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Unpacking the Teaching Potential of a Hypothetical Criminal Case Involving a Cross-Racial Eyewitness Identification

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> *I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.*
>
> –Ralph Ellison[1]

I. INTRODUCTION

The cacophony of conversation in the courtroom momentarily ceases when the judge takes the bench, and the court officer announces that court is in session. Lawyers and court personnel snap to attention, waiting for cases to be heard. The cries of a baby squirming in her mother's arms pierce the fleeting silence—the mother, like other spectators sitting on wooden benches, is there to show support for a loved one who was arrested. Court officers lead those who have been arrested from jail cells, sometimes referred to as "holding pens,"[2] into the courtroom. Strikingly, the courtroom becomes awash in a sea of Black and brown faces. This fictional scenario depicts an arraignment court in New York City, drawn from my experience working as an assistant district attorney in the Bronx and observing arraignments in Manhattan.[3]

Scenes like this one have no doubt played out in many courtrooms in the United States over the years—people from historically marginalized groups brought into courtrooms to learn their fates at arraignment, trial, and sentencing. Even though race is surely visible in these settings, it often was not truly seen.[4] Instead of realizing that something was wrong when one out of every three Black males landed in prison,[5] the criminal justice system plodded along, relying on "race-neutral laws"[6] to mete out justice. It took a series of tragedies, including the killing of Black men and women by

1. Ralph Ellison, Invisible Man 3 (Vintage Books 1972) (1952).

2. Robert Gangi, Crisis in the Court Pens 1–8 (1993); Shelley C. Chapman, *I'm a Judge and I Think Criminal Court Is Horrifying*, Marshall Project (Aug. 11, 2016), https://www.themarshallproject.org/2016/08/11/i-m-a-judge-and-i-think-criminal-court-is-horrifying.

3. The author worked as an assistant district attorney in Bronx County for five years beginning in 1986. From 2016 to 2020, she took her New York Law School Legal Practice students to observe arraignments in Manhattan criminal court. In New York, the arraignment is usually the criminal defendant's first court appearance. *See* N.Y. Crim. Proc. Law §§ 170.10, 180.10 (Consol., LEXIS through 2022 Chapters 1–55, 61–174). During an arraignment, the charges are read, and the court may order bail. *Id.*

4. *See* The Sent'g Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance (2018).

5. *Mass Incarceration: An Animated Series*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series (last visited Apr. 8, 2022). "Not everyone is treated equally in the criminal justice system. Racial bias keeps more people of color in prisons and on probation than ever before." *Id.*

6. *See* Seeing Race Again (Kimberlé Williams Crenshaw et al. eds., 2019) (challenging academic disciplines to see race).

the police,[7] the unveiling of wrongful convictions,[8] and pre-trial detention atrocities,[9] to bring race out of the shadows. The criminal justice system is finally openly acknowledging that race really matters.[10] Race can influence the trajectory of a case, frequently resulting in unjust outcomes.[11]

This essay highlights the threat of unjust outcomes: it unpacks the teaching potential of a class exercise designed to open students' eyes to the danger of racial bias in eyewitness identifications in criminal cases. The genesis for this piece is my teaching in Race, Bias, and Advocacy, a course at New York Law School that introduces students to "ways in which issues of race and racial bias manifest themselves in the law and its practice."[12] Consistent with the framing of the course, this essay focuses on the impact of racial bias in legal practice rather than on intersectionality[13] or bias and discrimination based on membership in other social and cultural groups.

The following presents the basics of a class exercise that I first introduced in Race and the Criminal Justice System: Criminal Prosecutions, one of many seminars within the larger Race, Bias, and Advocacy course.[14] The exercise, an interactive in-class roleplay, involves a hypothetical robbery. The case features one witness; the victim, who is a white woman; and the accused, who is a Black man. An inflection point that exists in many criminal cases is highlighted: a cross-racial eyewitness

7. *See* Deidre McPhillips, *Deaths from Police Harm Disproportionately Affect People of Color*, U.S. News & World Rep. (June 3, 2020), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color; *George Floyd: Timeline of Black Deaths and Protests*, BBC News (Apr. 22, 2021), https://www.bbc.com/news/world-us-canada-52905408.

8. *See All Cases*, Innocence Project, https://innocenceproject.org/all-cases/ (last visited Apr. 8, 2022); Ken Klonsky, Freeing David McCallum (2017) (telling the story of David McCallum, a Black man who spent twenty-nine years in a New York prison for a crime that he did not commit).

9. *See* Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers*, New Yorker (June 2, 2016), https://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers.

10. *Cf. Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Rep. John Conyers, Jr., Chairman, Comm. on the Judiciary).

11. Samuel R. Gross et al., Nat'l Registry of Exonerations, Race and Wrongful Convictions in the United States 1 (2017) ("As of October 15, 2016, the National Registry of Exonerations listed 1,900 defendants who were convicted of crimes and later exonerated because they were innocent; 47[percent] of them were African Americans, three times their rate in the [U.S.] population.").

12. Race, Bias, and Advocacy Course Syllabus, N.Y.L. Sch. (2021) (on file with author).

13. *See* Kimberlé Crenshaw, *Why Intersectionality Can't Wait*, *Opinion*, Wash. Post (Sept. 24, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/ ("Intersectionality is an analytic sensibility, a way of thinking about identity and its relationship to power. Originally articulated on behalf of [B]lack women, the term brought to light the invisibility of many constituents within groups that claim them as members, but often fail to represent them."); *see also* Kimberlé Crenshaw, On Intersectionality (2017).

14. The author began teaching this seminar in 2017 and has co-taught it in subsequent years.

identification[15]—a setting where the race of the eyewitness and the accused is often completely visible, yet may be ignored or discounted.[16] The exercise has two goals: first, to awaken students to the urgency of seeing race as a crucial consideration in the calculus of a case; second, to introduce students to a habit of thinking critically about the impact of race and racial bias in legal practice, a habit rooted in Professors Sue Bryant and Jean Koh Peters' groundbreaking work, *Five Habits for Cross-Cultural Lawyering*,[17] and informed by their guidance in *Talking About Race*.[18] My hope is that the exercise inspires students to develop analytical tools that will help them identify and combat racial bias in their work as counselors and advocates. A robust educational focus on the existence, effects, and elimination of racial bias is integral to the professional development of lawyers who are deeply committed to fairness and justice in the law and its practice.[19]

15. Although background information on eyewitness misidentifications and the cross-racial effect is introduced to provide context, this essay focuses on teaching; it is not an academic analysis of the law, but instead focuses on practices relating to eyewitness identifications.

16. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 935–36 (1984) (discussing problems with cross-racial identification and how the practice is disproportionately responsible for wrongful convictions).

17. *See* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* Race, Culture, Psychology, & Law 47–62 (Kimberly Holt Barrett & William H. George eds., 2005) [hereinafter *Five Habits for Cross-Cultural Lawyering*]; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33, 64–78 (2001) [hereinafter *Building Cross-Cultural Competence in Lawyers*]. In *Five Habits for Cross-Cultural Lawyering*, Professors Bryant and Koh Peters developed a methodology for examining how the cultural perspectives and biases of clients, lawyers, decision makers, and opponents may affect communication, understanding, and outcomes in a civil or criminal case. *See Five Habits for Cross-Cultural Lawyering*, *supra*.

Professor Bryant teaches at CUNY School of Law. *Susan Bryant*, CUNY Sch. of L., https://www.law.cuny.edu/faculty/directory/bryant/ (last visited Apr. 8, 2022). Professor Koh Peters is the Sol Goldman Clinical Professor Emeritus of Law at Yale Law School. *Jean Koh Peters*, Yale L. Sch., https://law.yale.edu/jean-koh-peters (last visited Apr. 25, 2022).

18. Jean Koh Peters & Susan Bryant, *Talking About Race*, *in* Transforming the Education of Lawyers 375–410 (Susan Bryant et al. eds., 2014) [hereinafter *Talking About Race*]. In *Talking About Race*, Professors Koh Peters and Bryant recommended that the five habits they developed in *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, be augmented with conversations about race and a focus on "developing ways to recognize, explore, and confront residual and ongoing racial prejudice in our systems of justice." *Talking About Race*, *supra*, at 375.

19. *See* Amy C. Gaudion, *Exploring Race and Racism in the Law School Curriculum: An Administrator's View on Adopting an Antiracist Curriculum*, Rutgers Race & L. Rev. (forthcoming 2022).

II. UNPACKING THE TEACHING POTENTIAL OF *PEOPLE V. HUDSON*, A HYPOTHETICAL CASE[20]

Basic Criminal Law courses cover concepts such as "mens rea, actus reus, causation, punishment, harm, and inchoate offenses,"[21] and although the laws that students study are packed with legal rules, those laws are, for the most part, silent on issues of race.[22] The *People v. Hudson* exercise compels students to look beyond the letter of the law to see the effect that racial bias, which sometimes may not be completely visible, could have in a case. The in-class roleplay exposes students to the complexity and challenges of legal practice.[23] After reading material on eyewitness identifications in criminal cases, students roleplaying prosecutors or defense attorneys[24] analyze the following hypothetical presented in the *Hudson* exercise:

> On October 11, Eliza Smith, a forty-five-year-old white woman, reports that she was robbed while standing on the street in front of a New York City subway station that morning. She says that a young Black man shoved her and took her pocketbook, grabbing the shoulder strap that was draped over her arm; she was not physically injured. In addition to keys and a few personal items, Eliza's pocketbook contained her wallet with $100 and a bank card. The police canvass the area; they do not find additional witnesses or Eliza's pocketbook and its contents.

20. The facts in this hypothetical resemble those presented in the 2017 case of *People v. Boone* out of New York. 91 N.E.3d 1194 (N.Y. 2017). The defendant in *Boone*, a nineteen-year-old Black man, was charged with two counts of robbery in the first degree and additional crimes. *Id.* at 1197. The two victims, a young white man and a white male teenager, each identified Boone as their assailant in separate six-person lineups; they asserted that Boone forcibly stole their cell phones. *Id.* at 1196–97.

    The trial court denied the defense's request for a jury charge on cross-racial identifications on the grounds that there had been no expert testimony or cross-examination on the issue. *Id.* at 1197. The defendant was convicted on both counts of robbery. *Id.* He appealed his conviction, alleging that the trial court denied him a fair trial by declining to instruct the jury on cross-racial identifications. *Id.* The appellate court held, in relevant part, that the trial court's refusal to charge the jury on cross-racial identifications did not constitute error. *Id.* The Court of Appeals reversed and remanded the case for a new trial, holding that when "a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect . . . ." *Id.* at 1203–04.

21. *See* Neil P. Cohen, *Teaching Criminal Law: Curing the Disconnect*, 48 St. Louis U. L.J. 1195, 1198–1201 (2004).

22. Certain criminal laws, such as hate crime statutes, address race. *E.g.*, 18 U.S.C. § 249; N.Y. Penal Law § 485.05 (Consol., LEXIS through Chapters 1–55, 61–174).

23. *See* Helen H. Kang, *Use of Role Play and Interview Modes in Law Clinic Case Rounds to Teach Essential Legal Skills and to Maximize Meaningful Participation*, 19 Clinical L. Rev. 207 (2012).

24. The professor may present the hypothetical to students in class immediately before the roleplay; alternatively, the hypothetical, along with material on eyewitness identifications, may be required pre-class reading.

> The day after the robbery, the police show Eliza a photo array[25] of men fitting the description she provided. She points to a photograph of a young Black man and says, "He looks like the guy who robbed me. Yes, it's him." The man Eliza identified is in the U.S. Army—he is stationed in Europe and was there on October 11.
>
> On October 27, more than two weeks after the robbery, Eliza calls the police precinct in the morning and reports that she just saw the man who robbed her buying a cup of coffee in a neighborhood delicatessen. Two police officers respond to the delicatessen and spot James Hudson, a twenty-year-old Black man who fits Eliza's description. They ask James if he would be willing to accompany them to the precinct to answer questions about a robbery that occurred on October 11; he agrees. At the precinct, the police read James his *Miranda*[26] rights, and he agrees to answer questions without an attorney. James says, "I had nothing to do with the robbery, but I was there and saw it happen. I was on my way to the subway." Eliza and James have never met, and they do not know each other.
>
> That afternoon, James participates in a lineup. Eliza points to James and says, "He is the man who robbed me. I will never forget his face." James' photograph was not included in the photo array that Eliza viewed the day after the robbery.
>
> The police arrest James and charge him with robbery in the third degree, a violation of N.Y. Penal Law § 160.05.[27] James is a sophomore studying computer science at a college in New York City. This is his first arrest.
>
> In a search incident to the arrest, the police find a silver four-leaf clover charm in James' jacket pocket. The charm belongs to Eliza; her initials are engraved on the charm, and she had it in her pocketbook on the day of the robbery. James says that he found the charm on the street.
>
> James is arraigned in criminal court on the robbery charge. Before the next court date, the prosecutor schedules an interview with Eliza, and the defense attorney schedules an interview with James.

