

ACBA IMPLICIT BIAS PROGRAM FOR CLE/CJE CLASSES

August 20, 2018

Attorney Lisette McCormick, Executive Director

PA Interbranch Commission for Gender, Racial and Ethnic Fairness

Lisette.mccormick@pacourts.us

I. Bias - Implicit and Explicit

Bias is the “pre-judging of a person based on his or her, perceived or actual, status of being a member of a particular group, without regard to that person’s actual conduct or performance.”¹ Researchers who study how human brains work to process information and make decisions have identified two types of bias - explicit bias and implicit bias. The distinguishing feature of each form of bias depends on the extent of an individual’s awareness of the bias. Thus, people who knowingly, and sometimes openly, embrace a stereotype or bias are exhibiting explicit bias. On the other hand, implicit bias involves far more subtle stereotypical associations. People are unaware that they are thinking or acting in a particular way because of the influence of that bias. Researchers have learned that individuals are more likely to rely on the automatic processing by their brains, sometimes referred to as “intuition” or “gut feelings”, when they must make decisions quickly. When they have more time to evaluate information using their analytical skills, according to the researchers, people’s decisions are more thoughtful and deliberate, that is, less influenced by implicit bias.²

Empirical research has also determined that automatic brain processing is just as common among key decision-makers in the justice system as it is among lay people.³ Judges, prosecutors, defense attorneys, police, witnesses, jury members, probation officers, and court personnel all hold implicit biases that may might lead them to make decisions based on their biases, rather than on the facts of the case, without even intending it. These findings have enormous implications, in particular, for the criminal justice system, in which implicit racial bias can have life or death consequences.

II. Implicit Bias in Legal Proceedings

My task today is to discuss examples of how shorthand schemas (or implicit bias) may influence behavior and decision-making in the justice system. I will start by giving you a couple of examples of implicit bias that can occur in just about any type of case, regardless of whether it involves a courtroom or not. These are behaviors that can influence case outcomes by calling to mind, or to the subconscious, negative stereotypes of a party, a witness, an attorney, or another person whose participation in the case is important. Next, I will review the stages of a criminal case and a civil case, and identify

¹ Chris Chambers Goodman, *Shadowing the Bar: Attorneys’ Own Implicit Bias*, 28 La Raza L. J. 18, 19 (2017).

² *Id* at 20.

³ Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1197 (2008-2009).

how the implicit bias of the various stakeholders can impact the outcomes of such cases. And finally, I will leave you with a few scenarios involving implicit bias that might be useful in illuminating the influence of implicit bias in a concrete manner.

A. Interactions Among Litigants

Language that may not obviously be coded as offensive can function as a subtler way of hinting at the negative stereotypes of a particular group or highlighting differences. For instance, any reference to a female attorney as “young lady” or without her proper title and last name introduction, can subtly discredit her and her work. Similarly, using language that implies some type of criminal identity, such as the word “thug” or “urban” when speaking about a Black defendant, calls upon and emphasizes the stereotype that associates Black individuals with criminality.⁴

B. Credibility Determinations

Implicit bias can play a large role in how fact-finders assess witness credibility. For instance, stereotypes associated with gender norms, can result in judging female and male expert testimony differently. Studies show that female expert witnesses are seen as more expert in cases that take place in family court, likely because of gender stereotypes that associate women with child-raising. Conversely, male experts are seen as more persuasive on topics perceived as masculine, like price-fixing or calculations of economic damages.⁵ The same goes for witnesses’ culturally-driven, or even trauma-induced, demeanor during their testimony. While some cultures may value straightforward story-telling, in other cultures, it is more common to tell stories in a nonlinear way. This structure may be interpreted as less truthful by someone not familiar with that culture.⁶ To counter this potential for bias, experts recommend keeping in mind cultural differences in the way that people interact, as well as individual biases when hearing witness testimony.

III. Bias in the Criminal Justice System

A. Critical Milestones or “Stages” in a Criminal Case:

1. The STOP by Police: On the basis of crime report, police investigate particular neighborhoods and persons of interest and ultimately decide to arrest a suspect or not.

⁴ Michael Tesler, *Racial Priming with Implicit and Explicit Messages*. Oxford Research Encyclopedia of Politics (May 2017). This paper offers an overview of racially-coded language and its implicit messaging. <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-49?print=pdf>.

