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## Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias

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### ABSTRACT

Although there is a long history of prejudice and discrimination against Latinxs within the U.S. legal system, there is a dearth of research seeking to understand the causal underpinnings of the biased decisionmaking that works against them. While this Article discusses the experience of those who identify as Latinx broadly, in several areas it pays special attention to the experience of Mexican Americans. First, this Article reviews the history of prejudice against Latinxs, the nature of that prejudice, and the importance of studying such prejudice within a legal context. Next, the Article reports on a series of studies conducted by the author over two decades that were designed to identify a theoretical model that might account for biased decisionmaking against Mexican Americans in legal decisions.

The Supremacy Clause is the U.S. Constitution's primary mechanism for resolving inevitable conflicts of law between two sovereigns operating in the same territory; it was not designed for the triangulated clashes between states and private actors performing federal work by contract. Current doctrine, however, flattens the structural difference. In scattered and undertheorized precedents, the U.S. Supreme Court has held that federal contracts can displace state law, and that the federal government's constitutional immunity from state law extends to contactors. This Article shines critical light on these Supremacy Clause spinoffs and argues to overrule them on constitutional and normative grounds. Across the regulatory spectrum, contractors routinely stand in for federal actors. But their contracts need not, and should not, stand in for federal law.

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## INTRODUCTION

The United States has the highest incarceration rate in the Western world,<sup>1</sup> and racial disparities exist with rates for Blacks and Latinxs much higher than rates for whites. These race disparities in incarceration plague federal, state,<sup>2</sup> and local prison systems.<sup>3</sup> The chance of incarceration is also disparate, since one of every three Black males, one of six Latinx males, but only one of seventeen white males, will experience incarceration during their lifetime.<sup>4</sup> This race disparity in incarceration exists not only for males, but for females as well.<sup>5</sup> Moreover, those who have been incarcerated never reach economic or social parity with their nonconvicted counterparts, and incarceration negatively impacts former convicts' and their family's wellbeing for years post incarceration.<sup>6</sup> The purpose of this

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1. THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/JLZ5-V343>].
  2. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison> [<https://perma.cc/M9W2-CEM9>].
  3. See Garrick L. Percival, *Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates*, 91 SOC. SCI. Q. 1063, 1075–76 (2010). At the local level, counties populated by those with conservative ideologies are more likely to have racial disparities in incarceration rates, with higher numbers of jailed Latinx and Black people. *Id.* at 1076–77, 1078 tbl.3.
  4. Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, HUM. RTS., Fall 2010, at 14, 14; see also *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, SENT'G PROJECT (Aug. 31, 2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/> [<https://perma.cc/7EF7-J8RF>].
  5. For race disparities for males and females, see *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/N5Q4-AS7W>]. Mexican Americans' race disparities in the legal system, including sentencing, have been noted since 1970 by the U.S. Civil Rights Commission. See U.S. COMM'N ON C.R., MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 2–13 (1970).
  6. See Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOCIO. REV. 526 (2002). Western used data from the National Longitudinal Survey of Youth and examined several statistical models with known predictor variables to examine the impact of incarceration on future earnings and career possibilities. Results indicated that incarceration had a significant negative impact on future earnings and potential careers, due to lack of education and training. *Id.*; see also Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOCIO. 553 (2005). Western and Pettit note that Black male joblessness is still grossly higher than that of white males, when controlling for Black males' higher unemployment rates in general. This unemployment rate is largely due to incarceration disparities, which impact later chances of employment and earnings. *Id.*

Article is to examine historical bias against Latinxs, negative stereotypes about Latinxs, and the current ramifications of stereotypes for legal decisionmaking.

## I. HISTORICAL BIAS

Latinxs are the largest ethnic minority in the United States,<sup>7</sup> but there is a dearth of research on the psychological basis for biased decisions made about Latinxs in general, and more specifically, in the criminal justice system.<sup>8</sup> The limited scholarly focus is especially problematic given the long history of stereotypes, prejudice, and discrimination in the United States against Latinxs,<sup>9</sup>

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7. See Antonio Flores, *Facts on U.S. Latinos, 2015*, PEW RSCH. CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos/#hispanic-rising-share> [<https://perma.cc/K24S-QBKZ>]. Hispanics make up nearly 18 percent of the U.S. population, and that number is expected to increase to 24 percent by 2065. *Id.* The focus of the research reported here is on Latinxs, and particularly those of Mexican descent, since Mexican Americans are the largest Latinx ethnic group in the United States, comprising over 60 percent of the U.S. Latinx population. *Id.*
  8. The emphasis on Black/white issues in psychology research has been noted. See, e.g., John F. Dovidio, Agata Gluszek, Melissa-Sue John, Ruth Dittmann & Paul Lagunes, *Understanding Bias Toward Latinos: Discrimination, Dimensions of Difference, and Experience of Exclusion*, 66 J. SOC. ISSUES 59 (2010); Amado M. Padilla, *Social Cognition, Ethnic Identity, and Ethnic Specific Strategies for Coping With Threat Due to Prejudice and Discrimination*, in MOTIVATIONAL ASPECTS OF PREJUDICE AND RACISM 7, 8 (Cynthia Willis-Esqueda ed., 2008); see also Bernd Wittenbrink, Pamela L. Gist & James L. Hilton, *Structural Properties of Stereotypic Knowledge and Their Influences on the Construal of Social Situations*. 72 J. PERSONALITY & SOC. PSYCH. 526 (1997). In legal studies, the lack of emphasis on Latinxs and their legal treatment has been noted by Frederick Aguirre. Frederick P. Aguirre, *Mendez v. Westminster School District: How It Affected Brown v. Board of Education*, 4 J. HISP. HIGHER EDUC. 321 (2005); see generally Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 BERKELEY LA RAZA L.J. 225 (2003). Luna makes the argument that Blacks and Mexicans/Mexican Americans experience some shared forms of discrimination, but there are issues that are unique to each group, with Mexican Americans' outcomes being far worse than those of Blacks on socioeconomic indicators. Luna contends that "Mexicans/Mexican Americans and other immigrants do not suffer any less from discrimination than Blacks do. In fact, socioeconomic indicators suggest that racial/ethnic discrimination has currently waged a greater toll on Mexicans/Mexican Americans than Blacks." *Id.* at 229 (emphasis omitted).
  9. It is important to note that the term Latinx refers to a panethnic identity that recognizes a collective experience of sociopolitical treatment by colonization, while Hispanic is a term originating in U.S. governmental and public policy entities. I have used Latinx in place of the Hispanic label. Latinx/Hispanic is not a racial label, since those identifying as Latinx can come from a wide array of origins; nevertheless, the Latinx or Hispanic stereotype often conflates the concept with a prototypic phenotype, typically that of American indigenous peoples from any nation or territory once colonized by Spain. For an overview of the pan-Latinx ethnicity, see José Calderón, "Hispanic" and "Latino": *The Viability of Categories for Panethnic Unity*, LATIN AM. PERSPS., Fall 1992, at 37, 39–40.

