women may have in proceeding with these matters?

**Voir Dire in Rape and Domestic Violence Cases**

How will you change the way you conduct or have lawyers conduct voir dire in cases involving women of color as victims of rape or domestic violence?

How will you change the jurors' questionnaire?

Handout

*With respect to women of color in the courts, how can judges utilize controlled processing to minimize their own and others' natural tendency to decide/act based on stereotypes?*

**Actions I Will Take as the Result of this Program:**

Handout

*How can judges control the courtroom to prevent and minimize bias against women of color in the courts?*

**Actions I Will Take as the Result of this Program:**

Handout

*How can judges control the courthouse beyond their courtrooms to address bias against women of color as it affects or is practiced by court personnel?*

**Actions I Will Take as the Result of this Program:**



Handout

*How can judges address the biases that confront battered women of color and immigrant women when they seek protection through the justice system? (Refer to the list of questions provided with these worksheets.)*

**Actions I Will Take as the Result of this Program:**

**When Bias Compounds:  
Insuring Equal Justice for  
Women of Color in the Courts**

**UNIT V**

**THE CULTURAL DEFENSE AND  
CULTURAL EVIDENCE**

**A Model Judicial Education Curriculum  
Developed by the**

**National Judicial Education Program  
to Promote Equality for Women and Men in the Courts\***

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*\*A Project of the NOW Legal Defense and Education Fund  
in cooperation with the National Association of Women Judges.*

## UNIT V. THE CULTURAL DEFENSE AND CULTURAL EVIDENCE

**Learning Objectives:** As a result of this unit judges will be able to:

1. Identify the principle arguments respecting the admission or rejection of cultural defenses.
2. Accurately assess the qualifications of individuals proffered as experts and the quality of their evidence.
3. Respect other cultures without denying victims the full protection of United States law.

**Overview:** This unit provides an introduction to the vexed question of admitting cultural evidence in defense of a criminal charge and explores the pros and cons of admitting the evidence and an alternative to the all or nothing approach. The unit can be presented in one of two ways: either centered on a wife-murder case study that builds on the battered immigrant woman case study from the unit on gender-based violence or as an exploration of four different types of cases.

**Recommended Length:** 60 minutes.

**Faculty:** Judge/Moderator to open and close the unit, learning objectives, and the judge or expert who will lead the discussion.

A judge who is conversant or willing to become conversant with these issues. If no judge is available or willing, an expert, such as a professor of law or political science, who is knowledgeable in this area.

*Give the judge/expert the materials below to prepare for the presentation.*

Judge/facilitators for small groups.

**Format:** A plenary session presentation, small group discussion, and report back session; or, a plenary session presentation and discussion.

**Overheads:** Overheads defining culture and cultural defense.

**Handouts:** Case Studies: State v. Ortiz (wife murder); or  
Case 1 - Female Genital Mutilation  
Case 2 - Marriage-by-Capture (rape)  
Case 3 - Parent-Child Suicide  
Case 4 - “Honor Defense” to Wife Murder

**Readings:** Readings for this unit are at the Readings tab for this unit.

**Optional Presentation Formats:**

This unit can be presented in one of two ways:

1. Lecture and small group discussion/report back on wife-murder case study that is the sequel to the battered immigrant woman case study, State v. Ortiz, in the violence unit. **60 minutes**
2. Lecture and small group discussion/report back on four different case studies—female genital mutilation, marriage-by-capture, parent-child suicide, honor defense to wife-murder. **90 minutes**

Additionally, any of these cases can be integrated into a program on cultural defenses.

***A word of explanation:*** The cultural defenses unit was originally built around case studies on four different issues and projected to last ninety minutes. We realized there was not time for this unit in a one-day pilot and replaced the four cases with one that is a sequel to the battered immigrant woman case study in the unit on gender-based violence. Even this shorter version of the unit proved too lengthy for a one-day program. We decided to eliminate the full unit in the proposed one-day schedule at the start of this curriculum and include a reference to the problem of cultural defenses in the violence unit. We provide this unit here in both formats so that you can include these materials in a longer program on women of color or integrate them into a program on cultural defenses.

**Structure and Timing:**

Presentation to Plenary Session	20 minutes
Small Group Exercise at Tables	20-40 minutes
Report Back	20-30 minutes



## PRESENTATION

### Introduction

***Note:** If you are using the State v. Ortiz case study, use paragraphs one and two of this introduction. If you are using the four case studies, begin with paragraph five and integrate Overheads One and Two into it.*

You will recall that in our last unit we explored a domestic violence hypothetical in which Elena Ortiz explained that she was seeking court protection because the violence in her home was getting worse and she was worried about what would happen to her children if her husband killed her. For the purposes of this unit, we will assume that her fears have been realized; her husband has killed her. But the husband claims that he was justified because she was unfaithful and he was protecting his honor according to the code of his country of origin.

We are going to make some rulings about the admission of evidence on that point. But first, let me give you a summary of the several positions courts and commentators have taken on the issue of cultural defenses, which, as you know, is a highly charged area of the law today.