⁵ Tess M. S. Neal, *Women as Expert Witnesses: A Review of Literature*, University of Nebraska Public Policy Center 7, 8 (March 2014).

⁶ *Goodman*, supra, note 1 at 41.

2. Arraignment: The judge makes decisions about bail and pretrial detention, taking into consideration the defendant's ties to his/her community and perceived dangerousness to the community.

3. Charging: The prosecutor decides whether to charge the suspect and determines the type of crime and the severity of the grade.

4. Plea Bargaining: The prosecutor determines whether to offer the defendant a plea bargain and the defendant (typically guided by counsel) decides whether to accept it.

5. Trial: If the defendant has elected to proceed with a jury trial, the defendant, with guidance from defense counsel, engages in jury selection. The judge oversees the process and then manages the trial proceedings. The jury decides whether the defendant is guilty or not. If the defendant elects to have the case heard by a judge without a jury, the judge manages the trial and determines whether the defendant is guilty or not.

6. Sentencing: If convicted, the defendant is sentenced by the judge with input from the probation department and the prosecutor.

B. Possible Bias at Each Stage:

Generally, research has demonstrated that Black individuals are disproportionately involved, that is, from initial stop through trial and conviction, in the criminal justice system. Additionally, disparities in the way they are treated by lawyers and judges throughout the process can create more significant obstacles than are experienced by their white counterparts. Although this differential treatment does not necessarily culminate in a different verdict in the same case, the increased obstacles faced by minorities compared to White defendants create a vastly different experience in the justice system for a Black defendant, and can accumulate throughout the process into an altogether more punitive system.

1. Police Encounter Stage

Potential Implicit Bias: Biases can influence a police officer's decision to stop an individual for questioning, to interrogate the suspect briefly or at length, to frisk the suspect, and to arrest or let the suspect off with a warning. As early as the 1950s, social scientists began uncovering empirical evidence among Whites of negative attitudes toward African Americans, including stereotypes about their being dangerous, violent and criminal.⁷ Studies show that implicit biases alter and affect numerous behaviors in which police regularly engage - visual surveillance, recall and even armed response. In a study by Eberhardt, et al,⁸ when participants were subliminally primed with a Black male face,

⁷ See Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 Personality & Soc. Psychol. Bull. 1139 (1995).

⁸ See Jennifer L. Eberhardt et al, *Seeing Black: Race, Crime and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004).

they were quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static. By implicitly thinking “Black”, they more rapidly saw a weapon. Another study discovered what is referred to as “shooter bias” among police officers, who were found to be quicker to shoot when the target was Black as compared to White.⁹

2. Arrest - Pretrial Bail and Detention

Potential Judicial Implicit Bias: Discretionary decisions with regard to bail, which are impacted by ties to the community and the likelihood that a defendant will be a future danger, tend to disadvantage Black defendants because of a greater perceived association between the word ‘black’ and criminality. The perception of the defendant alters the perception of both the seriousness of the crime (a higher level of violence is often attributed to conduct allegedly committed by Black suspects over White suspects) and the future risk.¹⁰ Consequently, empirical research has shown that judges routinely set bail at higher levels for Black male defendants than for White male defendants, despite uncorrelated flight risk estimates.¹¹

Potential Prosecutorial Implicit Bias: Prosecutors also play an important role in bail decisions, such as whether to oppose it, and if not, how much to recommend. As with judges, these prosecutorial determinations may be driven by implicit bias. Indeed, empirical evidence suggests that “at least in some jurisdictions, minority defendants receive less favorable pretrial detention determinations than their White counterparts.”¹² One major factor in bail decisions is the defendant’s ties to the community, including employment. Implicit Association Test (IAT) studies have demonstrated that White Americans stereotype Black Americans as being less intelligent, lazier and less trustworthy than White Americans. As a result, “these negative work- and character-related stereotypes might cause the prosecutor to view the Black defendant’s work history and community connections with more skepticism than a similar background provided by a White defendant.”¹³

3. Charging Stage

Potential Prosecutorial Implicit Bias: In general, prosecutors exercise tremendous discretion to decide whether, against whom and at what level of severity to charge a

⁹ See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181, 185-86 (2001).

