

The Implicit Racial Bias in Sentencing: The Next Frontier

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INTRODUCTION

A prominent life scientist recently declared that the Higgs boson particle, the Internet, and implicit bias are the three most important discoveries of the past half-century.¹ In President Obama's commencement address at Howard University last year, Obama stated: "And we knew . . . that even the good cops with the best of intentions—including, by the way, African-American police officers—might have unconscious biases, as we all do."² Why has implicit racial bias worked its way into a presidential address? More importantly, after focusing so long on explicit biases, what do we need to know and do about the pervasive problem of implicit racial bias in the courtroom?³

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1. Nancy Hopkins, Amgen, Inc. Professor of Biology, Mass. Inst. of Tech., Invisible Barriers and Social Change, Baccalaureate Address at Boston University's 141st Commencement (May 18, 2014), <http://www.bu.edu/news/2014/05/19/boston-universitys-141st-commencement-baccalaureate-address-nancy-hopkins> [<http://perma.cc/KT5L-P2Y3>].
 2. President Barack Obama, Remarks at Howard University Commencement Ceremony (May 7, 2016), <http://www.whitehouse.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony> [<http://perma.cc/N6XB-AMQ6>].
 3. Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing The Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 190 (2013) ("Judges, lawyers, and court staff have long recognized that explicit, or consciously endorsed, racial prejudices have no place in the American justice system. The Code of Judicial Conduct in most states expressly prohibits judges from engaging in bias, prejudice, or harassment on the basis of race . . .").

As I and many others, including Professor L. Song Richardson, argue, implicit racial bias is now the most pervasive problem affecting the criminal justice system. In her review of Nicole Gonzalez Van Cleve's book *Crook County: Racism and Injustice in America's Largest Criminal Court*, Professor Richardson eloquently discusses the explicit racial bias that Van Cleve vividly portrays happening in Cook County, Illinois courtrooms.⁴ As Professor Richardson, in her insightful critique, reveals, the pernicious and invisible-to-the-naked-eye effects of implicit bias in the shadows of the courtrooms and courthouses in Cook County—which Gonzalez Van Cleve does not address—present the more vexing problems.⁵ While the structural racial bias resulting from the “systemic triage” that Professor Richardson explores is an urgent problem, so too is the next frontier—the emerging discovery of implicit racial bias arising out of the relationship between skin tone, Afrocentric features, and sentencing.⁶

Social scientists, academics, lawyers, judges, and court administrators have recently demonstrated a heightened interest in implicit bias. While the recognition and limited study of implicit racial bias in the courtroom is not much older than the discovery of the Higgs boson, at least one criminal defense lawyer recognized it in a motion for new trial nearly ninety years ago. Lena Olive Smith—the first black female member of the Minnesota bar, a renowned civil rights lawyer of her time,⁷ and one of my personal heroes—called attention to the racial dynamics of a 1928 state court prosecution in which a black man was tried for raping a white woman before an all-white jury. In a motion for a new trial, Smith wrote:

The court fully realizes I am sure, that the very fact that the defendant was a colored boy and the prosecutrix a white woman, and the entire panel composed of white men—there was a delicate situation to begin with, and counsel for the State took advantage of this delicate situation [P]erhaps [the jurors] were, with a few exceptions, conscientious in their expressions [of no race prejudice]; yet it is common knowledge a feeling can be so dormant and subjected to one's sub-consciousness, that one is wholly ignorant of its existence. *But if the*

4. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017) (reviewing NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016)).

5. *Id.* at 866.

6. See generally Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOC. 90 (2016) (studying 866 offenders in Minnesota and finding that darker skin tone and Afrocentric features were related to harsher sentences).

7. Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 398 (2001).

*proper stimulus is applied, it comes to the front, and more often than not one is deceived in believing that it is justice speaking to him; when in fact it is prejudice, blinding him to all justice and fairness.*⁸

The definition Smith offers of implicit bias (albeit not labeled as such) matches any contemporary cognitive scholars' definition.⁹

While scholars have started to look at a host of implicit bias issues in the courtroom, most have done so with mock juries or studies that more closely resemble social science labs than real courtrooms.¹⁰ This Essay focuses on a single aspect of implicit racial bias in the courtroom: judicial sentencing.