including Mexican Americans.<sup>10</sup> The existence of unfair treatment against Latinxs indicates the need to understand the distal and proximal psychological causes of such treatment, since bias can permeate the legal system.<sup>11</sup>

Mexican Americans' incorporation into the ethnic fabric of the United States begins with two historical events: the annexation of Texas by the United States in 1845 and the Treaty of Guadalupe Hidalgo in 1848.<sup>12</sup> These events are important for two reasons. First, they mark the annexation of nearly half of Mexico by the United States.<sup>13</sup> Second, the events transformed the citizenship, legal, and social status of those with Mexican descent.<sup>14</sup> Whites who assumed political and social control espoused negative stereotypes about Mexican Americans.<sup>15</sup> A part of the

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10. For overviews of stereotyping, prejudice, and discrimination see STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS (Charles Stangor ed., 2000), and STEREOTYPES AND STEREOTYPING (C. Neil Macrae, Charles Stangor & Miles Hewstone eds., 1996). The term bias refers to a general tendency to respond in an unfair way to an object, including to a social category and its members. Bias can originate from stereotypes or prejudice. *Id.* at 4. Stereotypes are beliefs about a social category or group and its members, while prejudice expands on this notion and includes affective states or feelings towards the social category, as well as beliefs. *Id.* at 278. Prejudice is an attitude, while discrimination refers to behavior. *Id.* at 276. It is assumed that prejudice (an attitude) produces discrimination (a behavior). When stereotypes and prejudice are consensually held at the societal level, the impact can be damaging for the stereotyped targets. *Id.* at 22. For a review of stereotypes against Latinxs, particularly Mexican Americans, in the legal system, see STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (2003); Seth Motel & Eileen Patten, *Hispanic Origin Profiles, 2010*, PEW RSCH. CTR. (June 27, 2012), <http://www.pewhispanic.org/2012/06/27/country-of-origin-profiles> [<https://perma.cc/E48E-6Q9Y>]; and REYNALDO ANAYA VALENCIA, SONIA R. GARCÍA, HENRY FLORES & JOSÉ ROBERTO JUÁREZ JR., MEXICAN AMERICANS AND THE LAW 4 (2004).
  11. See BENDER, *supra* note 10, at 1–10. Disparities have been noted in a variety of areas within criminal justice procedures. See, e.g., Cynthia Willis-Esqueda, Russ K. E. Espioza & Scott E. Culhane, *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making*, 30 HISP. J. BEHAV. SCI. 181, 183 (2008).
  12. RAY SUAREZ, LATINO AMERICANS: THE 500-YEAR LEGACY THAT SHAPED A NATION 30, 33 (2013). Suarez notes that while annexation of Texas was meant to expand slavery for whites who had immigrated into the Mexican state of Tejas, several politicians in Washington stated they had no intention of granting civil and political rights to nonwhites. See also Natalia Molina, *The Power of Racial Scripts: What the History of Mexican Immigration to the United States Teaches Us About Relational Notions of Race*, 8 LATINO STUD. 156, 175 (2010).
  13. See Juan F. Perea, *A Brief History of Race and the U.S.–Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 284 (2003).
  14. See *id.* at 285. Carlos Soltero notes that after the Treaty of Guadalupe Hidalgo, there was a change in the “role of Mexicans in the American legal system,” which highlighted the loss of civil rights. CARLOS R. SOLTERO, LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES 9–10 (2006).
  15. Perea, *supra* note 13, at 284. According to Juan Perea, whites' fear of Mexicans having political and social power resulted in the use of negative stereotypes as the driving motivation behind opposition to statehood. These stereotypes were founded on the supposition that Mexicans were inferior to whites as part of a racial hierarchy. See LESLIE V. TISCHAUSER, THE CHANGING NATURE OF RACIAL AND ETHNIC CONFLICT IN UNITED STATES HISTORY 22–24 (2002). Leslie

transformation of the U.S. Southwest, these stereotypes were invoked to transform Mexican Americans from first to second-class citizens who were ultimately deprived of most civil rights.<sup>16</sup> Case law demonstrates the struggle to define the status of Mexican Americans and where they fit in the racial fabric of the United States.<sup>17</sup>

Race hierarchies in the United States place whites at the top and Blacks at the bottom. While the Treaty of Guadalupe Hidalgo stated that Mexicans could claim U.S. citizenship, only whites were allowed citizenship status. Thus, though Mexicans were deemed white, the indigenous ancestry and appearance of most Mexican Americans called into question their racial status, leaving them vulnerable to loss of rights.<sup>18</sup> For Mexican Americans, the issue was about not only race classification, but also how to guarantee provision of civil rights.<sup>19</sup> Even for those Mexican Americans deemed white, the race classification did not guarantee equal treatment. Indeed, those who fought for Latinx civil rights were reluctant to abandon the white category and demand consideration as another race.<sup>20</sup> This left Latinxs as a group in the middle—not Black, but not really white—and thus not falling under the race discrimination banner.<sup>21</sup> While lawsuits were brought

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Tischauer notes the desire of whites to remove all those of Mexican descent after Texas independence from Mexico. *Id.*

16. See LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 67–84 (2d ed. 2018) (making the argument that Mexican elites went from first-class citizens to second class, albeit with more civil rights than the American Indian populations).
17. See ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 253, 293 (2008); see also George A. Martinez, *Legal Indeterminacy, Judicial Discretion, and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994) (providing an overview of cases that address civil rights); Robert F. Castro, *Rescuing Catalina: Law, Storytelling, and Unearthing the Hidden History of Southwestern Slavery*, 12 BERKELEY LA RAZA L.J. 123, 134–35 (2000) (providing an overview of a slave case, since a race designation of Mexican or Indian would determine potential slave status).
18. The vast majority of Mexican Americans are descended from indigenous people in Mexico, resulting in an identifiable phenotype. See Satish Kumar et al., *Large Scale Mitochondrial Sequencing in Mexican Americans Suggests a Reappraisal of Native American Origins*, 11 BMC EVOLUTIONARY BIOLOGY 293 (2011); see also Frank F. Montalvo & G. Edward Codina, *Skin Color and Latinos in the United States*, 1 ETHNICITIES 321, 341 (2001) (reviewing the issue of appearance and race designations for Latinxs with a focus on Mexican Americans and overall wellbeing).
19. See GROSS, *supra* note 17, at 257–58.
20. See GÓMEZ, *supra* note 16, at 86–87. The race category of white was a desired status. Hence, there were psychological and social advantages to maintaining that designation. While the legal race category was white, the mixed ancestry of Mexicans resulted in a social category as nonwhite.
21. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995). Perea articulates the legal reasoning that uses ethnicity as a stand-in for race, which highlights the confusion of the courts about the race construct. See also IGNACIO M. GARCÍA, *WHITE BUT NOT EQUAL: MEXICAN AMERICANS, JURY*

against acts of discrimination against Mexican Americans, this classification conundrum did not change significantly until *Hernandez v. Texas* in 1954.<sup>22</sup> *Hernandez*, which was the first time Mexican American attorneys argued before the U.S. Supreme Court, was also the first case to treat Mexican Americans as a cognizable ethnic or racial group.