How do we define culture? [SHOW OVERHEAD ONE] A good working definition is:

Knowledge about customs, values, language, behavior, etiquette, traditions, belief systems, world views, food, dress, and musical tastes that is shared by members of a group. This shared knowledge is learned from others and passed on from generation to generation. Culture tells us how to behave and influences our interpretation of how others behave. Culture is the set of assumptions and understandings, often unexamined, that shapes our ideas and impacts our every decision.<sup>1</sup>

As the United States has become a more diverse and multicultural society, the cultural defense has been promoted as a necessary means of achieving fairness and justice in the legal system. [SHOW OVERHEAD TWO] The cultural defense excuses criminal behavior altogether or mitigates criminal liability due to a lack of requisite *mens rea* based on the defendant's claim that the act is accepted behavior in his or her culture and community.

The cultural defense implies that culture must be introduced for the sake of recent immigrants. Largely unrecognized is the fact that our own culture, with its default position of largely "white male" assumptions, as discussed in the primer materials you read before our program and again this

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<sup>1</sup>Peggy A. Nagae, and Kathleen M. O'Leary, The National Judicial College, Race Fairness and Cultural Awareness Faculty Development Workshop Manual 5-21 (1996) (copyright by PNL Consultants, Eugene, Oregon) (emphasis omitted).

morning, has norms and values which permeate the law.

### Historical Uses of the Cultural Defense and Cultural Evidence

Most cases which have been described as using a “cultural defense” have actually included cultural evidence in a traditional defense strategy, such as mistake of fact or diminished responsibility. Although several cases in which cultural evidence has been introduced have involved immigrants, indigenous peoples of the United States as well as members of racial and ethnic groups who are not part of the dominant culture have introduced cultural evidence in their defense. For example, as early as 1888, a U.S. court recognized a justification argument since the criminal acts were not punishable under the defendant’s sovereign legal system under Native American law.<sup>2</sup>

Cultural evidence has been admitted in a variety of contexts. In one parent-child suicide case, in which a mother strangled her son and attempted suicide due to factors such as her husband’s infidelity, the court allowed evidence of the defendant’s cultural background in determining the presence or absence of the relevant mental states.<sup>3</sup> Evidence of cultural background has also been used to determine a victim’s credibility in a sexual assault case by examining whether her actions after the alleged offense were typical of those expected in her culture.<sup>4</sup> Other uses of a cultural defense include a culturally based mistake of fact argument to determine *mens rea* or diminished responsibility.

The cultural defense and cultural evidence are issues of particular concern to women of color because they are often introduced in cases of violence against these women and their children. Women of color have been both the victims and the perpetrators in cases involving cultural evidence. For example, sexual assault and kidnaping have been defended as part of a marriage ritual in “marriage-by-capture” cases; bludgeoning a wife to death after learning of her infidelity was excused as a normal reaction in a more violent culture; and drowning one’s children in an attempted parent-child suicide was explained as a way to save face in light of a husband’s extra-marital affair.

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<sup>2</sup>See *United States v. Whaley*, 37 F. 145 (C.C.S.D. Cal. 1888); see also *People v. Croy*, No. 52587 (Placer County Super. Ct. Apr. 1990) (using information on the Native American experience to show the defendant’s actions in self-defense were reasonable).

<sup>3</sup>See *People v. Wu*, 286 Cal. Rptr. 868 (1991).

<sup>4</sup>See *State v. Lee*, 494 N.W. 2d 475 (Minn. 1993).

### Arguments in Favor of the Cultural Defense

The arguments favoring a free-standing cultural defense run as follows. The criminal justice system is often criticized for its imposition of and assumptions based on Western and white-male norms and values. A formal, freestanding cultural defense could be used to achieve fairness and individual justice and to promote cultural pluralism.<sup>5</sup> It is argued that by allowing a defendant to raise a cultural defense, our legal system would allow the fact-finder to apply the law to a more accurate profile of a reasonable person in the defendant's situation.<sup>6</sup>

Proponents of a formal cultural defense often refer to the importance of individualized justice in determining a defendant's culpability.<sup>7</sup> Despite the standard maxim that ignorance of the law is no excuse, an exception for recent immigrants would promote individualized fairness for those who are not yet familiar with our laws. Furthermore, because it is unlikely that an immigrant will face a jury which closely resembles her peers, educating the jury on the defendant's background helps bridge the cultural gap.

The cultural defense is also viewed as essential to maintaining a commitment to cultural pluralism.<sup>8</sup> The defenses available in a criminal justice system should reflect the diversity of the people it serves. Furthermore, for cultural pluralism and multiculturalism to survive and flourish, individuals must be able to maintain their customs and values.<sup>9</sup> Thus, by allowing each individual to maintain her culture, the criminal legal system will assist in preserving and promoting a pluralistic society.

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<sup>5</sup>See Note, *The Cultural Defense in the Criminal Law*, 99 HARV.L.REV. 1293 (1986); see also Alison Dundes Renteln, *A Justification of the Cultural Defense As Partial Excuse*, 2 REV. L. & WOMEN'S STUD. 437 (1993).

<sup>6</sup>See Renteln, *supra* note 5, at 440.

<sup>7</sup>See Renteln, *supra* note 5, at 440; Note, *supra* note 5, at 1298.

<sup>8</sup>See Note, *supra* note 5, at 1301

<sup>9</sup>*Id.*, at 1299.