Three critical points articulated by Professor Richardson are important to reiterate. First, implicit racial bias and other implicit biases exist even, and sometimes particularly, in egalitarian individuals. In fact, such individuals are less likely to be aware of these implicit biases, because they lack explicit biases.¹¹ I am a prime example. Given my personal relationships and professional background as a former civil rights attorney, I did not consider myself racially biased. You can imagine how shocked I was, after taking my first Black/White Implicit Association Test (IAT) more than a decade ago, to discover I had strong anti-black implicit biases.¹² Second, the effects of implicit biases in the

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8. *Id.* at 447-48 (quoting Defendant's Motion for New Trial, State v. Hayward, No. 26241 (4th D. Ct. Minn. June 18, 1928)) (emphasis added).
 9. *E.g.*, Elek & Hannaford-Agor, *supra* note 3, at 190 ("[U]nconscious attitudes (including culturally learned associations or generalizations that we tend to think of as stereotypes) introduce unjustified assumptions about other people and related evidence that can distort a person's judgment and behavior. This phenomenon is now referred to as *implicit bias* to differentiate it from explicit or intentional bias.").
 10. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004) (finding strong implicit racial bias among capital defense lawyers subjected to an assessment test, but not testing whether such bias affected their decision-making); Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005) (finding that mock jurors were significantly harsher in making judgments about the criminality of a defendant than other participants who thought they were reading a newspaper account of an alleged crime, especially when the defendant was a member of an out-group); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010) (finding that priming mock jurors with a photo of an armed robber revealing dark forearm skin (as opposed to light forearm skin) increased mock jurors' finding that ambiguous evidence was more probative of guilt).
 11. Richardson, *supra* note 4, at 865, 888.
 12. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 149-50 (2010).

courtroom are invisible to the naked eye.¹³ Finally, Professor Richardson is correct that, in extremely busy courts like Cook County, Illinois, where courtroom participants are overwhelmed with more cases than proper resources, such conditions create a rich environment for systemic implicit racial biases to thrive and infect every aspect of courtroom criminal proceedings.¹⁴ Professor Richardson astutely observes that multi-tasking courtroom professionals in Cook County and other overwhelmed criminal courts face time pressures that prompt them to make quick discretionary decisions—“the classic situations in which implicit biases are likely to influence decisions and judgments.”¹⁵ However, the corollary is not true. No cognitive social scientist or implicit bias scholar has suggested that implicit biases arise only when there are severe time pressures. Thus, it would be unwise to assume implicit bias in courtrooms exists in Pittsburgh, but not Pocatello, and in Chicago, but not Chico.

In this Essay, I will first briefly discuss the IAT and its objective role as the most recognized, studied, and accepted test in revealing implicit racial bias. Next, I turn to cognitive blind spots, especially judicial blind spots, that lead to implicit racial bias in sentencing. Cutting edge empirical studies of inmate populations in several states strongly suggest implicit racial bias contributes to increases in the length of sentences based on offenders’ darker skin tone and more pronounced Afrocentric features.

I. IMPLICIT RACIAL BIAS IN JUDICIAL SENTENCING

A. *Implicit Association Test*

The IAT,¹⁶ in its most common format, is a computerized online test that takes about ten minutes (including a “brief questionnaire of explicit attitudes, stereotypes, and related judgments about the topic, a short demographics survey, and administration of an IAT”) and is the primary and most popular tool

13. Richardson, *supra* note 4, at 865.

14. *Id.* at 877-85.

15. *Id.* at 881.