¹⁰ Goodman, *supra*, note 3, at 32.

¹¹ See Caisa Royer, Daniel Hido, and Michael Slotnick, *Defining Implicit Bias*. Available at https://courses2.cit.cornell.edu/sociallaw/student_projects/Definingbias.html. See also Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Settings*, 46 Stan. L. Rev. 987, 992 (1994).

¹² Roger J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 813-14 (2012), citing *Task Force on Race and the Criminal Justice Sys., Preliminary Report on Race and Washington’s Criminal Justice System*, 35 Seattle U. L. Rev. 623, 647 (2012).

¹³ *Id* at 814.

particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence - all with little judicial oversight. This is problematic because the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in exactly that kind of environment.

First, in determining whether to charge at all, there is statistical evidence that prosecutors are more likely to press charges against Black than White defendants, where the charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge or use of a weapon.¹⁴ Implicit biases also come into play when prosecutors are assessing the strength of a self-defense claim. Empirical studies have found that people in our culture strongly associate Black people with guns and other weapons. As a result, prosecutors can also be influenced by such cultural associations, which can unconsciously guide these determinations.¹⁵

Additionally, with regard to juveniles, in deciding whether to charge a defendant as a juvenile or as an adult, prosecutors' implicit bias can result in their viewing Black juveniles as more culpable and, therefore, more responsible for their actions than White juveniles.¹⁶ This results in the 'adultification' of Black juveniles, who are more likely to be tried as adults than their White peers.¹⁷ Research from the field reveals that court officials "consistently portray [B]lack youths differently than white youths in their written court reports, more frequently attributing Blacks' delinquency to negative attitudinal and personality traits...The researchers found that perceived 'negative internal attributes' that the [B]lack children possessed outweighed even characteristics such as the seriousness of the offense and prior criminality."¹⁸ This implicit bias that Black juveniles are both more likely to engage in criminal activity and are more conscious of their actions, results in disproportionate numbers of Black juveniles tried, and subsequently sentenced, based on this higher standard of punishment.

4. Plea Bargaining Stage

Potential Prosecutorial Implicit Bias: Most criminal cases are resolved by plea bargaining and, unlike some other points in the criminal process, this stage is subject to almost no

¹⁴ See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 *Law & Soc'y Rev.* 587, 615-19 (1985).

¹⁵ Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 *Eur. Re. Soc. Psych.* 36, 55 (2007). See also, *Payne*, *supra* note 9, at 190.

¹⁶ Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483, 483 (2004).

¹⁷ Rebecca Epstein, Jamilia J. Blake, and Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Center on Poverty and Inequality (June 27, 2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

¹⁸ George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *Am. Soc. Rev.* 554, 567 (1968).

oversight of prosecutorial discretion. The problem with this is that “implicit bias thrives in the midst of discretionary determinations.”¹⁹ The four factors that federal prosecutors must consider in deciding whether to pursue a plea bargain include: (1) the nature and seriousness of the offense or offenses charged; (2) the defendant’s remorse and willingness to assume responsibility; (3) the public interest in having the case tried rather than disposed of by a guilty plea; and (4) the expense of trial and appeal.²⁰ In assessing each of these four factors, implicit biases can permeate the thought-processes of a prosecutor. Perceptions of seriousness of the offense, for example, depend in large part on how the prosecutor views the defendant. If the defendant is implicitly associated with hostility, criminality, or dangerousness, this implicit bias can influence the decision to offer a plea. The same is true of each of the other factors. Indeed, prosecutors have been found to be more likely to offer White defendants generous plea bargains, compared to Black or Latino defendants. Specifically, in the report *Criminalizing Race: Racial Disparities in Plea Bargaining*, White defendants were over 25% more likely than Black defendants to receive a charge reduction, and 75% more likely to have all misdemeanor charges, carrying potential imprisonment, reduced, dropped, or dismissed.²¹ Similarly, in their *Assessment of Racial Disparities in the Plea Process*,²² Metcalfe and Chiricos concluded that “in terms of a charge reduction, [B]lack defendants get less of a value for their plea than White defendants”. They stated that “if plea bargaining is viewed as advantageous for its more lenient sentencing outcomes, ... [B]lack males are disadvantaged in a system that relies heavily on plea bargaining.”²³ Thus, minority defendants are treated more punitively than White defendants within the same system, which is a consistent part of their experience in the criminal justice system, and contributes to their association with increased criminality.