Recognizing the problems of allowing cultural evidence, some scholars advocate a limited approach in order to maintain gains in areas such as violence against women while minimizing cultural stereotyping. Proponents of this approach recognize that while cultural evidence has been used to practically legitimize violence against women depending on the cultural setting, it may also aid in the defense of women of color, particularly those whose actions have been shaped by a culture in which women are devalued and marginalized. For example, cultural evidence could assist jurors in understanding the gender-role limitations and oppressive context in which a female defendant acted in a parent-child suicide case.

### **Arguments Against the Cultural Defense**

Opponents of a freestanding cultural defense also argue by the principles of fairness and justice. A legal system should have only one standard, and immigrants and other minority groups must learn its rules and values. Otherwise, those who know the rules, regardless of their race or national origin, would be treated more harshly and thus unfairly compared to recent immigrants committing the same criminal acts. Furthermore, victims of those who do not know the rules will be offered less protection.

Women's advocates are also concerned that a formal cultural defense is unfair, especially to women of color, because it eliminates the limited progress achieved in areas such as domestic violence. Because violence against women of color is still so widely accepted and approved in cultures across the world, just as it was until very recently in our own culture, cultural background can be easily used to justify or excuse the perpetrator's actions. Members of immigrant communities who should otherwise be protected by the law are at risk of further violence. Victims of immigrants, particularly their partners and children, would receive unequal and less protection in comparison to the white male and even female population. Immigrant communities often express their concern that crimes with immigrant victims are punished less severely than cases in which the victim is white. For example, Hmong community members in LaCrosse, Wisconsin were outraged when a Hmong man received probation for sexually assaulting his two Hmong stepdaughters. His attorney argued that, "he is from Vietnam. . . Part of what happens in an agrarian culture, sometimes young girls are married and that may have been a carry-over in their culture. . . . This behavior may have seemed to be OK or not as bad as we view it."<sup>10</sup> A spokesman for the victims' family countered, "There are no cultural differences to allow a man to molest children that age. . . . The family of the victims were shocked."<sup>11</sup> In an earlier case, the children's biological father had been sentenced to 10 years in

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<sup>10</sup>*Molester's Probation Shocks Kin*, CAPITAL TIMES, August 29, 1996, at 3A.

prison for sexually assaulting the white daughter of a girlfriend.<sup>12</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> See e.g., Meg Jones, *Sex Assault Sentence Draws Charges of Bias*, MILWAUKEE J. SENTINEL, Aug. 29, 1996, at 1.

The danger of allowing a cultural defense or in presenting inaccurate information as cultural evidence has surfaced in the experiences of women in immigrant communities.<sup>13</sup> For example, in a 1988 New York case with a bench trial, a Chinese immigrant was convicted of a reduced charge and received a minimal, probational sentence for murdering his wife after she confessed to infidelity.<sup>14</sup> The judge found that the defendant's cultural values contributed to his state of mind. Women in the Asian community were outraged and frightened. Battered women in the Chinese community felt that they were at a much greater risk of violence from their partners.<sup>15</sup> One Chinese immigrant husband told his wife that "If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney."<sup>16</sup> Another woman fled her home with her children and sought emergency shelter immediately after reading about the case in a Chinese newspaper, fearing that her husband would find out about the decision.<sup>17</sup> In addition, a counselor for battered immigrant women confirmed that before the decision, women could try to threaten their abusive husbands with punishment through the legal system. Afterwards, this potential deterrent had been eliminated.<sup>18</sup>

### **The Case for Allowing Cultural Evidence in Limited Circumstances**

In achieving the proper balance between cultural information and the oppressive conditions women face, it is necessary to recognize the intersectional oppressions of women of color, who experience sexism in their own cultures and both racism and sexism in American culture. Cases involving gender-based violence should include "not only the way that 'cultural practices' among . . . men and . . . women are an expression of particular power arrangements, but also the different means by which these practices are maintained and legitimated."<sup>19</sup> One view, therefore, recommends an "antissubordination analysis" which would help distinguish between cases in which women are

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<sup>13</sup> See e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 76-77 (1994) (advocating a limited use of cultural evidence) This article is in the readings for this unit; Alice J. Gallin, *Note: The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 735-36 (1994).

<sup>14</sup> *People v. Dong Lu Chen*, No. 87-7774 (N.Y. SUP. CT. Dec. 2, 1988).

<sup>15</sup> See Alexis Jetter, *Fear Is Legacy of Wife Killing in Chinatown: Battered Asians Shocked by Husband's Probation*, *NEWSDAY*, Nov. 26, 1989, at 4.

<sup>16</sup> See Jetter, *supra* note 15, at 4 (quoting a counselor at the New York Asian Women's Center, retelling a conversation with a Chinese immigrant woman).

<sup>17</sup> See Jetter, *supra* note 15, at 4 (referring to a story told by a co-director of the New York Asian Women's Center).

<sup>18</sup> See Jetter, *supra* note 15, at 4 (referring to the experiences and statement of a counselor at the New York Asian Women's Center).