Unequal treatment for Mexican Americans, then, has a long history. After the Treaty of Guadalupe Hidalgo was signed, increased contact between Mexican Americans and non-Latinx whites produced conflict over resources and social power.<sup>23</sup> In order to enforce the United States' legal and social power, mob violence against and lynching of Mexican Americans occurred throughout the Southwest.<sup>24</sup> This violence signaled mob control and punishment of Mexican Americans, often in spite of the legal system. In that era, it was common for the general public, lawmakers, and legal actors to express plainly racist notions of Mexican Americans.<sup>25</sup> Even into the 1900s, legal actors' commentary on Mexican

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DISCRIMINATION, AND THE SUPREME COURT 64–65 (2009); GÓMEZ, *supra* note 16, at 82–83, 139 (noting the racial hierarchy that formed in the Southwest, in addition to the requirement of white status for U.S. citizenship following the annexation of Texas and the Treaty of Guadalupe Hidalgo); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986*, at 38–39 (1987) (describing the efforts of Texas government officials to maintain the restriction on voting to whites only, since the goal was exclusion of Mexicans of indigenous ancestry).

22. *Hernandez v. Texas*, 347 U.S. 475 (1954). For an overview of early education discrimination cases, see Rubén Donato & Jarrod Hanson, “In These Towns, Mexicans Are Classified as Negroes”: *The Politics of Unofficial Segregation in the Kansas Public Schools, 1915–1935*, 54 AM. EDUC. RSCH. J. 53S (2017), and Frederick P. Aguirre et al., *Mendez v. Westminster: A Living History*, 2014 MICH. ST. L. REV. 401. See also *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (the first case of the twentieth century to address antimiscegenation laws, involving a Mexican American woman, Andrea Perez); García, *supra* note 21, at 67–74. Prior to *Hernandez*, courts addressed the issue of Mexican Americans' lack of jury service, but biased assignment to juries focused on language proficiency or tax roll lists. Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153 (2005) (addressing the reasoning of the U.S. Supreme Court under Earl Warren recognizing the social construction of race and how Mexican Americans in Texas experienced a “racialized” inequality in nearly all areas of social life).
23. For a review of conflicts after U.S. colonization of New Mexico, see Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC'Y REV. 1129 (2000), and Juan F. Perea, *supra* note 13 (providing an overview of race-based issues regarding the incorporation of Mexican Americans into the body politic).
24. See WILLIAM D. CARRIGAN & CLIVE WEBB, *FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICAN AMERICANS IN THE UNITED STATES, 1848–1928*, at 1–6 (2013).
25. *Id.* at 35–37; see also IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* 62–64 (2003) [hereinafter LÓPEZ, *RACISM ON TRIAL*]; IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 102 (2006); Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007); Perea, *supra* note 13 (providing an overview of the opposition to annexation of the Southwest by legislators and U.S. senators, including use of pejorative language to describe those of Mexican descent).

Americans indicated beliefs of inherent inferiority. In the 1928 case *Ramirez v. State*,<sup>26</sup> for example, the county prosecutor, sheriff, and jury commissioner all testified that Mexican Americans were not eligible for jury service because they were less intelligent, could not speak English, and were incapable of understanding the proceedings.<sup>27</sup>

Although there has been increased visibility of Latinxs in lawmaking and legal arenas,<sup>28</sup> Latinxs continue to be underrepresented in legal academia and as legal system actors, though they remain overrepresented in the carceral system.<sup>29</sup> In September 2020, Latinxs accounted for over 30 percent of the federal prison population despite being 18 percent of the general population, and are the fastest growing minority group in the prison system.<sup>30</sup>

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26. 40 S.W.2d 138 (Tex. Crim. App. 1931).

27. *Id.* at 139.

28. See, e.g., Suzanne Gamboa, *Latinos Show Record Gains in Congress, Though Numbers Are Still Low*, NBC NEWS (Nov. 15, 2018, 12:26 PM), <https://www.nbcnews.com/news/latino/latinos-show-record-gains-congress-though-numbers-are-still-low-n936781> [https://perma.cc/J8DA-HWRV]; HISP. BAR ASS'N-D.C., HBA-DC DIVERSITY REPORT: THE STATE OF HISPANIC ATTORNEYS IN THE DC LEGAL MARKET 7-9 (2018), [https://cdn.ymaws.com/www.hbadc.org/resource/resmgr/strategicpartnershipfellowships/hba-dc\\_2018\\_diversityreport\\_.pdf](https://cdn.ymaws.com/www.hbadc.org/resource/resmgr/strategicpartnershipfellowships/hba-dc_2018_diversityreport_.pdf) [https://perma.cc/G88Q-ZV2Y].

29. For a review of the experience of Mexican Americans with legal representation see Brent G. McCune, Lisa J. Soto, William G. Weaver & Alejandra Hobbs, *The Disappearing Mexican-American Law Student*, 19 TEX. HISP. J.L. & POL'Y 1 (2013), and Leo M. Romero, Richard Delgado & Cruz Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M. L. REV. 177 (1975). Latinxs' underrepresentation within legal education is longstanding. See Marc-Tizoc González, *La Gran Lucha: Latina and Latino Lawyers, Breaking the Law on Principle, and Confronting the Risks of Representation*, 13 HASTINGS RACE & POVERTY L.J. 61 (2016). See Sharon Foley & Deborah L. Kidder, *Hispanic Law Students' Perceptions of Discrimination, Justice, and Career Prospects*, 24 HISP. J. BEHAV. SCI. 23, 32 (2002), for an explanation of why Latinx students may not enter a legal career, and thus, why there is an underrepresentation of Latinx attorneys. Latinx law students, particularly female students, expect to face discrimination, and the less they perceive the system as just, the less satisfaction they expect with the career choice. Sharon Foley, Deborah L. Kidder & Gary N. Powell, *The Perceived Glass Ceiling and Justice Perceptions: An Investigation of Hispanic Law Associates*, 28 J. MGMT. 471, 486-90 (2002), found that Latinx attorneys' perceptions of ethnic discrimination were positively related to perceptions of a glass ceiling, and perceptions of a glass ceiling was predictive of intentions to leave the profession, which results in Latinx underrepresentation. As the proportion of Latinx law associates increased, however, the perception of a glass ceiling decreased. *Id.* at 487-88.