Interestingly, in its recent study conducted of racial, ethnic and socio-economic disparities in the imposition of the death penalty, Penn State University’s Justice Center for Research²⁴ concluded that between 2000 and 2010, Philadelphia District Attorneys sought the death penalty in a large number of cases, most likely as a means of securing a guilty plea from the defendant to a sentence of life without parole. The motions to seek the death penalty were then retracted. These plea bargains were more commonly offered

¹⁹ *Smith & Levenson, supra* note 12, at 816.

²⁰ U.S. Dep’t of Justice, Grand Jury Manual: Plea Agreements IX-7-8 (1991).

²¹ Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 Boston College Law Review (2018, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036726.

²² Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 Justice Quarterly, 223-253 (2018).

²³ *Id* at 250.

²⁴ John Kramer, Jeffery Ulmer, & Gary Zajac, *Capital Punishment Decisions in Pennsylvania: 2000-2010, Implications for Racial, Ethnic and Other Disparate Impacts*, available at http://www.painterbranchcommission.com/_pdfs/PSU-death-penalty-study-report_101217.pdf. These findings are discussed on pp. 96, 100, and 116 of the report.

to indigent Black defendants, who had very little choice in the matter with a death sentence hanging over their heads.

5. Trial Stage

Potential Juror Implicit Bias: There is a long line of research on racial discrimination by jurors, most in the criminal context. The general research consensus is that jurors of one race tend to show bias against defendants who belong to another race (“racial outgroups”) in both verdicts and sentencing.²⁵ An interesting note discovered by researchers is that contrary to normal expectations, when a case is racially-charged, jurors, who want to be fair, respond by being more careful and thoughtful about race and their own assumptions. The researchers found no evidence of bias in these jurors’ deliberations and outcomes. By contrast, when the case is not racially-charged, even when there is a Black defendant and a White victim, jurors are less vigilant about their own potential biases. This suggests that awareness of the issue itself, rather than relying on a color-blind approach, can have a recognizable effect on how people engage in decision-making.²⁶

Self-Defense Claims: In jury trials involving a self-defense claim, in particular, a racially-biased evaluation can have especially negative results. In recent years, national attention has focused on cases in which unarmed young Black men were shot and killed because the shooter believed that they were reaching for a gun, which in reality, was something innocuous, such as a cellphone. This stereotype of increased danger and guilt, even as a victim to the crime, is a common one that can affect jurors (as well as prosecutors and defense attorneys) during the course of a criminal trial. In particular, it can influence jurors’ determinations about the reasonableness of a self-defense claim. For example, this implicit bias can result in a juror, judge or prosecutor being more likely to believe that a suspect was reasonable in his/her concern that a Black victim was reaching for a gun.²⁷

Racial cues can affect juries as well. One study found that mock jurors who read about an African-American perpetrator remembered the aggressive case facts better than those who read about the same case, but with a White perpetrator.²⁸ In another study involving mock-jurors, the researchers found that “mock-jurors automatically associated Black with ‘Guilty’ and White with ‘Not Guilty’ on an IAT.”²⁹ Further, they found that the mock-jurors were “more likely to evaluate ambiguous evidence as guilt-prone after having briefly seen

²⁵ See Tara L. Mitchell et al, *Racial Bias in Mock Juror Decision-Making, A Meta Analytic View of Defendant Treatment*, 29 Law & Hum. Behav. 621, 627-28 (2005).

²⁶ See Samuel Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psych. Pub. Pol’y & L. 201, 255 (2001).

²⁷ *Goodman, supra*, note 1, at 30.

²⁸ Justin D. Levenson, *Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering*, 57 *Duke L. J.* 345, 350 (2007).