<sup>19</sup> See Volpp, *supra* note 13, at 93-94.

victims of male violence and those in which they are perpetrators of violence against their children in a social structure with patriarchal values. This approach would examine “whether the defendant acted with a consciousness of her position within the social structure of her community.”<sup>20</sup> For example, a woman whose choices have been limited by her position in her culture and family due to gender could present evidence of such constraints on her decisions, and thus show these limited options within the context of her subordination on the basis of gender. In a parent-child suicide, therefore, a woman’s limited, gender-specific choices in light of a husband’s affair would be taken under consideration.

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<sup>20</sup>*Id.*, at 98.

In addition to focusing on the intersectionality of race and gender and recognizing the marginalization of women within their own cultures, it is also necessary to establish a uniform standard in admitting cultural evidence. One approach advocates allowing cultural evidence as a challenge to the prosecution's burden of proving *mens rea*.<sup>21</sup> Prosecutors would assume a vital role in exposing stereotypes and other types of incorrect information in the defendant's arguments. Prosecutors would also have the responsibility, when necessary, of providing accurate information about the defendant's culture and about alternative, non-violent choices in the situation. In cases involving violence against women, for example, the prosecution could present rebuttal cultural evidence from a women's advocacy organization in the defendant's community, to dispel stereotypes about gender roles or to discuss the non-violent options the defendant might have had in his community. Another scholar goes further in advocating a formal cultural defense as a partial excuse, such as in provocation or diminished responsibility, to either reduce a charge or a sentence.<sup>22</sup>

### Expert Witnesses

Assuming you decide to allow cultural evidence to be presented, what should you consider in qualifying the proposed experts, and how much weight should you accord their testimony?

Thorough voir dire of the proposed expert witnesses is critical. Following the New York bench trial described earlier, in which women in the Chinese immigrant community feared physical abuse from their partners after a defendant was convicted of a reduced charge and then given minimum sentence of five years probation for killing his wife, members of the Chinese and Asian American communities were outraged at the stereotypes and inaccurate information presented by the expert witness on Chinese culture. For example, the expert testimony, offered by a white anthropologist, described the Chinese, compared to Americans, as being more volatile and violent.<sup>23</sup> Cross-

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<sup>21</sup> See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); This article is in the readings for this unit.

<sup>22</sup> See Renteln, *supra* note 5, at 488.

<sup>23</sup> See Volpp, *supra* note 13, at 66 (quoting the court transcript).

examination of the expert revealed that he had never heard of a Chinese case in which a man had killed his wife, yet he testified that this act was accepted in China. Nevertheless, the judge gave the expert testimony and inaccurate cultural profile considerable weight in his decision when he described the Defendant as “a product of his culture.... The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor.”<sup>24</sup>

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<sup>24</sup>Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL.L.REV. 1053, (quoted from Nina Schuyler, *Cultural Defense: Equality or Anarchy?*, S.F. WKLY., Sept. 25, 1991, at 1).

When evaluating the expert witness's testimony, it is also necessary to ask from whose perspective the "culture" is being described. In this wife-murder case, the anthropologist presented the story from a male perspective. As pointed out by one commentator, the expert did not consider the gender oppression experienced by women in Chinese society because the expert's testimony "obviate[d] the possibility that a woman, might describe divorce, adultery and male violence within 'Chinese culture' very differently."<sup>25</sup>

### **Eliminating Stereotypes and Prejudice**

The problem of overcoming ignorance and defeating stereotypes cannot be stressed enough. All participants in cases involving women and girls of color must have a sufficient level of cultural sensitivity and knowledge of the women's and girl's life experiences. This awareness, or cultural competence, is needed to enable judges, prosecutors, defense attorneys, social workers, and other courtroom actors to properly interpret and evaluate facts in the case.

An example of the need for cultural competence arose in a child custody case in which the white attorneys, social worker and psychologist all were unfamiliar with chemical hair straightener, a product commonly used by African-American women. An African-American mother was charged with neglect, temporary custody was given to the father, and a white female psychologist who did the custody evaluation for the court recommended full custody with the father. The custody recommendation was based on the fact that the girl's hair fell out after a visit during which the mother applied hair straightener. The judge was an African-American woman. She recognized the psychologist's lack of knowledge of grooming practices of African-American girls, and questioned her entire evaluation. Further investigation in this case revealed that the hair problem resulted from the father's improper care after application of the straightener, when the child was back in his custody.<sup>26</sup>

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<sup>25</sup>Volpp, *supra* note 13, at 76.

<sup>26</sup>For this and other case reviews involving cultural issues in child abuse and neglect cases, see Karen Aileen Howze, *Making Differences Work: Cultural Context in Abuse and Neglect Practice for Judges and Attorneys*, ABA Center on Children and the Law, 45-46 (1996).

Finally, in addition to reaching out for information on the cultural background of a defendant's or victim's country of origin, juries, experts, and judges must also understand other aspects of the current context and situation of the parties before them. This would include recognizing language barriers and translation difficulties in the courtroom as well as the challenges faced by many immigrants due to isolation created by language and cultural barriers. Judges, jurors, and attorneys must keep in mind that a trial involving women of color not only involves the cultural background of the parties, but also American culture, which imposes many of its own cultural values, biases and stereotypes through the legal system, and creates the need for knowledge of and sensitivity to the cultures of others. In addition, while our own culture and society has taken steps to end gender violence against women and girls, we must recognize that our culture still excuses violence in many cases.<sup>27</sup> Despite the progress that has been made, violence against women is often trivialized, and we must focus on progress that must still be realized, rather than impose a false picture of our own moral superiority to end the replication of another culture's sexism within the United States.