The *Hudson* exercise provides a framework for introducing students to the danger of cross-racial misidentifications in criminal cases.

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25. Nat'l Rsch. Council, Identifying the Culprit 23 (2014) (describing photo arrays as "the most common police-arranged identification procedure used in the United States" in which the witness is shown a group of photographs sequentially or simultaneously).

26. Miranda v. Arizona, 384 U.S. 436, 467–76 (1966) (delineating rights that must be read to persons in police custody prior to interrogation).

27. Penal § 160.05 ("A person is guilty of robbery in the third degree when he forcibly steals property.").

III. LEARNING ABOUT THE DANGER OF CROSS-RACIAL EYEWITNESS MISIDENTIFICATIONS IN CRIMINAL CASES

A. Contextual Background

"Eyewitness misidentification is a consistent and outsized contributor to wrongful convictions."[28] In 2014, the National Academy of Science issued a comprehensive study[29] reporting that "at least one mistaken eyewitness identification was present in almost three-quarters" of the cases in which the accused was exonerated by DNA evidence.[30] Misidentification is a complicated problem "rooted in human psychology,"[31] often attributable to the frailties of perception and memory.[32]

Police practices may also affect the reliability of eyewitness identifications.[33] Police-arranged identification procedures include live lineups (the eyewitness views a row of people), photographic arrays (the eyewitness views photographs of people), and live showups (the eyewitness views one person).[34] Suggestive police identification procedures[35]—such as showing only the suspect or the suspect's picture to the eyewitness, encouraging the eyewitness to make an identification, and arranging

28. *How Eyewitness Misidentification Can Send Innocent People to Prison*, Innocence Project (Apr. 15, 2020), https://www.innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/. "Nationally, 69[percent] of DNA exonerations—252 out of 367 cases—have involved eyewitness misidentification, making it the leading contributing cause of . . . wrongful convictions. Further, the National Registry of Exonerations has identified at least 450 non-DNA-based exonerations involving eyewitness misidentification." *Id.*; *see also Anthony Broadwater*, Nat'l Registry Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6082 (Feb. 25, 2022) (describing the exoneration of Anthony Broadwater, a Black man who was wrongfully convicted of rape after he was misidentified as the perpetrator by Alice Sebold, a white woman).

29. Nat'l Rsch. Council, *supra* note 25.

30. *Id.* at 11.

31. Greg Hurley, Nat'l Ctr. for State Cts., The Trouble with Eyewitness-Identification Testimony in Criminal Cases (2017).

32. *See* Nat'l Rsch. Council, *supra* note 25, at 45–70; Lawrence Rosenthal, *Eyewitness Identification and the Problematics of Blackstonian Reform of the Criminal Law*, 110 J. Crim. L. & Criminology 181, 183–84 (2020).

33. *See* Rosenthal, *supra* note 32.

34. Andrew E. Taslitz, *"Curing" Own Race Bias: What Cognitive Science and the* Henderson *Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. Legis. & Pub. Pol'y 1049, 1051 (2013); *see also* Nat'l Rsch. Council, *supra* note 25, at 21–30 (describing other police-arranged identification procedures such as confirmatory photographs, field views, "mug" books, and yearbooks).

35. Analyses of wrongful convictions reveal that police investigations may be influenced by "tunnel vision." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292 [hereinafter *Multiple Dimensions*]. "Tunnel vision is the product of a variety of cognitive distortions, such as confirmation bias, hindsight bias, and outcome bias, which can impede accuracy in what we perceive and in how we interpret what we perceive." Keith A. Findley, *Tunnel Vision*, *in* Conviction of the Innocent 306 (Brian L. Cutler ed., 2012).

lineups with people known as "fillers"[36] who do not match the description of the perpetrator—may increase the risk of eyewitness identification error.[37]

Studies on eyewitness identifications show that the danger of misidentification is magnified when the eyewitness and the accused are of different races.[38] This is known as "own-race bias,"[39] the "other-race effect,"[40] and the "cross-race effect."[41] An eyewitness is more likely to misidentify an innocent person when that person is a different race from the eyewitness.[42] Professor Andrew E. Taslitz[43] observed that own-race bias "occurs across all races studied, though the bias might be somewhat worse when whites are identifying persons of other races."[44]

There are a variety of hypotheses about the cause of own-race bias.[45] Among the possible explanations are the "social categorization" and "contact theories."[46] Social categorization processes may cause a person of one race to fail to pay attention to individuating features of people of other races.[47] An eyewitness's lack of significant,

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36. *See* Nat'l Rsch. Council, *supra* note 25, at 25.

37. Rosenthal, *supra* note 32, at 183–84. In-court identifications—where the prosecutor in court asks the witness to point to or otherwise identify the perpetrator—can also be problematic. *See* Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 Cornell L. Rev. 305, 325–26 (2021) (asserting that in-court identifications have a superficial quality).

38. *See* Taslitz, *supra* note 34, at 1051–57. A meta-analytic review of thirty-nine research articles addressing own-race bias concluded that "[p]articipants were 1.56 times more likely to falsely identify a novel other-race face when compared . . . [to] own-race faces." Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psych. Pub. Pol'y & L. 3, 15 (2001); *see also* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psych. Pub. Pol'y & L. 230, 231 (2001) ("[A] Black innocent suspect has a 56[percent] greater chance of being misidentified by a [w]hite eyewitness than by a Black eyewitness.").

39. Taslitz, *supra* note 34, at 1052.

40. *Id.*

41. *See* People v. Boone, 91 N.E.3d 1194, 1198 (N.Y. 2017).

42. *See* Taslitz, *supra* note 34, at 1052 (citing James Michael Lampinen et al., The Psychology of Eyewitness Identification 98 (2012)). "[Own-race bias] does not result from differences in skin color but rather from differences in racial features." *Id.* at 1057 (citing Yair Bar-Heim et al., *The Role of Skin Color in Face Recognition*, 38 Perception 145 (2009)).