30. *Inmate Statistics: Inmate Ethnicity*, FED. BUREAU PRISONS (Oct. 3, 2020), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) [https://perma.cc/8QYY-RXT7]; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI725219> [https://perma.cc/PXV6-R8J6]; see JOSHUA ROVNER, *The SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS* (2016), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests> [perma.cc/CZAN-UWY5] (reporting that Hispanic youth are 61 percent more likely to have youth detention, compared to white, non-Hispanic youth); see generally José Luis Morín, *Latino/as and U.S. Prisons: Trends and Challenges*, in *BEHIND BARS: LATINO/AS AND*



## II. MANIFESTATION OF THESE STEREOTYPES IN SOCIAL PSYCHOLOGY

One of the factors that contributes to producing inequality for Mexican Americans is the negative beliefs and stereotypes attributed to them as a group.<sup>31</sup> As a foundation to understanding prejudice, beliefs and stereotypes about groups and group members serve to guide our understanding and connect our feelings and behavioral inclinations.<sup>32</sup> Jeffrey Dixon and Michael Rosenbaum have noted that cultural theory explains how negative stereotypes can be transmitted over generations, and contact with members of the targeted group is unnecessary for adoption of the stereotype notions.<sup>33</sup> Negative stereotypes of those of Mexican descent have been present since the earliest written depictions in the 1800s, since those of Mexican descent were characterized as lazy, indolent, ignorant, immoral, degraded, savage, and violent.<sup>34</sup> William Raat has shown, for instance, how the label “Greaser” denoted the filth and criminality of those of Mexican descent.<sup>35</sup>

Negative stereotypes have also been seen in legal arenas. In one of the most egregious cases, the stereotypical notion of criminality was demonstrated in the infamous *Sleepy Lagoon Case*,<sup>36</sup> in which a Sheriff’s deputy suggested that Mexican Americans were biologically predisposed to violence on account of their ancestral ties to Aztecs.<sup>37</sup> In another case, an Oklahoma judge admitted to calling Mexican

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PRISON IN THE UNITED STATES 17 (Suzanne Oboler ed., 2009) (providing an overview of the issue of growing incarceration rates for Latinos).

31. See BENDER *supra* note 10, at 1, 5.
32. R. C. Gardner, *Stereotypes as Consensual Beliefs*, in 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 1 (Mark P. Zanna & James M. Olson eds., 1994) (providing an introduction to the significance and measurement of stereotypes in understanding prejudice); see also ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES 103–06 (1993).
33. Jeffrey C. Dixon & Michael S. Rosenbaum, *Nice to Know You? Testing Contact, Cultural, and Group Threat Theories of Anti-Black and Anti-Hispanic Stereotypes*, 85 SOC. SCI. Q. 257 (2004).
34. See LÓPEZ, RACISM ON TRIAL, *supra* note 25, at 63–64; CECIL ROBINSON, WITH THE EARS OF STRANGERS: THE MEXICAN IN AMERICAN LITERATURE 33–45 (1963); Raymund A. Paredes, *The Mexican Image in American Travel Literature, 1831–1869*, 52 N.M. HIST. REV. 5 (1977).
35. W. DIRK RAAT & MICHAEL M. BRESCIA, MEXICO AND THE UNITED STATES: AMBIVALENT VISTAS 5–9 (4th ed. 2010); see also BENDER, *supra* note 10, at 55 (noting that the “Greaser” term is related to the California Vagrancy Act of 1855, also called the Greaser Act, targeting Mexicans who were considered idle); LÓPEZ, RACISM ON TRIAL, *supra* note 25, at 62 (noting the connection between the term “Greaser” and the perception that Mexicans were dirty and greasy); Paredes, *supra* note 34; ROBINSON, *supra* note 34, at 34–37 (providing a review of early writings that depict Mexicans as filthy, which morphed into the label “Greaser”).
36. *People v. Zammora*, 152 P.2d 180 (Cal. App. 1944).
37. See *SLEEPY LAGOON DEF. COMM.*, THE SLEEPY LAGOON CASE 12–15 (1943). See also VALENCIA ET AL., *supra* note 10, at 5–7, for a review of the testimony as well as the treatment of Mexican American males in the case.

workers “wetbacks,” and was also accused of calling them “filthy animals.”<sup>38</sup> While discussing an agricultural problem, a Kansas legislator stated: “Looks like to me, if shooting these immigrating feral hogs works, maybe we have found a [solution] to our illegal immigration problem.”<sup>39</sup> A California judge suggested that genocide might be a method to address the immoral and criminal behavior of Mexican Americans.<sup>40</sup> These images and characterizations of the criminal, lazy, immoral, and undocumented Mexican American are pervasive in literature, television, film, and cultural imagery.<sup>41</sup>

As a discipline, psychology has been slow to respond to the causes and consequences of bias against Latinxs, including Mexican Americans.<sup>42</sup> Prior to 1930, psychological research focused on confirmation of the inferiority of Mexican Americans, usually comparing Mexican Americans to whites, with an emphasis on biological, race-based differences.<sup>43</sup> This research hinged on the notion that