**For the Shorter Version of this unit, use the following Introduction and case study, State v. Ortiz.**

### **Introduction to Small Group Exercise**

Having looked briefly at the arguments for and against the cultural defense and for limited admission of cultural evidence, we turn to the hypothetical I noted at the start of my remarks involving the murder of Elena Ortiz by her husband, and his effort to invoke a cultural defense. We will explore this hypothetical in our small groups and then in a report back session. Your group's facilitator will give you instructions.

### **Small Group Exercise**

Instructions for facilitators:

Ask participants to remove the State v. Ortiz hypothetical from their folders and read it closely. The

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<sup>27</sup>For an example of our culture trivializing violence against women, see the discussion of *State v. Peacock* (Md. Cir. Ct. Oct. 17, 1994) (No. 94-CR-0943) in Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L.REV. 1063 (1995). In this case, like that of the Chinese immigrant discussed above, a man killed his wife over her infidelity and received a de minimis sentence.



State v. Ortiz hypothetical is on the next page.

Appoint a group member to watch the time so you cover all the questions. Appoint a different group member to take notes and give the report back.

Handout

**CULTURAL DEFENSE CASE STUDY - WIFE MURDER**

**State v. Ortiz**

Julio Ortiz, who immigrated from the Dominican Republic in 1988, is accused of murdering his wife, Elena. A month before the murder, the cleaning service for which Elena worked downsized a quarter of its staff. The remaining staff, such as Elena, had to do the same work with less employees. Elena had to work several hours more per week, and put in many more late hours.

Mr. Ortiz complained that Elena was coming home late and having too much contact with the men at work. He accused her of having an affair with her supervisor, based on a few phone calls to the home from him, and the late hours Elena worked. The violence in the home began to escalate. On the night of her murder, Elena denied having an affair, as she had in the past. Upset over these accusations, and exhausted from a particularly long work day, Elena resisted Julio's sexual advances. Julio responded by killing Elena with his bare fists.

Mr. Ortiz's attorney wants to introduce evidence of the "honor defense." She claims that where Mr. Ortiz comes from, husbands who have killed their wives when their honor was compromised by a wife's actual or suspected actions have been completely exonerated. The defense wants to introduce evidence that a wife's adultery and refusal to have sexual relations with her husband are often excused as sufficient provocation to murder.

The defense proposes to call as an expert witness Dr. Clifford Olewsky. Dr. Olewsky is a Professor of Sociology at one of the state's most prestigious public universities. He is also the Assistant Director of the university's fledgling Hispanic Studies Department. He teaches a course on marriage and family practices in Brazil, and has written several scholarly articles in this regard. Dr. Olewsky is prepared to testify about gender relations in "Hispanic culture."

### Discussion Guide

Discuss the following questions in terms of the State v. Ortiz hypothetical. Look for or make the points presented below.

- I. *Would you admit expert evidence on the importance and role of a man's honor in Julio Ortiz's culture? If so, what is the relevancy of the testimony? To show reasonableness? Provocation? In order to justify a reduced charge or sentence? If not, are there any circumstances under which this type of evidence should be admissible?***
- II. *Assuming you would admit this testimony for some purpose, would you qualify Dr. Olewsy as an expert in this case? What kinds of questions would you ask him in order to qualify him as an expert? Is his research on point? Is he relying on generalizations and stereotypes?***

Dr. Olewsy is prepared to testify about gender relations in "Hispanic culture" and helps to direct the "Hispanic Studies Department" at the state university. As noted in the handout on labels, the preferred term to refer to people of Spanish descent is "Latino." His use of the term "Hispanic" should spark a line of questions concerning his cultural sensitivity. How accurate and up-to-date is his research? In addition, his supposed expertise is on marriage and family practices in Brazil; the defendant is a native of the Dominican Republic. Can the expert demonstrate that such practices are generalizable across continents and ethnicities?

**II. *What kinds of stereotypes or beliefs by jury members could prejudice the outcome of the case?***

Refer back to the list of stereotypes generated during the opening exercise of Unit I, and to the discussion about beliefs about communities of color as being "naturally violent" from Unit III. Professor Jenny Rivera writes of the dominant culture's attitude toward domestic violence in the Latino community in an article in your Readings:<sup>28</sup>

Historically, Latinos have been stereotyped as violent and alien. This misrepresentation of the "Latino character" has developed during this past century, and non-Latino society today continues to express and explain inaccurate images of Latinos and Latino family life.

Popular myth has become accepted as truth; Latino males are believed to be irrational and reactive. The standard description of Latino males as hot-blooded, passionate and prone to emotional outbursts is legendary. "Macho" is the accepted - and expected - single-word

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<sup>28</sup>Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) (citations omitted);

synonymous with Latino men and male culture. Consequently, it is natural to expand and apply this construct to the entire Latino community, and thereby justify assumptions that Latinos are violent.