²⁹ Justin D. Levenson et al, *Guilty by Implicit Racial Bias, The Guilty Not guilty Implicit Association Test*, 8 *Ohio St. J. Crim. Law* 187, 190 (2010).

a security camera image of a dark-skinned perpetrator, as compared to a lighter-skinned perpetrator in the same image.”³⁰

Potential Judicial Implicit Bias: As we have discussed, the judge plays a critical role in various aspects of the trial, exercising important discretion in setting bail, deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial and rendering verdicts in some cases. Studies have shown that judges, just as lay people, hold implicit racial biases which can influence their judgment.³¹

For instance, during jury selection, the implicit bias of both judges (and lawyers) can affect the racial composition of the jury who will be hearing the case and deciding on the guilt or innocence of the defendant. This is done through the use of peremptory challenges that provide an opportunity to counsel to remove jurors, whom the involved parties believe may skew the jury in a way that is detrimental to their client. These peremptory challenges are often based on race or gender assumptions that are thought to make a juror more or less sympathetic towards the defendant.³² When peremptory challenges are used to remove minorities in higher numbers, the constitutional promise of a representative jury can be called into question. For example, an implicit bias that associates the word ‘black’ with criminality, may result in prosecutors being more likely to consider a Black potential juror as having anti-law enforcement tendencies, or being opposed to the prosecution of drug crimes or the use of the death penalty as a punishment.³³ Defense attorneys can challenge the removal of a juror by a prosecutor based on race, in what is known as a Batson challenge. However, many of these challenges are rejected by judges, who frequently accept the prosecutor’s proffered excuse that the removal was not based on race, when in fact it was, implicitly or explicitly.³⁴

Potential Prosecutorial Implicit Bias: Implicit bias can also have an impact on a prosecutor’s argument at the close of a trial. There have been documented instances in which a prosecutor has referred to a defendant during his closing argument as an “animal” who shouldn’t be let out of his cell, or that the jury should send a message to “that jungle”. An empirical study confirmed that participants, most of whom claimed never to have heard of the stereotype linking Blacks to apes, nonetheless implicitly connected them in that way. Another study of newspaper coverage of Black criminal defendants in Philadelphia found nearly four times the number of dehumanizing references per article, than in articles covering White capital defendants. Moreover, the study found a “strong correlation

³⁰ Justin D. Levenson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 309 (2010).

³¹ *Rachlinski et al*, *supra*, note 3 at 1197.

³² *Royer, supra*, note 11.

³³ Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Florida L. Rev. 63 (2017).

³⁴ *Goodman, supra*, note 1, at 31-32.

between the number of times an animalistic reference was made and the likelihood that the defendant received the most severe punishment available.”³⁵

Potential Defense Attorney Implicit Bias: Contrary to what might be expected, even criminal defense attorneys have been shown to have acted based upon implicit biases. One study found that capital defense attorneys implicitly associated Black with “bad” and White with “good” on an IAT study that the researchers conducted.³⁶ Their implicit attitudes toward Blacks roughly mirrored those of the general population.³⁷

Like most private attorneys, criminal defense attorneys, especially those with limited resources and funds, tend to prioritize cases based on their perceived odds of winning, and allocate resources accordingly. Subconsciously, using stereotypes of guilt versus innocence that negatively impact perceptions of Black and Hispanic defendants, a criminal defense attorney may miscalculate the merits of the case and not give it appropriate concern.³⁸ With defendants who are already the subject of implicit biases based on their race, adding the potential for fewer allocated resources and effort on behalf of their defense attorney only compounds the problem.

6. Sentencing Stage

Potential Judicial Implicit Bias: Sentencing decisions in criminal cases are one of the clearest ways to track differential punitive treatment along group lines. These decisions can vary based on implicit biases. Numerous studies have found that judges subconsciously impose harsher sentences on dark-skinned defendants³⁹, are more likely to deviate favorably from sentencing guidelines for White than for Black defendants⁴⁰, and exhibit modest racial disparities in criminal sentences favoring defendants of their own race.⁴¹ Additionally, lower income and lower levels of education are significantly correlated with longer sentences, suggesting a possible unconscious cultural elitism among judges that can impact sentencing decisions.⁴²

In Pennsylvania, a 2003 study by the Pennsylvania Supreme Court Committee on Racial and Gender Bias found that compared to White males and females of all ages, older

³⁵ Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 403-04 (2012).

³⁶ Theodore Eisenberg & Sheri L. Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev., 1539, 1545 (2004).

³⁷ *Id.*

³⁸ *Goodman, supra*, note 1, at 33.

³⁹ Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black and White Disparities in Sentencing*, 12 Empirical Legal Stud. 395 (2015).