43. Andrew E. Taslitz was a law professor at Howard University and American University who taught Criminal Procedure, Evidence, and Criminal Law. Megan McDonough, *Andrew E. Taslitz, Law Professor, Dies at 57*, *Obituaries*, Wash. Post, https://www.washingtonpost.com/local/obituaries/andrew-e-taslitz-law-professor-dies-at-57/2014/03/04/31c15354-a332-11e3-8466-d34c451760b9_story.html (last visited Apr. 9, 2022).

44. *See* Taslitz, *supra* note 34, at 1052–53 (citing Tara Anthony et al., *Cross-Racial Facial Identification: A Social-Cognitive Interaction*, 18 Personality & Soc. Psych. Bull. 299 (1992)).

45. Taslitz, *supra* note 34, at 1057–58. Professor Taslitz noted that no correlation was found between conscious racial bias and own-race bias. *Id.* at 1057. He further observed that the evidence is mixed as to whether implicit or unconscious racial bias contributes to own-race bias. *Id.*

46. *Id.* at 1058.

47. *Id.* at 1058, 1063–72.

meaningful, interracial contact may also be a cause of own-race bias.[48] Research suggests that to overcome own-race bias, "[t]he contact must be of a high quality; that is, persons of one race must be motivated to come to know persons of other races as individuals, and consequently to recognize those individuals' individuating features."[49]

B. The Exercise

Working through the *Hudson* exercise as prosecutors or defense attorneys, students evaluate the facts, identify legal issues, and consider next steps. Each side presents its analysis and students on opposing sides may debate the merits of the case. The class learns that real cases do not land on lawyers' desks in neat packages.[50] At first glance, the hypothetical may not trigger an examination of race and racial bias. However, by scrutinizing the case from the perspective of the prosecutor or defense attorney, students recognize that the integrity of the case could be compromised by a cross-racial eyewitness misidentification.

Reflecting on the assigned reading on eyewitness identifications,[51] students recognize that James Hudson may be innocent despite the victim's certainty when she identified him in the lineup. October 27 began as an unremarkable day for Hudson with a stop to get a cup of coffee, but it quickly turned into a nightmare. He was confronted by the police, placed in a lineup, and arrested for robbery—a crime punishable by a possible term of imprisonment.[52] There is, however, evidence implicating Hudson: He admitted that he was at the scene of the robbery, albeit as a witness; the victim's charm was in his pocket, a circumstance he explains as a coincidence; and the victim identified him as the perpetrator. But, because the victim and the accused are different races, the eyewitness identification—key evidence against Hudson—could be mistaken and possibly the product of own-race bias.[53] The roleplay demonstrates that the case cannot be resolved by a mechanical

48. *Id.* at 1058–63.

49. *Id.* at 1072.

50. Kristine Hamann, *Getting It Right: Practical Approaches to 21st Century Prosecution*, N.Y. L.J. (Sept. 3, 2013) ("Any discussion of prosecutors' ethics must begin with putting the work of a prosecutor in context. A case does not arrive on a prosecutor's desk neatly organized into a coherent picture. The collective evidence can be messy, confusing, and filled with ambiguous information.").

51. For assigned readings on eyewitness identifications, see, for example, *State v. Henderson*, 27 A.3d 872 (N.J. 2011), which enhanced jury charges on eyewitness identifications; *People v. Boone*, 91 N.E.3d 1194 (N.Y. 2017), which addressed jury charges on the potential cross-race effect in eyewitness identifications; Taslitz, *supra* note 34, at 1049, which examines the role of own-race bias in eyewitness identifications; Johnson, *supra* note 16, at 936, which focuses on evidence showing a substantial rate of error in cross-racial face recognition; and Crim. Jury Instructions 2d: Identification (N.Y. State Unified Ct. Sys. 2021), which provides the witness identification standard and tools to evaluate its accuracy.

52. N.Y. Penal Law §§ 70.00, 160.05 (Consol., LEXIS through Chapters 1–55, 61–174).

53. The class may also consider whether the police-arranged identification procedures violated the accused's constitutional right to due process. U.S. Const. amend. XIV, § 1. For a general discussion of judicial precedent relating to eyewitness identifications in criminal cases, see Nat'l Rsch. Council, *supra* note 25, at 31–44, and James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 Alb. L. Rev. 719, 736–50 (2019).

application of law to facts. Instead, the prosecutor must ask questions and seek additional evidence; the prosecutor, in the search for the truth, has a responsibility to "leave no stone unturned."[54]

The *Hudson* roleplay may be expanded to include mock interviews with the victim and the accused. Mock interviews allow students to practice lawyering skills including active listening, incisive questioning, and effective communication.[55] Actors, law school faculty, or students can play the roles of the accused and victim in mock interviews.[56] The professor leading the class may create role instructions[57] to prepare interviewees for the roleplay.

The overarching goal of students roleplaying prosecutors is to determine whether the robbery charge is supported by probable cause.[58] A charge that does not meet this threshold must be dismissed or reduced.[59] An important goal of students roleplaying defense attorneys[60] is to identify factual and legal deficiencies in the case that could support a dismissal, or a downgrading of the charge and collateral consequences[61] that could adversely affect Hudson.

For case law relating to eyewitness identifications, see, for example, *Perry v. New Hampshire*, 565 U.S. 228 (2012); *Manson v. Brathwaite*, 432 U.S. 98 (1977); *United States v. Ash*, 413 U.S. 300 (1973); *Neil v. Biggers*, 409 U.S. 188 (1972); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Simmons v. United States*, 390 U.S. 377 (1968); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967), *abrogated by United States v. Johnson*, 457 U.S. 537 (1982); and *United States v. Wade*, 388 U.S. 218 (1967).

54. *See* Ethics & Best Pracs. Subcomms., Dist. Att'y Ass'n of the State of N.Y., "The Right Thing" 1–2 (Tammy Smiley & Autumn Hughes eds., 2021) [hereinafter The Right Thing].

55. *See* Stefan H. Krieger et al., Essential Lawyering Skills 117–50 (6th ed. 2020).

56. A roleplay with interviews of both the victim and accused may involve all the students in the class—half playing the lawyers and half observing the interview. The interview of the victim could take place first, followed by the interview of the accused, or vice versa. This format allows students to observe and learn from others.