In one notable example of Professor Rivera's observations, a California judge was censured in 1982 for stating that "Spanish persons live by different standards than we do: ...wife abuse is common and more acceptable for them."<sup>29</sup>

### **Report Back and Discussion of Similar Case**

At the conclusion of the Small Group Exercise, the judge or expert leading this unit asks the member of each group who took notes to briefly report the group's conclusions about the admissibility of cultural evidence in State v. Ortiz hypothetical. Ask the reporters not to repeat a prior reporter's remarks. Either add something new or simply concur. If time permits, after each group has given its report, discuss the following scenario involving another instances in which cultural evidence might have some bearing on the outcome of the case. Relate the consensus about the relevancy of cultural evidence in the State v. Ortiz circumstance to the following situation in which the defendant is a woman of color.

#### Parent-Child Suicide Case

Suppose you have a parent-child suicide case. The defendant is a recent Chinese immigrant who is accused of the first degree murder of her 10-month-old son, who bled to death after she cut his throat, slicing the jugular vein. The woman also tried to end her own life by cutting her veins.

The woman's court appointed attorney wants to introduce cultural evidence in her trial. In particular, he wants to show how her cultural background forced her to take actions which contributed to her defense of temporary insanity. The attempted parent-child suicide occurred five days after the woman learned that the father of her illegitimate son was engaged to marry a woman from his home town in China, as arranged by his family. In China having a child out-of-wedlock is a very shameful and dishonorable thing to do. When she learned about the marriage, she believed that her only honorable option was to commit suicide and to end her son's life, since he would not have a father and would have to live in shame for the rest of his life as an illegitimate child.

Would you permit expert testimony on the defendant's culture and its role in an insanity defense? If the defendant was found guilty, would you consider mitigating the sentence if there was evidence that a parent-child suicide is an involuntary-manslaughter charge in China?

Would you admit such evidence?

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<sup>29</sup>*In re Stevens*, 31 Cal. 3d 403,405 (1982).

Address the concern of using an insanity defense in the United States when an act is a culturally acceptable reaction in another culture.

**For the longer version of this unit, use the four case studies that follow. State v. Ortiz can be used instead of Case 4 - “Honor Defense” to wife-murder.**

### **Case 1 — Female Genital Mutilation**

#### **Facts:**

Warris Jibril is a 10 year-old girl who immigrated to the United States with her younger sister and brother, and parents five years ago from Somalia. During summer vacation, her parents arranged for her to undergo a genital operation which for centuries has been a common rite of passage in her country of origin. The procedure is known to those who disapprove of it as female genital mutilation, FGM. It was performed at the family home by an elderly midwife, and involved cutting off Warris’s clitoris and part of the labia minora. Warris’s parents believe this tradition to be central to their daughter’s well-being and future. It will assure her happiness as well as economic stability by helping her marriage prospects. Also, Warris’s mother was worried that if she did not have her daughter cut soon, her clitoris would grow like a penis, and render intercourse impossible. In addition, her parents were worried that Warris would become too interested in boys, and that she would end up becoming involved with a boy before marriage, like so many of the American girls with whom Warris goes to school.

Warris’s parents and the midwife have been charged with child abuse, for inflicting physical injury, under their state’s penal code. Their attorneys plan on introducing cultural evidence because the practice is part of the culture and tradition of the parents’ and midwife’s native home. What type of cultural evidence, if any, should be allowed in the trial?

#### **Group Discussion Questions**

- Should the parents be punished or given any leniency in the charge or sentencing for submitting their daughter to a procedure which they believe is beneficial to her standing in the community as well as to her future marriage prospects?
- Should any special consideration or leniency be given to the mother, who herself had the same procedure done, and thus is a victim of FGM and a culture which attempts to limit women’s and girl’s choices over their sexuality?

**Background Information for the Facilitator** - Please review FGM materials in Readings.

FGM frequency of occurrence in and outside US.

FGM and religious requirements.

1. Age at which FGM occurs.
2. Health issues/problems.

3. Existence of the state, federal, and international laws against FGM.

### **Case 2 — Marriage by Capture**

**Statement of the Case.** Sia Ye Vong, who came to the United States as a Hmong refugee in 1989 has been charged with first degree sexual assault of S. At his trial, he asserts a cultural defense, maintaining a mistake of fact argument as to consent. Defendant maintains that he was following the Hmong marriage practices, in which the man is suppose to “capture” his bride and consummate the “marriage” at his family home. S has testified that she did not give her consent and furthermore that she resisted Defendant’s actions and told him she did not want to be his wife or participate in the customary practice.

**Admission of Expert Testimony.** Defendant wants to introduce the testimony of Dr. Clifford Olewsky as an expert on Hmong culture and its marriage practices in order to show that a person in the Defendant’s position reasonably believed S had consented to the traditional practice.

**Dr. Olewsky’s Background.** Dr. Olewsky is a Professor of Anthropology at one of the state’s most prestigious public universities. He has taught several anthropology courses on Vietnam, and written several scholarly articles, including one on the Hmong’s family structure and the traditional role of each person in her family. Although Dr. Olewsky has not done any extensive field work in Vietnam over the past two decades, he visits the capital every other summer for 4 - 6 weeks, and spends much of his time doing research and keeping up on current information from his colleagues.