⁴⁰ David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285, 286-88 (2001).

⁴¹ David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?* 41 J. Legal Stud. 347 (2012).

⁴² *Royer, supra*, note 11.

Latino males were the group most likely to be sentenced to jail, and to receive the longest term of imprisonment, followed by young Latino males and young African American males.⁴³

Afrocentric features: A study related to the effect of Afrocentric features on length of sentences concluded that within each race, the more stereotypically Black the defendant looked, the harsher the punishment was.⁴⁴ The participants in the study were judges who were not subliminally primed beforehand and showed no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.

Potential Probation Officer and Police Implicit Bias: Both police and probation officers also play an important role in the sentencing process by recommending sentences to the judges in the cases. Just as with other decisions-makers in the criminal justice system, implicit biases influence their judgment as well. This was demonstrated in an empirical study which determined that when they were subliminally primed with words related to African-Americans, such as Harlem or dreadlocks, the probation officers and police recommended harsher sentences for Black defendants than White defendants.⁴⁵

IV. Bias in Civil Cases

A. Critical Stages of a Federal Employment Discrimination Case

1. Plaintiff files complaint with an administrative agency.
2. After administrative remedies are exhausted, plaintiff files complaint in federal court.
3. Defendant files a Motion to Dismiss
4. Defendant files for a Motion for Summary Judgment.
5. The trial takes place either before the judge or jury.
6. A verdict is rendered and damages are determined.

B. Possible Implicit Bias at Stages

⁴³ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Ethnic Bias in the Justice System*, available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf. This conclusion is discussed on p. 139 of the report.

⁴⁴ See Irene V. Blair et al, *The Influence of Afro-Centric Facial Features in Criminal Sentencing*, 15 *Psychol. Sci.* 674-675 (2004).

⁴⁵ See Sandra Graham & Brian Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483 (2004).

1. Pre-Trial Adjudication Stage

Potential Judicial Implicit Bias: Due to a change in the law, judges now have more discretion in ruling on motions to dismiss. Whereas previously, all factual allegations made in the complaint were assumed to be true, the judge now can dismiss factual allegations made in the complaint if they are “merely conclusory”.⁴⁶ This takes place before discovery has even begun, when the judge would know far less about the merits of the case. In *Iqbal*, the Supreme Court advised that whether a complaint states a plausible claim for relief will be a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁴⁷ This is problematic because the less specific information one has, and the more one relies on common sense and personal experience, the more likely implicit biases infect the decision. In other words, “the more gap-filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge’s assessment, in the absence of a well-developed evidentiary record.”⁴⁸

2. Trial Stage

Potential Judicial Implicit Bias: If the case gets to trial, the parties will introduce evidence on the merits of the claim. Just as in criminal cases, all judges have implicit biases that may play a role in a large number of decisions they make throughout a civil trial, including jury selection, rulings on admissibility of evidence, jury instructions, and credibility determinations regarding witnesses and parties. If the judge is White and the plaintiff is a minority or a woman, as is true of many employment discrimination cases, the judge can subconsciously rely on racial and gender stereotypes and the same preference for his “ingroup” that was discussed in the context of criminal cases.

3. Verdict Stage

Potential Juror Implicit Bias:

Motivation to Shift Standards: Studies have shown that if a juror is White and he/she identifies strongly with his/her race, and the defendant is White and is being sued by a racial minority, the accusation of illegal and immoral behavior by the defendant can threaten the status of the juror’s racial ingroup. This threat to the ingroup can motivate jurors to shift standards in a direction that shields the ingroup from ethical responsibility.⁴⁹

Evidentiary Standards: Evidentiary standards for jurors are specific, but substantively vague. How does the juror use that standard - how much evidence is needed to convince him/her that this standard has been met? Numerous studies show how our assessments of evidence are themselves potentially malleable. One potential source of malleability is

⁴⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).

⁴⁷ *Id.* at 677.

⁴⁸ See Jerry Kang, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124,1163 (2012).