In my first year of teaching Race and the Criminal Justice System: Criminal Prosecutions, in 2017, I included an interview of the victim in the in-class roleplay; I played the interviewee, students played prosecutors, and a faculty member played the defense attorney. In the fall 2021 iteration, I debuted an interview with the accused and included an interview with the victim; actors played the interviewees.

57. The role instructions can include details that only the interviewees know in advance; it is the students' job to ask the interviewees questions that will reveal important information. *See* Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. Legal Educ. 212, 215, 219–34 (2001) (discussing the creation of a standardized client role).

58. *See* The Right Thing, *supra* note 54, at 11 (citing N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.3.8(a) (LEXIS through Apr. 15, 2022)).

59. *Id.* "If [the prosecutor] come[s] to know that a pending charge is not supported by probable cause, [the prosecutor] must act appropriately to dismiss or to reduce the charge . . . ." *Id.* (citing tit. 22, § 1200.3.8(a)).

60. *See* tit. 22, § 1200.1.1 (describing lawyers' professional responsibility to provide competent legal representation).

61. A criminal conviction could, for example, interfere with Hudson's ability to continue his education and obtain employment. *See generally* A.B.A., Collateral Consequences of Criminal Convictions (2018) (examining the secondary effects of criminal convictions).

The following presents some basic topics[62] relating to the robbery, identification procedures, and arrest that groups of students roleplaying prosecutors and defense attorneys can explore in mock interviews of the victim and the accused. The mock interviews take place after Hudson's arrest and his arraignment in criminal court but before the next court date. The prosecution has not presented the case to a grand jury.[63]

C. Mock Interviews

1. The Victim

In the role of prosecutors, students interviewing the victim should probe into her perceptions on October 11, her physical, mental, and emotional state at the time, and her memory of the robbery.[64] What happened in front of the subway station? Did she get a good look at the perpetrator? Who, if anyone else, was there? Was she sick, stressed, or distracted on the day of the robbery? Was she under the influence of medication or another substance that could have affected her perception? Did her memory of the perpetrator's characteristics fade in the more than two weeks that elapsed between the robbery and the lineup? Was her memory contaminated by conversations she had with others about the robbery? The victim may sincerely believe that Hudson was the perpetrator, but a flawed perception and a clouded, incomplete, or false memory could have led to a misidentification.[65]

The victim's interactions with the police before, during, and after the identification procedures are also relevant.[66] What did the police say to her beforehand? Did the police announce or suggest that the perpetrator would be in the photo array and lineup? Did the police encourage her to make an identification? This line of questioning is necessary to discover whether suggestive police procedures corrupted the victim's identification.[67]

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62. Using these basic topics as a jumping-off point, the interviews should include a mix of open-ended questions and follow-ups probing into the specifics of the robbery, identification procedures, and arrest.

63. In New York, the prosecutor may present evidence relating to a criminal charge to a grand jury. N.Y. Crim. Proc. Law § 190.30 (Consol, LEXIS through Chapters 1–55, 61–174). If the evidence is legally sufficient, the grand jury may vote to indict the accused on the charge. § 190.65.

64. *See* Nat'l Rsch. Council, *supra* note 25, at 45–70 (discussing research on the effects of vision and memory on eyewitness identifications); *see also* Boaz Sangero, *Applying the STAMP Safety Model to Prevent False Convictions Based on Eyewitness Misidentifications*, 83 Alb. L. Rev. 931, 942 (2020) ("With terrifying or traumatic circumstances or brief occurrences, which usually characterizes a criminal incident, a witness can absorb only a small proportion of what is transpiring." (citing Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 Case W. Rsrv. L. Rev. 165, 181 (1990))).

65. *See* Sangero, *supra* note 64, at 941–45 (providing research and statistics regarding the inaccuracy of eyewitness identifications, including an explanation of the three-stage process of remembering faces).

66. *See* Rosenthal, *supra* note 32, at 183–85 (noting police techniques and interactions during eyewitness interrogations that can affect a report's credibility).

67. In a real case, prosecutors would also interview the police officers who arranged the identifications to evaluate the propriety of the identification procedures. *Id.* at 183–88. The *Hudson* exercise could be expanded to include an interview of a police officer, played by a student, professor, or actor.

Because cross-racial identifications may be unreliable when an eyewitness has limited or superficial interracial interactions,[68] students roleplaying prosecutors need to learn about the nature, frequency, and quality of the victim's contact with people of other races.[69] Particularly troubling is the victim's misidentification of a Black man in the photo array that was first presented to her.[70] Is it possible that the victim, experiencing own-race bias, also misidentified Hudson, a bystander at the scene of the robbery? Again, the victim may sincerely believe that Hudson was the perpetrator, but this belief could be the result of own-race bias.

2. The Accused

In the role of defense attorneys, students interviewing Hudson should ask for a detailed account of October 11, the day of the robbery, and October 27,[71] the day he was placed in a lineup and arrested. Where was he going the morning of October 11? Was he with anyone? What happened in front of the subway station? What did the police say to him in the delicatessen on October 27? What did he tell the police? What happened at the precinct? How was the lineup conducted? What were the circumstances of the arrest? What happened after the arrest? Learning where and when Hudson found the victim's charm is also important because his possession of the charm is inculpatory evidence. And of course, students roleplaying defense attorneys need to learn more about Hudson, a college sophomore studying computer science, and evaluate how a conviction or plea to a lesser charge could impact his future. Indeed, his odyssey into the criminal justice system has the power to jeopardize his education, career plans, and financial security, and could negatively affect other aspects of his life.[72]

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68. *See* Taslitz, *supra* note 34, at 1059 (reporting that, even in instances of regular interracial contact, members of a "status-superior group" may not be attentive to individuating features of members of a "status-inferior group").

69. To learn about the nature, frequency, and quality of the victim's contact with people of other races, students playing prosecutors can, for example, ask her to provide background information relating to her family, job, and community.

70. The circumstances of the photo array, including whether the police displayed photos simultaneously or sequentially and the victim's degree of certainty in the photo array identification, is an important interview topic.

71. Questions focusing on the conduct of the police on October 27, the day of Hudson's arrest, might elicit evidence suggesting that the police violated Hudson's rights under the U.S. Constitution and applicable New York law. *E.g.*, U.S. Const. amends. IV, V, VI, XIV; N.Y. Const. art. I, §§ 1, 6, 11, 12.