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38. Debra Cassens Weiss, *Okla. Judge Admits ‘Wetback’ Comment, But Denies Calling Workers ‘Filthy Animals’*, ABA J. (Jan. 7, 2011, 1:02 PM), [https://www.abajournal.com/news/article/okla.\\_judge\\_admits\\_wetback\\_comment\\_but\\_denies\\_calling\\_workers\\_filthy\\_animal](https://www.abajournal.com/news/article/okla._judge_admits_wetback_comment_but_denies_calling_workers_filthy_animal) [https://perma.cc/54QT-6FNG].
  39. Gustavo Valdes, *Democrats Call for Kansas Lawmaker’s Resignation Over Immigrant ‘Joke’*, CNN POL. (Mar. 18, 2011, 7:20 PM) (quoting Virgil Peck Jr., former member of the Kansas House of Representatives), <http://www.cnn.com/2011/POLITICS/03/18/kansas.rep.immigrants/index.html> [https://perma.cc/C35Q-V9EM].
  40. See LÓPEZ, *RACISM ON TRIAL*, *supra* note 25, at 84–86. Numerous examples exist of legal actors’ discriminatory comments. See, e.g., Associated Press, *Lawmaker Punished for Mexicans Remark*, NBC NEWS (Apr. 21, 2008, 7:44 PM), [http://www.nbcnews.com/id/24244278/ns/us\\_news-life/t/lawmaker-punished-mexicans-remark/#.X4TSxC2ZNbU](http://www.nbcnews.com/id/24244278/ns/us_news-life/t/lawmaker-punished-mexicans-remark/#.X4TSxC2ZNbU) [https://perma.cc/JF5T-H8CL].
  41. See generally BENDER, *supra* note 10, at 15 (describing the pervasive characterization and images of Mexican Americans as criminals); see also LÓPEZ, *RACISM ON TRIAL*, *supra* note 25, at 63; Dana E. Mastro & Elizabeth Behm-Morawitz, *Latino Representation on Primetime Television*, 82 JOURNALISM & MASS COMMUN. Q. 110 (2005) (providing an overview of television depictions of Latinos with criminal as a category); CHARLES RAMÍREZ BERG, *LATINO IMAGES IN FILM: STEREOTYPES, SUBVERSION, & RESISTANCE* (2002) (providing a review of the blatant Latinx stereotypes in film).
  42. See AM. PSYCH. ASS’N, *REPORT OF THE APA TASK FORCE ON THE IMPLEMENTATION OF THE MULTICULTURAL GUIDELINES 2* (2008), <https://www.apa.org/about/policy/multicultural-report.pdf> [https://perma.cc/52GU-ZGCS].
  43. See Thomas R. Garth, *An Investigation of the Intelligence of Mexican and Full and Mixed Blood Indian Children*, 7 EUGENICAL NEWS 105 (1922); Thomas R. Garth, *The Intelligence of Indians*, 56 SCIENCE 635 (1922); Thomas R. Garth, Walter M. Holcomb & Irma Gesche, *Mental Fatigue of Mexican School Children*, 16 J. APPLIED PSYCH. 675 (1932); Thomas R. Garth, Thomas H. Elson & Margaret M. Morton, *The Administration of Non-Language Intelligence Tests to Mexicans*, 31 J. ABNORMAL & SOC. PSYCH. 53, 55 (1936) (finding it “startling” that Mexican American children would score equally to white children on a nonverbal test, while the usual results of whites scoring higher than Mexican American children on verbal IQ tests was demonstrated).

intelligence, among other traits, was hereditary, and Mexican Americans were less intelligent compared to whites.<sup>44</sup>

Since then, psychological research has focused on measurement of stereotypes and how stereotypic bias can predict behavior towards minority groups, including Mexican Americans.<sup>45</sup> For example, by 1945 Norman Humphrey compared the pervasive stereotype of Mexican American youths as delinquents with actual observations of youths to determine the veracity of the stereotyped notion.<sup>46</sup> Out of identified types, a criminal type was included.

A few studies have examined measurements of anti-Latinx and anti-Mexican stereotypes.<sup>47</sup> Yolanda Niemann and her colleagues found that Mexican

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44. For intelligence differences, see Helen Lois Koch & Rietta Simmons, *A Study of the Test-Performance of American, Mexican, and Negro Children*, 35 PSYCH. MONOGRAPHS 44 (1926), and E. Lee Davenport, *The Intelligence Quotients of Mexican and Non-Mexican Siblings*, 36 SCH. & SOC'Y 304 (1932). Even Mexican food was suspected of lowering health. See Kenneth L. Wentworth, *The Effect of a Native Mexican Diet on Learning and Reasoning in White Rats*, 22 J. COMP. PSYCH. 255, 265 (1936). The notion that Latinxs have lower intelligence persists, since with implicit (below awareness) responding, people demonstrate the belief in the lower intelligence of Latinxs. See James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCI. 355 (2005). The issue of intelligence testing requires consideration of multiple factors, and use of an array of intelligence indicators produces no significant differences between Mexican American and white children. See John R. Bergan & Elena B. Parra, *Variations in IQ Testing and Instruction and the Letter Learning and Achievement of Anglo and Bilingual Mexican-American Children*, 71 J. EDUC. PSYCH. 819 (1979). For information on nonverbal intelligence testing that indicates no differences between Mexican American and white college students, see George Domino & Amanda Morales, *Reliability and Validity of the D-48 With Mexican American College Students*, 22 HISP. J. BEHAV. SCI. 382 (2000).
45. See Halford H. Fairchild & Patricia Gurin, *Traditions in the Social-Psychological Analysis of Race Relations*, 21 AM. BEHAV. SCIENTIST 757, 761 (1978). The aftermath of World War II saw psychologists focusing on the ramifications of discrimination for Black Americans. For an example of the connection between stereotypes and discriminatory outcomes for Mexican Americans, see Norman Daymond Humphrey, *The Stereotype and the Social Types of Mexican-American Youths*, 22 J. SOC. PSYCH. 69, 72, 74 (1945). The stereotype of the Mexican American as a juvenile delinquent is compared to an ethnographic depiction of categorical types. Norman Humphrey reported the only type considered fully acceptable to "middle class" Americans had light skin color. *Id.*
46. Humphrey, *supra* note 45, at 69; see also Fairchild & Gurin, *supra* note 45, at 759, 764.
47. See Halford H. Fairchild & Joy Asamen Cozens, *Chicano, Hispanic, or Mexican American: What's in a Name?*, 3 HISP. J. BEHAV. SCI. 191 (1981) (finding that Chicanos were viewed as the most ignorant and cruel); Raymond Buriel & Richard Vasquez, *Stereotypes of Mexican Descent Persons: Attitudes of Three Generations of Mexican Americans and Anglo-American Adolescents*, 13 J. CROSS-CULTURAL PSYCH. 59, 64 (1982) (When comparing whites with three generations of Mexican Americans (first, second, and third generations), whites consistently held more negative attitudes about Mexican Americans); E. Lou Carranza, *Scale for the Measurement of Attitude Toward Chicanos: A Research Note*, 14 HISP. J. BEHAV. SCI. 277 (1992) (developing a scale to measure attitudes, with items ranging from extremely negative to extremely positive); Gerardo Marín, *Stereotyping Hispanics: The Differential Effect of Research Method, Label, and Degree of Contact*, 8 INT'L J. INTERCULTURAL REL. 17 (1984) (finding that

Americans are commonly associated with the following stereotypical attributes: uneducated, ambitionless, poorly groomed, lower class, and criminal.<sup>48</sup> These attributes are consistent with historical and cultural associations. As part of their ethnic identity, Mexican Americans also note that they are racially profiled and perceived as criminals, describing discriminatory treatment by police and concerns with justice.<sup>49</sup>

Knowledge about the content of stereotypes is important, since once embraced, stereotypes provide information for expectations for one's own behavior as well as how to interpret the behavior of the stereotyped targets.<sup>50</sup> Occasionally, the results are surprising. Todd Pittinsky and colleagues, for example, found that positive attitudes about Latinxs predicted positive behaviors towards Latinxs, but negative stereotypes did not.<sup>51</sup>

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regardless of the label used—Hispanic, Mexican American, or Chicano—negative stereotypic traits were more frequently assigned to Hispanics than to Whites). For the term “Chicano,” see CARLOS MUÑOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 53 (1989). Chicano is a term that Mexican Americans use to identify themselves as a social and political group. The term signifies an acknowledgement of oppression in the United States and a sense of pride in indigenous ancestry and culture.