⁴⁹ Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 Personality Soc. Psych. Bull., 768, 769 (2010).

a desire to protect one's ingroup status, as referenced above. "If a juror strongly identifies with the defendant employer as part of the same ingroup ...the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. Jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup."⁵⁰

Performer Preference: Jurors will often receive evidence and interpretive cues from lawyers, judges, parties and witnesses in the courtroom ("performers"). "People tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor market. In high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man. When the actual person does not fit the ideal type, people may evaluate the performance more negatively."⁵¹ One study found this type of preference with respect to lawyers as a function of race. Researchers identified a strong implicit stereotype associating litigators with whiteness, which correlated with more favorable evaluations of the White lawyer in terms of competence, likeability and hireability.⁵² Thus, potential jurors' implicit stereotypes can cause racial discrimination in judging attorney performance in trial, with potentially negative consequences for his/her client. Similar processes can take place in how jurors evaluate parties and witnesses, as they perform their various roles at trial.⁵³

4. Damage Awards

Potential Plaintiff Attorneys' Implicit Bias: In a 2010 study, researchers evaluated the brain's response to seeing people in pain and found that White prosecutors had a tendency to react more strongly to the pain of a white individual than a Black individual. Thus, the prosecutors may implicitly empathize with White victims and may act more harshly in prosecuting a defendant whose victim is White.⁵⁴ Similarly, in a civil context, a White attorney may advocate for a higher damage award on behalf of a White client because of his or her empathy for someone of his or her own race. As a result, Black victimhood tends to be taken less seriously, reducing the value of Black lives in the civil (or criminal) justice system.

Potential Juror Implicit Bias: In civil cases, jurors can treat Black victims with less value than White victims. In the report *Psychological and Structural Bias in Civil Jury Awards*, it was found that when juries had discretion, Black plaintiffs were awarded less than White

⁵⁰ Kang, *supra*, note 48, at 1166.

⁵¹ *Id.* at 1167.

⁵² See Jerry Kang et al, *Are Ideal Litigators White? Measuring the Myth of Color-Blindness*, 7 J. Empirical Legal Stud. 886 (2010).

⁵³ Kang, *supra*, note 48, at 1168.

⁵⁴ Royer, *supra*, note 11.

plaintiffs.⁵⁵ Thus, implicit biases that associate Black individuals with poverty and consistently undervalue them as victims can play a role in civil jury verdicts.

V. Scenarios

Below are three scenarios for possible use in a discussion or program about implicit bias.

- Your client sustained a back injury as the result of unsafe department store conditions. Ultimately, the case goes to trial and the jury awards your client \$20,000 in damages, equal to what was due for the medical bills and lost income but not meeting the pain and suffering demand. Having been involved in a number of personal injury claims, you notice that the damages awarded are less than what you have previously seen for almost-identical cases. When you consult with a fellow attorney, they wonder whether the jury simply did not see your client as a compelling victim. “I mean, the guy’s tough. You know the neighborhood he’s from. Besides, \$20,000 is a lot of money, especially given what he’s usually making.”
 - What bias(es) is the fellow attorney exhibiting?
 - How can implicit biases affect personal injury claims?
- You are the second chair attorney in a medical malpractice case before a judge that you have argued in front of a number of times and have developed a good working relationship with. The lead attorney is a more experienced lawyer that you are working with for the first time. During the course of the trial, the opposing counsel repeatedly refers to what the young lady’ said, indicating your lead attorney. When objected to in a side bar, the judge does not seem to understand the problem because the opposing counsel assures everyone that he does not intend any harm in it. “I’m old. As I’ve gotten older, that’s just how I’ve started to speak. I’m just as likely to call *you* a young man.”
 - What are the implications of calling a female attorney a young lady and how might they differ from calling a male attorney a young man?
 - How might this language play into implicit biases about female attorneys?
 - How might a male lawyer’s experience in the courtroom differ from a female lawyer’s?
- You have to set bail for a man arrested for driving under the influence in an automobile accident earlier that night. You notice that, despite the fact that this is his first DUI, the defendant has had a light history of low-level misdemeanors. Additionally, you note that the defendant has a spotty employment record and has repeatedly changed addresses over the last couple of years, and therefore does not seem particularly tied to the community or particularly responsible. Because of this, you set what you consider to be a reasonably high bail.

⁵⁵ This report can be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659875.

- What alternative assumption could a judge have drawn based on this same information and how would this change the bail decision?
- How can implicit biases about job and housing instability being associated with negative moral traits (like irresponsibility) contribute to bail decisions that negatively impact indigent defendants?