72. *See* Melissa Chan, *These Black Lives Matter Protestors Had No Idea How One Arrest Could Alter Their Lives*, Time (Aug. 19, 2020), https://time.com/5880229/arrests-black-lives-matter-protests-impact/ (discussing collateral consequences of arrests); Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, Brennan Ctr. for Just. (June 21, 2021), https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment (analyzing collateral consequences of a criminal record); Hillel R. Smith, Cong. Rsch. Serv., R45151, Immigration Consequences of Criminal Activity (2021) (discussing potential immigration consequences associated with convictions).

D. Exercise Debrief

The *Hudson* hypothetical provides a bare-bones summary of the case, inviting students to think like lawyers and identify additional information and evidence that could be relevant. Did implicit or explicit racial bias taint the victim's perception and account of the robbery?[73] Does video footage of the robbery exist? Is there additional evidence, for instance, of social media posts and cell phone records that could shed light on the events of October 11? Are there any other witnesses? After participating in the roleplay, students recognize that to answer these questions, the prosecutor and defense attorney must investigate further. New information and evidence could strengthen the prosecution's case, but it could also exculpate Hudson, possibly revealing that the victim's identification of him was mistaken. Only after a thorough investigation, including interviews with the police officers involved in the case, will the prosecutor be able to make an informed decision about whether to prosecute the case, dismiss it, or reduce the charge.

The debrief also focuses on exculpatory evidence that already exists in the case—the victim's prior identification of another man as the perpetrator. This aspect of the hypothetical sparks a thoughtful class discussion about the responsibility of prosecutors to seek justice, not only for victims and the community, but also for those accused of crimes.[74] Students realize that the prosecutor has a legal and ethical obligation to disclose the photo array identification to the defense because withholding such information could contribute to a wrongful conviction.[75]

Another component of the debrief is a discussion of certain proposals, some of which have been adopted in various jurisdictions, to decrease the risk of error in eyewitness identification procedures.[76] Recommendations include "double-blind" lineups where neither the administrator of the lineup nor the witness know the

73. *See generally* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012); Jessica A. Clarke, *Explicit Bias*, 113 Nw. U. L. Rev. 505 (2018).

74. *See* Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 Tex. A&M L. Rev. 515, 519–22 (2016) (discussing the prosecutorial duty to seek justice); *see also* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA Crim. Just. L. Rev. 1, 2 (2019) ("In recent years, some elected prosecutors have sought to change [the] narrative by using their power and discretion with the goals of not only enforcing the law, but also reducing mass incarceration, eliminating racial disparities, and seeking justice for all, including the accused.").

75. *See* The Right Thing, *supra* note 54 (noting rules, judicial precedent, and statutes governing the professional conduct of New York prosecutors); *see also* Brady v. Maryland, 373 U.S. 83, 87–88 (1963) (describing the prosecutorial obligation to disclose exculpatory evidence); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (discussing the prosecutorial obligation to disclose witness impeachment material).

76. *E.g.*, *Eyewitness Identification Reform*, Innocence Project, https://innocenceproject.org/eyewitness-identification-reform/ (last visited Apr. 8, 2022) (listing states that have implemented eyewitness identification reforms); Kristine Hamann, Dist. Att'y Ass'n of the State of N.Y., New York State Identification Procedures—An Overview 1 (2014) (outlining statewide reforms to ensure "fair and neutral" identification procedures); Identification Proc.: Photo Arrays and Line-ups Model Policy (N.Y. State Div. of Crim. Just. Servs. 2017) (model identification procedures in New York).

identity of the suspect; lineups that include more fillers;[77] and sequential lineups that show the witnesses individually instead of as a group of people.[78] An additional lineup recommendation is the "blank" lineup, one that does not include the suspect; a "true" lineup would follow if the witness fails to identify anyone in the blank lineup.[79] Other proposed reforms include limiting the use of showups, selecting appropriate fillers for and including only one suspect in identification procedures, recording identification procedures, providing witnesses with standard instructions for identification procedures,[80] and recording contemporaneous "confidence statements" in which witnesses attest to the degree of confidence they have in their identifications.[81]

Following the roleplay, the class may also discuss judicial precedent addressing the danger of eyewitness misidentifications. Central to the discussion is *State v. Henderson*, a landmark New Jersey Supreme Court case on eyewitness identifications decided in 2011.[82] *Henderson* endorsed the use of enhanced jury instructions on the

77. *See* Nat'l Rsch. Council, *supra* note 25, at 25. "Fillers are selected for their physical similarities to the suspect (gender, race, hair length and color, facial hair, height, skin tone, and other distinguishing features)." *Id.*

78. Laura Connelly, Note, *Cross-Racial Identifications: Solutions to the "They All Look Alike" Effect*, 21 Mich. J. Race & L. 125, 140–41 (2015) (double-blind and sequential lineups); Taslitz, *supra* note 34, at 1069 (larger lineups).

79. Taslitz, *supra* note 34, at 1069–71.

80. Standard witness instructions are a safeguard against conscious and unconscious law enforcement cues that could affect a witness's identification. *See* Nat'l Rsch. Council, *supra* note 25, at 28, 91–92, 107.

> Witnesses should be instructed that the perpetrator may or may not be in the photo array or lineup and that the criminal investigation will continue regardless of whether the witness selects a suspect. Administrators should use witness instructions consistently in all photo arrays or lineups, and can use pre-recorded instructions or read instructions aloud, in the manner of the mandatory reading of Miranda Rights. Accommodations should be made when questioning non-English speakers or those with restricted linguistic ability. Additionally, the committee **recommends** the development and use of a standard set of instructions for use with a witness in a showup.

Id. at 107; Miranda v. Arizona, 384 U.S. 436, 467–76 (1966) (*Miranda* rights).

81. Nat'l Rsch. Council, *supra* note 25, at 108; Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of the Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. 377, 388–400 (2016); *see also* Connelly, *supra* note 78, at 141–43 (delineating additional proposals to guard against misidentification, such as reforming composite sketch procedures, training police officers about the danger of cross-racial identifications, and using technology to create lineups); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 643 (concerning fillers that resemble the suspect, police instruction to witnesses that the suspect might not be in the lineup, and the importance of avoiding lineups when it is unlikely that the suspect is the perpetrator).