**Dr. Olewsky’s Testimony.** Dr. Olewsky is prepared to testify about the marriage practices and traditions of the Hmong. Although his research has not focused on marriage traditions, Dr. Olewsky learned of how couples came together when he did interviews for his article on the family roles and structure. In several of these cases, a “marriage-by-capture” custom was observed in the families, in which a woman was kidnaped and taken to the man’s family home to consummate the marriage. According to this information as well as some publications on the marriage custom, the woman should resist the man’s advances to protect her virtue, and allow the man to prove his worthiness to her.

### **Group Discussion Questions**

- Would you permit Dr. Olewsky’s testimony?
- Is there any other information you would like to know or consider about Dr. Olewsky’s professional or academic background?

### **Voir dire of the expert:**

- Publications, how recent?
- Is his research on point (on violence against women, marriage rituals, etc. Are there any relevant

statistics)?

- Is Dr. Smith relying on generalizations and stereotypes?
- To what extent was the defendant a participant in the culture described by the expert?

### **Case 3 — Parent-Child Suicide**

#### **Facts:**

Ling Yeng, who immigrated to the United States from China in 1991, is accused of the first degree murder of her 10 month old son, Sam Pang, who bled to death after Ling cut his throat, slicing the jugular vein. Ling also tried to end her own life by cutting her wrists. If the paramedics had arrived half-an-hour later, she probably would have succeeded.

Ling's attempted parent-child suicide occurred 5 days after she learned that her son's father, Fok Pang was engaged to marry a woman from his home town in China, as arranged by his family. Neither Ling nor Fok has told family members in China that they have had a child out-of-wedlock since it is very shameful and dishonorable to do so. Fok repeatedly promised Ling that he would marry her ever since he found out about the pregnancy, however, he always found a reason to postpone. When Ling discovered that he was returning to China to get married and bring his bride back to the U.S., she believed that her only honorable option was to commit suicide and to end Sam's life, since he would not have a father and would have to live in shame for the rest of his life as an illegitimate child.

Ling's court-appointed attorney wants to introduce cultural evidence in her trial. In particular, she wants to show how the pressures of Ling's cultural background forced her to take actions which contributed to her defense of temporary insanity.

#### **Group Discussion Questions**

- Would you permit expert testimony on culture, and its role in an insanity defense?
- If the defendant was found guilty, would you consider mitigating the sentence if there was evidence that a parent-child suicide is an involuntary-manslaughter charge in China?
- Would admit such evidence?
- Address the concern of using an insanity defense in the US when an act is a culturally acceptable reaction in another culture.



### **Case 4 — “Honor Defense” to Wife Murder**

#### **Facts:**

Joao Lopez, who immigrated from Brazil seven years ago, is accused of murdering his wife, Terezinha. Five months before the murder, Terezinha received a promotion from head server to assistant manager at the restaurant where she worked. The new position required several hours more work per week, as well as many more late hours. Joao complained that as a result of the promotion, Terezinha was coming home late and having too much contact with the men at work. He accused her of having an affair with another restaurant manager based on a few phone calls to the home from the manager, the late hours Terezinha worked, and the fact that Terezinha was bringing home meals from the restaurant, which he concluded were given to her by the manager so that he could spend time with Terezinha when she should have been at home making dinner. On the night of her murder, Terezinha denied having an affair, as she had in the past. Upset over these accusations, Terezinha resisted Joao’s sexual advances. Joao responded by killing Terezinha using his bare fists.

Joao’s attorney wants to introduce evidence of the “honor defense,” which in the past has completely exonerated husbands who have killed their wives when their honor was compromised by a wife’s actual or suspected actions. The defense wants to introduce evidence that a wife’s adultery and refusing to have sexual relations with her husband are often excused as sufficient provocation to murder.

#### **Group Discussion Questions**

- Would you admit expert evidence on the importance and role of a man’s honor in the Defendant’s culture? If so, what is the relevancy of the testimony? To show reasonableness? Provocation? In order to justify a reduced charge or sentence?
- What types of stereotypes or beliefs by jury members could prejudice the outcome of the case?
- Address the concern of the “honor defense” upholding a male perspective on honor in cases of a wife’s infidelity and the right to have sexual relations with one’s wife. Does the defense take into account women’s perspectives or position in society?

## Closing

At the conclusion of the report back, the Judge/Moderator closes the unit with a succinct review of the problems posed by the cultural defense and some highlights from the discussion. **It is essential to formally conclude this and every unit to create a sense of closure.** Don't let the units just trail off or end without it.

The **cultural defense** excuses criminal behavior altogether or mitigates criminal liability due to a lack of requisite *mens rea* based on the defendant's claim that the act is accepted behavior in her culture and community.

[OVERHEAD ONE]

## **CULTURE IS:**

Knowledge about customs, values, language, behavior, etiquette, traditions, belief systems, world views, food, dress, and musical tastes that is shared by members of a group. This shared knowledge is learned from others and passed on from generation to generation. Culture tells us how to behave and influences our interpretation of how others behave. Culture is the set of assumptions and understandings, often unexamined, that shapes our ideas and impacts our every decision.\*

\*Peggy A. Nagae, and Kathleen M. O'Leary, The National Judicial College, Race Fairness and Cultural Awareness Faculty Development Workshop Manual 5-21 (1996) (copyright by PNL Consultants, Eugene Oregon) (emphasis omitted).