48. Yolanda F. Niemann, Leilani Jennings, Richard M. Rozelle, James C. Baxter & Elroy Sullivan, *Use of Free Responses and Cluster Analysis to Determine Stereotypes of Eight Groups*, 20 *PERSONALITY & SOC. PSYCH. BULL.* 379 (1994). The trait of criminal appears among the top fifteen most frequently reported by participants. *Id.* at 384 tbl.3. African American males also received this trait, but not Anglo or Asian American males. *Id.*
49. Yolanda Flores Niemann, Andrea J. Romero, Jorge Arredondo & Victor Rodriguez, *What Does it Mean to Be “Mexican”? Social Construction of an Ethnic Identity*, 21 *HISP. J. BEHAV. SCI.* 47, 53–54 (1999). Those of Mexican descent provided information on the meaning of being Mexican as part of an ethnic identity, and men and women reported being perceived as criminal and being treated badly by police as part of that identity. *See id.* at 54, 58.
50. *See* Wittenbrink et al., *supra* note 8; *see also* Fairchild & Gurin, *supra* note 45, at 764.
51. *See* Todd L. Pittinsky, Seth A. Rosenthal & R. Matthew Montoya, *Liking Is Not the Opposite of Disliking: The Functional Separability of Positive and Negative Attitudes Toward Minority Groups*, 17 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH.* 134 (2011). Controversy surrounds the meaning and measurement of implicit bias, as articulated by Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 *J. APPLIED PSYCH.* 567 (2009). B. Keith Payne and colleagues argue for a situationally induced activation of implicit bias. B. Keith Payne, Heidi A. Vuletich & Kristjen B. Lundberg, *The Bias of Crowds: How Implicit Bias Bridges Personal and Systemic Prejudice*, 28 *PSYCH. INQUIRY* 233 (2017). In other words, social context influences the constructs that are cognitively activated, which influences implicit responding. Nevertheless, it should be noted that examination of implicit measures of bias against Latinxs has been conducted, with both non-Latinxs and Latinxs demonstrating implicit bias toward Latinx targets. *See, e.g.*, David S. March & Reiko Graham, *Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics*, 18 *GRP. PROCESSES & INTERGROUP REL.* 89 (2015). Evidence that implicit bias against Latinx targets can be modified with social contact with Latinxs has also been demonstrated. *See* Tiffany N. Brannon & Gregory M. Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice By Sparking Interest in an Out-Group’s Culture*, 24 *PSYCH. SCI.* 1947 (2013).

Consequently, stereotypic notions against Latinxs would be demonstrated in a number of areas. For example, whites prefer greater social distance from Latinxs;<sup>52</sup> there are negative occupational outcomes based on a so-called Latinx phenotype;<sup>53</sup> housing segregation is still high for Latinxs;<sup>54</sup> and Latinxs have low educational attainment.<sup>55</sup>

### III. RESEARCH PROGRAM

Instances of bias in the legal system are bolstered by experimental psychological research, as well. In a study of jury composition, Jack Lipton found that the Chicano defendant was perceived as more likely to be guilty, less intelligent, less likable, and considered more dishonest by white jurors than by jurors who identified as Chicano.<sup>56</sup> Similarly, white mock jurors are more likely to impose longer sentences on a low socioeconomic status Mexican American defendant, compared to a white one; Mexican American mock jurors do not differentiate.<sup>57</sup> Galen Bodenhausen and Meryl Lichtenstein found that subjects, who were provided with information to make the case materials appear complicated and to focus on making a guilt judgment, rated the defendant to be more guilty and aggressive and recalled more negative information about a Latinx defendant, compared to an ethnically nondescript one.<sup>58</sup> Bodenhausen also

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52. For an earlier measure of social distance, see Robert L. Brown, *Social Distance Perception as a Function of Mexican-American and Other Ethnic Identity*, 57 SOCIO. & SOC. RSCH. 273 (1973). For more recent measures, see Cynthia Willis-Esqueda, Invited Talk at the Annual Meeting of the Midwestern Psychological Association: Latino/as and Bias: Origins & Expression (May 3, 2013) (showing that non-Hispanic Whites prefer greater social distance from Mexican Americans in personal relationships, as well as in everyday social life).
53. Rodolfo Espino & Michael M. Franz, *Latino Phenotypic Discrimination Revisited: The Impact of Skin Color on Occupational Status*, 83 SOC. SCI. Q. 612, 621 (2002).
54. See William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, BROOKINGS INST. (Dec. 16, 2010), <https://www.brookings.edu/opinions/census-data-blacks-and-hispanics-take-different-segregation-paths> [perma.cc/LUC9-FB2F].
55. Jens Manuel Krogstad, *5 Facts About Latinos and Education*, PEW RSCH. CTR. (July 28, 2016), <https://www.pewresearch.org/fact-tank/2016/07/28/5-facts-about-latinos-and-education> [perma.cc/RJF9-485F]; see also Hsiu-Lan Cheng, Ryon C. McDermott, Y. Joel Wong & Keiko M. McCullough, *Perceived Discrimination and Academic Distress Among Latinx College Students: A Cross-Lagged Longitudinal Investigation*, 67 J. COUNSELING PSYCH. 401 (2020).
56. Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISP. J. BEHAV. SCI. 275, 282 (1983). Lipton used a rating for degree of guilt, rather than a dichotomous guilty/not guilty measure. In pre-deliberation decisions, Anglo jurors attributed more guilt to the Hispanic defendant than did Chicano jurors, but in post-deliberation decisions, the responses became equalized. *Id.*
57. See Willis-Esqueda et al., *supra* note 11, at 189.
58. Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871, 875 (1987).

determined that the activation of the Latinx stereotype interferes with the processing of subsequent evidence.<sup>59</sup> Latinx and white judges also handle cases differently—there is evidence that Latinx judges sentence Latinxs and whites equally, whereas white judges tend to sentence Latinxs more severely.<sup>60</sup> Finally, a review of federal court data has shown that Latinx defendants experience a measurable sentencing penalty when compared to both white and Black defendants.<sup>61</sup> Other researchers have found that Hispanic and Black defendants are more likely to be detained and incarcerated when compared to white defendants.<sup>62</sup> The Sentencing Project also notes that Latinxs are incarcerated at higher than expected rates.<sup>63</sup>