82. 27 A.3d 872 (N.J. 2011). The class may also discuss other important court decisions on eyewitness identifications. *E.g.*, Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (instructing U.S. courts to consider "the opportunity of the witness to view the criminal at the time of the crime, the witness['s] degree of attention, the accuracy of [the witness's] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation" when evaluating the reliability of eyewitness identifications); State v. Lawson, 291 P.3d 673, 690–98 (Or. 2012) (announcing a revised procedure for Oregon trial courts when determining the admissibility of an eyewitness identification); Rosenthal, *supra* note 32, at 188–206 (discussing *Manson* and *Henderson* and their progeny).

reliability of eyewitness identifications[83] and instructed trial courts to explore all relevant variables,[84] including race-bias,[85] in pre-trial hearings on the admissibility of eyewitness identifications.[86]

In light of studies confirming the inaccuracy of eyewitness identifications, courts have also held expert testimony to be admissible on the issue.[87] Nonetheless, eyewitness identifications remain fraught because jurors may discount the possibility of eyewitness error,[88] and non-racially diverse juries may not fully appreciate the effect of own-race bias in cross-racial eyewitness identifications.[89]

The debrief of the *Hudson* exercise ends with student reflections on the responsibility of lawyers to look beyond the basics of a case and identify influences, sometimes not completely visible, that might affect the outcome. The prosecutor in the *Hudson* case must engage in such an inquiry,[90] resisting the temptation of tunnel vision.[91] The class recognizes that a rash exercise of prosecutorial discretion, such as presenting the evidence in *Hudson* to a grand jury without more investigation, could

83. *Henderson*, 27 A.3d at 919. Various state courts have followed *Henderson*'s approach. *See, e.g.*, State v. Cabagbag, 277 P.3d 1027, 1029 (Haw. 2012) ("[C]riminal . . . courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in the case, and it is requested by the defendant . . . ."); Commonwealth v. Bastaldo, 32 N.E.3d 873, 880–81 (Mass. 2015) (requiring a jury instruction on the accuracy of cross-racial identifications in criminal cases); People v. Boone, 91 N.E.3d 1194, 1203 (N.Y. 2017) (same).

84. *Henderson*, 27 A.3d at 919–23. Relevant variables include "system variables" (those relating to the administration of the identification procedures) and "estimator variables" (those relating to the witness, the accused, and the event). *Id.* at 895.

85. *Id.* at 921.

86. *Id.* at 919–23; *see also* Taslitz, *supra* note 34, at 1054 ("[*Henderson*] articulated a wider array of scientifically-informed factors [compared to those articulated in *Manson*] for courts to consider in determining the unreliability of an identification . . . .").

87. *E.g.*, *Henderson*, 27 A.3d at 925 ("Expert testimony may also be introduced at trial, but only if otherwise appropriate."); *Boone*, 91 N.E.3d at 1199 ("A psychological principle such as the cross-race effect may lend itself to expert testimony."); *Lawson*, 291 P.3d at 696 ("Because many of the system and estimator variables that we described earlier are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning variables that can affect the reliability of eyewitness identification.").

88. Rosenthal, *supra* note 32, at 184 ("Moreover, studies have found that jurors have limited ability to assess the reliability of eyewitness identifications and, instead, tend to over-believe eyewitnesses and discount the risk of eyewitness error.").

89. *See* Taslitz, *supra* note 34, at 1092 ("White jurors are unlikely fully to appreciate the [own-race bias effect] or incorporate it into their decision-making. A racially diverse jury is likely to do a better job because jury diversity may affect what the jury sees and how it sees it.").

90. *See* The Right Thing, *supra* note 54, at 1 ("We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do 'the right thing.'").

91. *See Multiple Dimensions*, *supra* note 35, at 329 (explaining how "the information provided to [prosecutors] and the feedback they receive" can distort guilt assessments). Prosecutors may also be vulnerable to tunnel vision when faced with pressure to root out crime and obtain convictions. *See id.* at 327–29 (maintaining that the pressure to obtain convictions often outweighs a prosecutor's "interest in doing justice").

lead to a wrongful conviction. A criminal charge is "like a loaded gun"[92]—it has the power to shatter lives. Therefore, prosecutors, in exercising discretion, must thoroughly investigate, engage in rigorous factual and legal analysis, and consider whether racial bias could be a corrupting influence in a case.

IV. CULTIVATING THE HABIT OF THINKING CRITICALLY ABOUT THE IMPACT OF RACE AND RACIAL BIAS IN LAW PRACTICE

Twenty-first century lawyers work in multicultural, globally-connected environments.[93] They represent clients from diverse backgrounds and navigate social institutions that follow a variety of cultural norms.[94] The cultural lens through which lawyers, clients, witnesses, and legal decision makers view the world is informed by race, gender, ethnicity, and a panoply of other characteristics.[95]

The *Hudson* exercise shows how the cultural lens of an eyewitness who is a different race from the accused could contribute to an unjust result in a criminal case—a misidentification resulting from own-race bias might lead to the conviction of an innocent man. Drawing on the methodology described by Professors Bryant and Koh Peters in *Five Habits for Cross-Cultural Lawyering*[96] and elaborated on in *Talking About Race*,[97] the *Hudson* exercise seeks to inspire students to develop the habit of thinking critically[98] about the potential impact of race and racial bias in every legal matter entrusted to them as lawyers.

Professors Bryant and Koh Peters developed a framework for cross-cultural lawyering that considers the cultural perspectives and biases of clients, lawyers, legal decision makers, and opponents.[99] *Five Habits* calls upon lawyers to identify (1)

92. *See* The Right Thing, *supra* note 54, at 1.

93. *See* Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 Nova L. Rev. 177, 191–92 (2014) (demonstrating the importance of cultural competency for lawyers).

94. Shahrokh Falati, *The Makings of a Culturally Savvy Lawyer: Novel Approaches for Teaching and Assessing Cross-Cultural Skills in Law School*, 49 J.L. & Educ. 627, 633–37 (2020).

95. *See, e.g.*, *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 48 (providing examples of cultural groups and norms and explaining how they relate to "effective cross-cultural lawyering"); *Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 38–41; Christina A. Zawisza, *Teaching Cross-Cultural Competence to Law Students: Understanding the "Self" as "Other,"* 17 Fla. Coastal L. Rev. 185, 192 (2016) (providing examples of "newer cultural categories").

96. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17; *Building Cross-Cultural Competence in Lawyers*, *supra* note 17.

97. *Talking About Race*, *supra* note 18.

98. *See* Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching About Identity, Culture, Language, and Difference*, *in* Transforming the Education of Lawyers 349, 364–74 (Susan Bryant et al. eds., 2014) (providing tools to help remove bias from cross-cultural lawyering); *see also* Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Strategies*, 8 Geo. J.L. & Mod. Critical Race Persp. 251, 251–54 (2016) (discussing the use of mindfulness practices to teach and learn about race).

99. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17; *Building Cross-Cultural Competence in Lawyers*, *supra* note 17.

cultural "degrees of separation and connection" between themselves and their clients that may affect communication and understanding;[100] (2) "rings in motion"—the cultural differences and similarities of clients, lawyers, legal decision makers, and opponents that may shape a case;[101] (3) "parallel universes"—alternative interpretations of and explanations for the behavior of clients and others;[102] (4) "red flags"—signs that attorney-client communication is faltering—and corrective measures;[103] and (5) the "camel's back"—stress, heavy caseloads, and other factors that may negatively impact the attorney-client relationship.[104]

The "rings in motion" inquiry is at play in the *Hudson* exercise. Central to this inquiry is "identifying and analyzing how cultural differences and similarities influence the interactions between the client, the legal decision makers, the opponents, and the lawyer."[105] Professors Bryant and Koh Peters observe that "[t]he lawyer's goal in reading the rings is to consciously examine influences on the case that may be invisible but will nonetheless affect the case."[106] The *Hudson* exercise challenges

100. *Talking About Race*, *supra* note 18, at 393 ("Habit One's focus on the impact of similarities and differences on trust-building allows students and faculty to explore how racial mistrust and microaggression might influence the relationship."); *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 64–67 (discussing the significance of similarities and differences between lawyers and their clients).

101. *Talking About Race*, *supra* note 18, at 394 ("In assessing similarities and differences between the client and the law and decision makers, students can identify how implicit bias might operate in their clients' cases and plan to explicitly take the bias into account when assessing case strengths and building responses."); *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 68–70 (describing three dyads—lawyer-client, client-legal system, and lawyer-legal system—that are helpful in determining the impact of culture in a case).

102. *Talking About Race*, *supra* note 18, at 394 ("Parallel Universe Thinking can help students interpret 'seemingly inconsequential acts' as ones that are interpreted differently by those who are subjected to them on a regular basis. This understanding increases students' ability to recognize and use the concept of microaggressions."); *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 70–72 (providing examples of Parallel Universe Thinking in practice).

103. Signs that the client is bored, disengaged, angry, or uncomfortable are examples of "red flags" under Habit Four. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 58. Corrective measures may include redirecting the conversation to the client's priority and providing the client with the opportunity to explain concerns in more depth. *Id.* at 58–59; *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 72–76 (discussing corrective measures).

For further discussion of Habit Four, see Susan J. Bryant & Jean Koh Peters, *Six Practices for Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Mindful Approaches*, *in* The Affective Assistance of Counsel 183–228 (2007).

104. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 59–60; *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 76–78 (adding that cultural and societal norms may negatively impact the attorney-client relationship).

105. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 53–54; *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 68–70 (noting that cultural differences and similarities can influence decision makers).

106. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 55; *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 40 ("By teaching students cross-cultural lawyering skills and perspectives, we make the invisible more visible . . . ."); *Talking About Race*, *supra* note 18, at 383 (encouraging lawyers to regularly ask, "What role does race play in our work?" to monitor individual bias). The *Hudson*

students to engage in this type of examination, albeit in relation to a witness: they must critically evaluate whether and how the cultural lens and possible biases of an eyewitness who is a different race from the accused could affect the case.[107] This method of analysis should become a staple in legal education and a regular habit of lawyers. Just as lawyers routinely research laws, read statutes, and interview witnesses, they should also routinely consider the potential impact of racial bias and other influences that sometimes may not be completely visible in legal practice. This habit of critical thinking will empower lawyers to be counselors and advocates mindful of their responsibility to promote justice and eliminate bias and racism.[108]

V. CONCLUSION

In 2022, the American Bar Association (A.B.A.) approved a new standard for A.B.A.-accredited law schools that will require education on "bias, cross-cultural competency, and racism."[109] Instructional material like the *Hudson* exercise that engages students in critical thinking about the impact of race and racial bias in legal practice would help satisfy such a requirement. Teaching students about bias and racism is a crucial step in the professional development of effective, empathetic lawyers committed to achieving justice for clients and society.[110]

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exercise could also trigger a discussion of "parallel universe" explanations for behavior. *Talking About Race*, *supra* note 18, at 394.

107. *Five Habits for Cross-Cultural Lawyering*, *supra* note 17, at 59–60; *see also Building Cross-Cultural Competence in Lawyers*, *supra* note 17, at 56–57. The practice of self-reflection to identify bias and stereotyping, complemented by non-judgment, is an integral feature of the five habits. *Id.* So too does the habit of critical thinking about the impact of racial bias in legal practice demand that lawyers refrain from self-judgment and engage in self-reflection. *Id.*

108. *See Talking About Race*, *supra* note 18, at 407 (encouraging "reflection and self-understanding" to work toward a bias-free justice system).

109. Revised Standards for Approval of Law Schools (Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n 2022) (amending the *A.B.A. Standards and Rules of Procedure for Approval of Law Schools* to require curricula "on bias, cross-cultural competency, and racism"). The newly adopted Standard 303(c) states:

> A law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation. For students engaged in law clinics or field placements, the second educational occasion will take place before, concurrently with, or as part of their enrollment in clinical or field placement courses.

Id. at 3.

110. In 2020, deans from 150 law schools, in a letter to the Council of the A.B.A. Section of Legal Education and Admissions to the Bar, urged the Council to "require, or at least consider requiring, that every law school provide training and education around bias, cultural competence, and anti-racism." Letter from 150 Law School Deans to Members of the Council of the A.B.A. Section of Legal Education and Admissions to the Bar (July 30, 2020) (on file with *New York Law School Law Review*). The letter further stated, "[p]reparing law students to be lawyers requires that they should be educated with respect to bias, cultural awareness, and anti-racism. Such [legal] skills are essential parts of professional competence, legal practice, and being a lawyer." *Id.*