# READINGS

## TABLE OF CONTENTS

### **PRE-PROGRAM PRIMER: Cognitive Process, Stereotyping, Intersectionality and the Implications for the Courts**

Irwin A. Horowitz and Kenneth S. Borden, "Social Perception: The Construction of Social Reality," *Chapter 3 in Social Psychology* 87 (1995).

Mark Snyder, "Self-Fulfilling Stereotypes" in Race, Class and Gender in the United States 370 (Paula S. Rothenberg ed., 1994).

Susan T. Fiske, "Controlling Other People: The Impact of Power on Stereotyping," American Psychologist 621 (June 1993).

Patricia G. Devine and Steven J. Sherman, "Intuitive Versus Rational Judgment and the Role of Stereotyping in the Human Condition: Kirk or Spock?" 3 Psychological Inquiry 153 (1992).

Jody Armour, "Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit," 83 California Law Review 733 (1995).

Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 The University of Chicago Legal Forum 139 (1989).

### **UNIT I. Stereotyping and the Implications for Women of Color in the Courts**

#### The Intersection of Race and Gender and Its Implications for the Law

Judge Benjamin Aranda, "Women of Color: The Burdens of Both, The Privileges of Neither," Judge's Journal 29 (Winter 1996).

#### Findings of the Task Forces on Racial and Ethnic Bias in the Courts Respecting Women of Color

California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, Final Report (1997) (excerpt).

Florida Supreme Court Racial and Ethnic Bias Study Commission, "Special Concern: The Experiences of Minority Women in the Judicial System," in Where the Injured Fly for Justice 49 (1991).

### **UNIT III: Women of Color as Victims of Gender-Based Violence**

#### Women of Color Attorneys in the Courts and the Profession

Report of the American Bar Association Multicultural Women Attorneys Network, The Burdens of Both, The Privileges of Neither (1994).

#### Stereotypes About African American Women and Implications for the Courts

Lucy A. Williams, "Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate," 22 Fordham Urban Law Journal 1159 (1995).

Wright v. CTL Distribution, 650 So. 2d 641 (FL 1995); 679 So. 2d 1233 (FL 1996).

Dorothy E. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," in Critical Race Feminism 127 (Adrienne K. Wing ed., 1997). The full text of this article is in 104 Harvard Law Review 1419 (1991).

#### Gender-Based Violence Against Women of Color: Overview

Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," 43 Stanford Law Review 1241 (1991) (excerpt).

#### Domestic Violence

Linda L. Ammons, "Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and The Battered Woman's Syndrome," 1995 Wisconsin Law Review 1003.

Jenny Rivera, "Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials," 14 Boston College Third World Law Journal 231 (1994).

Karin Wang, "Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community," 3 Asian Law Journal 151 (1996).

## Domestic Violence and Immigrant Women

Leslye E. Orloff and Minty Siu Chung, *Overcoming Cultural Barriers* (AYUDA, Washington D.C., 1996).

The Family Violence Prevention Fund, "Issue Paper on Domestic Violence Cases Involving Immigrant and Refugee Communities: The Response of the Courts," December 1991.

## Interpreters

Monika Batra and Prema Vora, "Silence! The Court is in Session," The Sakhi Quarterly (Spring 1997).

Maria L. Ontiveros, "Rosa Lopez, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility," in Critical Race Feminism 269 (Adrienne K. Wing ed., 1997).

"Judges' Guide to Standards for Interpreted Proceedings," in Court Interpretation: Model Guides for Policy and Practice in the State Courts 124 (1995).

"Model Code of Professional Responsibility for Interpreters in the Judiciary," in Court Interpretation: Model Guides for Policy and Practice in the State Courts 197 (1995).

## Rape

Jennifer Wriggins, "Rape, Racism, and the Law," 6 Harvard Women's Law Journal 103 (1983).

## Sexual Harassment

Sumi K. Cho, "Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong," in Critical Race Feminism 203 (Adrienne K. Wing, ed., 1997).

Charles R. Lawrence III, "Cringing at Myths of Black Sexuality," (need newspaper cite).

Nell Irvin Painter, "Hill, Thomas, and the Use of Racial Stereotype," in Racing Justice, En-gendering Power 200 (Toni Morrison ed., 1992).

### UNIT III: The Cultural Defense and Cultural Evidence

#### Cultural Defenses

Leti Volpp, "(Mis)identifying Culture: Asian Women and the 'Cultural Defense,'" 17 Harvard Women's Law Journal 57 (1994).

Holly Maguigan, "Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?" 70 New York University Law Review 36 (1995).

Catherine L. Annas, "Irreversible Error: The Power and Prejudice of Female Genital Mutilation," 12 Journal of Contemporary Health Law and Policy 325 (1996).

Meg Jones, "Sex Assault Sentence Draws Charges of Bias," Milwaukee Journal Sentinel, Aug. 29, 1996, at 1

"Molester's Probation Shocks Kin," Associated Press, Aug. 29, 1996, at 3A

"Judge Defends Sentence in Sexual Assault Case," Associated Press, Sept. 4, 1996, at 5B.