With the ultimate goal of understanding the psychological underpinnings of how and when stereotypic notions of Latinxs influences outcomes of legal decisionmaking, my colleagues, students, and I devised a research program—now in its third decade—to identify the psychological underpinnings of biased decisionmaking for Latinxs in legal arenas, particularly in the criminal justice system. We conducted studies that examine a variety of factors that might enhance the risk for perceptions of culpability of Latinxs and punitiveness towards Latinxs, particularly Mexican Americans. As a first step, the identification of stereotypical crimes by five U.S. male ethnic groups (Latinxs, Blacks, whites, Asian Americans, and American Indians) was conducted in order to determine if certain crimes are stereotypically linked to male Latinxs. It was determined that Latinxs and Blacks are perceived as much more likely than whites or Asians to commit violent crimes

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59. Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCH. 726 (1988); see Dolores A. Perez, Harmon M. Hosch, Bruce Ponder & Gloria Chanez Trejo, *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCH. 1249 (1993).
  60. See Malcolm D. Holmes, Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez & Joseph P. Graves, *Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics*, 74 SOC. SCI. Q. 496, 500 (1993).
  61. Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 AM. SOCIO. REV. 705 (2000); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001) (providing a review of disparities in sentencing across ethnic groups over time).
  62. For a review, see Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014).
  63. MARC MAUER & RYAN S. KING, THE SENT'G PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 2–4 (2007), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf> [<https://perma.cc/2DVK-UQCV>].

(armed robberies, assault, murder) and drug offenses.<sup>64</sup> This strongly suggests that notions of Latinx male criminality and violent tendencies are still embedded in stereotypes of Latinxs.

These findings then led us to ask how such perceptions might influence decisionmaking in legal contexts. John Dovidio and Samuel Gaertner have articulated a theory of racism that may help answer this question. They assert that there are two kinds of racists: old fashioned racists, who are openly antagonistic against certain groups (e.g., Latinxs or Blacks); and a more modern form, that may show empathy for the disparate treatment of minorities, but still harbor racist feelings and beliefs about minority groups and group members.<sup>65</sup> It is easy to identify the outward racist, but the other type—what they term the aversive racist—is unlikely to show bias unless there is a facially race neutral justification or cue.<sup>66</sup>

In a number of studies highlighting bias against Latinxs in the criminal justice system, we attempted to demonstrate the prevalence of Dovidio and Gaertner's latter, aversive form of racism.<sup>67</sup> The basic paradigm of these studies involves providing participants with vignettes of an offense and then manipulating defendant characteristics within each vignette.<sup>68</sup> Socioeconomic status (SES) is one facially race neutral factor that we have relied on to demonstrate bias.<sup>69</sup> SES has been found to be a significant negative characteristic that lends itself to higher assumptions of guilt.<sup>70</sup> Thus, participants are confronted with a vignette that portrays a defendant who is either high or low in SES and either Latinx or white.

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64. Cynthia Willis-Esqueda, *European American Students' Perceptions of Crimes Committed by Five Racial Groups*, 27 J. APPLIED SOC. PSYCH. 1406, 1411–13 (1997).

65. Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. SOC. ISSUES 615, 618 (2005).

66. *Id.* at 619. It is aversive to think of oneself as a racist. Consequently, people will demonstrate racism when nonrace-related cues allow biased responses without the appearance of racism.

67. *Id.*

68. See Willis-Esqueda et al., *supra* note 11, at 185.

69. *Id.* at 183.

70. See generally Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737 (2002) (providing an overview of the debilitating effect of poverty on legal outcomes and highlighting that access to equal justice is less likely for those most in need, the poor); see also Eric Hoffman, *Social Class Correlates of Perceived Offender Typicality*, 49 PSYCH. REP. 347 (1981) (finding that mock jurors perceive low SES defendants as less attractive and representing a “typical offender”); Yvonne Hardaway Osborne & Neil B. Rappaport, *Sentencing Severity With Mock Jurors: Predictive Validity of Three Variable Categories*, 3 BEHAV. SCI. & L. 467 (1985) (finding mock jurors have assigned lengthier sentences to low SES defendants than high SES defendants); Jennifer Skeem, Nicholas Scurich & John Monahan, *Impact of Risk Assessment on Judges' Fairness in Sentencing Relatively Poor Defendants* 4 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Paper, Paper No. 2019-02, 2019), <https://ssrn.com/abstract=3316266>.

The participants are asked to decide the guilt or innocence of the defendant and assign to the defendant various ratings of culpability<sup>71</sup>—for example, responsibility, blame, belief in defendant, trustworthiness, past and future likelihood of criminal behavior, and similarity to self.

In the first study of the series, we wished to determine if Mexican Americans and whites would differ in assigning culpability for a Mexican American or white defendant who differed by SES (high or low) in a theft case. Results indicated, first, that white mock jurors showed signs of aversive racism in that the low SES Mexican American defendant was found guilty more frequently, more to blame, higher in responsibility, and less believable than the low SES white defendant or the high SES defendant, regardless of race.<sup>72</sup> If race made no difference for culpability assignment, then there would be no differences in culpability ratings between the Mexican American and white defendants. Low SES served as a nonrace-related cue to demonstrate bias. In addition, the low SES Mexican American defendant was rated lower on traits associated with positive character attributes—competence, likeability, ethicality, unselfishness, warmth, and sensitivity—compared to conditions indicating bad character.<sup>73</sup> Mexican American mock jurors showed a bias against the low SES defendant, but did not indicate race-based bias in terms of culpability or character ratings.<sup>74</sup> These findings confirmed our hypothesis that aversive racism provides a theoretical framework, at least in part, to understand biased decisionmaking against Latinx defendants.

The next issue we examined concerned how stereotypes influence culpability for Mexican American defendants and the attorneys who represent them.<sup>75</sup> If participants make biased culpability assessments against the Mexican American defendant, compared to a white one, would this taint of criminality extend to a

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71. The construct of culpability has been linked to various components. For an overview of various culpability components, such as responsibility, blame, and agency, see KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* 2 (1985). For a review of the psychological research that has examined culpability components and the measurement of culpability, see Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 *PSYCH. BULL.* 556, 557 (2000).

72. Cynthia Willis-Esqueda, Russ K. E. Espinoza & Scott E. Culhane, *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making: A Cross-Cultural Examination of European American and Mexican American Mock Jurors*, 30 *HISP. J. BEHAV. SCI.* 181, 189 (2008). Two studies were conducted. Study one involved a white sample from Nebraska and study two involved a Mexican American sample from Texas.

73. *Id.* at 190.

74. *Id.* at 193.

75. See Russ K. E. Espinoza & Cynthia Willis-Esqueda, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH.* 364 (2008).



defense attorney, particularly a Mexican American attorney, compared to a white attorney? While there has been discussion about the appropriateness of cultural sensitivity in legal advocacy, there is a dearth of research on attorney characteristics.<sup>76</sup> We found the low SES Mexican American defendant was, once again, attributed higher culpability, compared to the low SES white or the high SES defendants, regardless of race.<sup>77</sup> However, the low SES Mexican American defendant who was represented by a Mexican American defense attorney received the highest culpability ratings of all.<sup>78</sup> In general, low SES defendants represented by a Mexican American attorney were ascribed more negative traits, compared to the other conditions.<sup>79</sup> Given the call by legal scholars and the American Bar Association to increase diversity, these findings bode ill for the success of Latinx attorneys.<sup>80</sup>

Another possible race neutral cue is immigration status. In an extension of the previous studies, we examined the effects of SES, Mexican American versus Canadian nationality, and documented versus undocumented status on perceptions of defendant culpability in a second-degree murder vignette.<sup>81</sup> The study found that “the low-SES undocumented Mexican defendant was found guilty more often, given a more severe sentence, thought to be more culpable, and rated lower on a number of trait measures compared with all other conditions”—in other words, compared with low SES documented Mexicans, high SES undocumented Mexicans, low SES undocumented Canadians.<sup>82</sup>

Finally, in our most recent effort, we were concerned with how notions of inherent criminal characteristics would drive biases against Latinxs, even those who have been exonerated of a crime. As such, for this study, we included participant ratings of essentialism, the ideology that certain traits are inherently

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76. See generally Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 47 (Kimberly Holt Barrett & William H. George eds., 2005).

77. Espinoza & Willis-Esqueda, *supra* note 75, at 367 n.72.

78. *Id.* at 368 n.72.

79. *Id.* at 367–69 n.72.

80. See Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiative> [<https://perma.cc/6RY3-RGZW>]. Laffey and Ng report on the underrepresentation of Latinx attorneys in the United States, compared to population numbers.

81. Russ K. E. Espinoza, Cynthia Willis-Esqueda, Suzette Toscano & Jennifer Coons, *The Impact of Ethnicity, Immigration Status, and Socioeconomic Status on Juror Decision Making*, 13 J. ETHNICITY CRIM. JUST. 197, 197 (2015). The sample in this study consisted of prospective jurors called for service in a California courthouse. Data was collected in a room at the courthouse.

82. *Id.*

embedded in social groups.<sup>83</sup> In this study we examined notions of culpability for Mexican American exonerees, compared to white exonerees.<sup>84</sup> We found that the majority of a national adult sample were unable to define “exoneree.” After providing a definition of exoneree and a vignette based on a real exoneration case, those high in essentialism (compared to those low in essentialism) believed the exoneree to be guiltier on a rating scale, assigned more responsibility and blame, believed the exoneree to be more likely to have committed past criminal acts and more likely to commit future criminal acts, and believed the exoneree to be more likely to have a criminal personality. In addition, those high in essentialism believe the exoneree’s children are more likely to be or become criminals.<sup>85</sup>

### CONCLUSION

Our studies point to a pervasive and underlying stereotypic notion about Latinxs that influences decisionmaking about culpability. We used different crimes, samples from different states, and varied the characteristics of the targets (SES, defendant or attorney, exoneree). We found biased decisionmaking with higher culpability assignment for Latinxs compared to whites in each study. For exonerees, this bias extended to their children. The impact of these biases is not lost on Latinxs. A national survey found that Latinxs at all SES levels report experiencing racism;<sup>86</sup> the nature and context of exposure to racism, however, varies considerably based on SES. Lower levels of SES predict higher levels of lifetime exposure to race-related threats, harassment, and stigma.<sup>87</sup> In 2010, another survey of Latinxs found 61 percent believed discrimination against Latinxs is a major problem in the United States,<sup>88</sup> and in 2016, over half stated they

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83. See Johannes Keller, *In Genes We Trust: The Biological Component of Psychological Essentialism and Its Relationship to Mechanisms of Motivated Social Cognition*, 88 J. PERSONALITY & SOC. PSYCH. 686 (2005). Johannes Keller articulates the notion of essentialism, the idea that attributes or traits are linked to social categories and appear genetic in origin. *Id.* at 686–88. Keller developed a scale to measure beliefs in essentialism. Essentialist thinking harkens back to the early psychology work on Latinxs concerning intelligence and other traits.
84. See also Cynthia Willis-Esqueda, *Bad Characters and Desperados* (Feb. 8, 2019) (paper presented at the Latinx Communities, Race, and the Criminal Justice System Symposium, UCLA School of Law) (on file with author).
85. See Keller, *supra* note 83, at 690 tbl.1.
86. Elizabeth Brondolo et al., *Sociodemographic Variations in Self-Reported Racism in a Community Sample of Blacks and Latino(a)s*, 39 J. APPLIED SOC. PSYCH. 407, 419 (2009).
87. *Id.* at 420.
88. Mark Hugo Lopez, Rich Morin & Paul Taylor, *Illegal Immigration Backlash Worries, Divides Latinos*, PEW RSCH. CTR. (Oct. 28, 2010), <https://www.pewresearch.org/hispanic/2010/10/28/illegal-immigration-backlash-worries-divides-latinos> [<https://perma.cc/5XLK-L7JB>].

had been the target of racism.<sup>89</sup> It is not surprising to find that Latinxs have negative attitudes towards the criminal justice system. Mark Hugo Lopez and Gretchen Livingston found Latinxs have low confidence in the criminal justice system; under half (46 percent) have confidence that police will not use excessive force on suspects, in contrast to their white counterparts who had high confidence in the criminal justice system, with 73 percent confident that the police would not use excessive force.<sup>90</sup>

The American Psychological Association's 2001 Resolution on Racial/Ethnic Profiling has advocated for research into racial and ethnic disparities within the legal system.<sup>91</sup> This sends a clear signal that such disparities are acknowledged and should be challenged. Future research should examine how psychological research on legal issues can uncover the underlying causes of race disparities for Latinxs, particularly given the long history of legal system bias against them. "[A]t the heart of the American paradigm is the perception that law and its agents (for example, police officers, correctional officers, attorneys and judges) are color-blind and thus justice is impartial, objective and seeks la verdad (the truth). But, la realidad (reality) differs."<sup>92</sup>

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89. Jens Manuel Krogstad & Gustavo López, *Roughly Half of Hispanics Have Experienced Discrimination*, PEW RSCH. CTR. (June 29, 2016), <https://www.pewresearch.org/fact-tank/2016/06/29/roughly-half-of-hispanics-have-experienced-discrimination> [<https://perma.cc/3436-EN3X>].
  90. MARK HUGO LOPEZ & GRETCHEN LIVINGSTON, PEW HISP. CTR., *HISPANICS AND THE CRIMINAL JUSTICE SYSTEM*, at i fig.1 (2009), <https://www.pewresearch.org/wp-content/uploads/sites/5/reports/106.pdf> [<https://perma.cc/92FN-KFTQ>].
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