16. For an introduction and explanation of the IAT from one of its founders, see Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464-66 (1998) (introducing the IAT). For more information on the IAT, see Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS 265 (John A. Bargh ed., 2007); and Jerry Kang, Judge Mark Bennett, Devon Carbadó, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124, 1129-31 (2012).

for determining whether and what type of implicit biases individuals have.¹⁷ Its wide use is due to its “ease of administration, adaptability to a variety of topics, large effect sizes, and good reliability”¹⁸ A description of a typical administration of the IAT is in the following footnote.¹⁹

A plethora of studies have found that people harbor biased implicit associations against stereotyped group members like Blacks.²⁰ Brian Nosek (one of the founders of the IAT, along with Anthony G. Greenwald and Mahzarin R. Banaji) reviewed data from more than 2.5 million completed IATs and self-reports across seventeen topics (e.g., race, skin-tone, religion, weight, etc.).²¹ Regarding the Black v. White IAT, a dark skin v. light skin (skin-tone) IAT, and a Black children v. White children IAT, Nosek found that White participants demonstrate a strong implicit pro-White preference.²² This was also true for Native Americans, Hispanics, Asians, and multi-racial individuals, demonstrating that “the result is more than an own-group preference effect.”²³ Only Blacks

17. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 7 (2007).

18. *Id.* at 8.

19. This description of a typical IAT test is taken from Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. (forthcoming 2017) (footnote omitted) (internal quotation marks omitted):

Study participants, working on computers, press two pre-designated keyboard keys as quickly as possible after seeing certain words or images on the computer monitors. The words and images are grouped into meaningful categories. These categories require participants to pair an attitude object (for example, Black or White . . .) with an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) Participants complete multiple trials of the pairing tasks, such that researchers can measure how participants perform in matching each of the concepts with each other. For example, in one trial of the most well-known IATs, participants pair the concepts Good-White together by pressing a designated response key and the concepts Bad-Black together with a different response key. After completion of the trial, participants then pair the opposite concepts with each other, here Good-Black and Bad-White. The computer software that gathers the data measures the number of milliseconds it takes for participants to respond to each task. Scientists can then analyze (by comparing reaction times and error rates using a statistic called “D-prime”[]) whether participants hold implicit associations between the attitude object and dimension tested.

20. See generally Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 24 (2009) (reviewing 32 samples involving Black-White interracial behavior).

21. Nosek et al., *supra* note 17, at 2-4.

22. *Id.* at 17.

23. *Id.*

did not, on average, express a pro-White implicit bias.²⁴ These studies are important because implicit racial preferences often predict behavior and decision-making.²⁵

B. Judges and Scotomas

The tendency to favor in-groups and disfavor out-groups is likely one of the most prevalent findings in social science.²⁶ That implicit racial bias may affect sentencing should come as no surprise. There “is rich and overlapping literature” documenting implicit racial bias by white Americans favoring whites over blacks,²⁷ and commentators “almost universally agree” that racial disparities are pervasive in the U.S. criminal justice system.²⁸ Scholars in criminal law have used implicit racial bias analysis to explain virtually every aspect of racial discrepancies, from police procedures like stop-and-frisk to arrest rates, prosecutorial charging decisions, and plea bargaining and sentencing.²⁹

Judges, like all vertebrates, have visual blind spots or *scotomas* (from the Greek word for darkness).³⁰ We also have cognitive blind spot bias—that is, the ability to see bias in others, but not in ourselves.³¹ In one study, Professor

24. *Id.*

25. See Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765, 1766–67 (2014) (“These studies have been influential because implicit racial preferences predict behaviors such as negative interracial contact, biases in medical decision making, and hiring discrimination.”) (citations omitted).

26. See, e.g., Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Towards None and Charity for Some—Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669, 670 (2014) (“The scientific study of prejudice has been pursued uninterruptedly since the introduction of the first measures of intergroup attitudes by Bogardus (1925) and Thurstone (1928). In this (now) massive body of scientific work, one is unlikely to encounter completely new ideas. True to that expectation, this article’s central thesis—that ingroup favoritism is a prime cause of discrimination—is not new.”).

27. Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 879 (2015).

28. *Id.* at 872 n.1.

29. *Id.* at 873.

30. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT* xi (2013).

31. Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014) (“This psychological blind spot prevents us from seeing our own cognitive biases, yet allows us to see them in others.”); see also Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681–82 (2005); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565 (2007).

Jeffery Rachlinski and co-authors found that 97% of state court administrative law judges attending an educational conference rated their ability “to avoid racial prejudice in decisionmaking” in the top half of other judges at the conference.³² Of course, that is mathematically impossible. The authors worried that “this result means that judges are overconfident about their ability to avoid the influence of race”³³ In my recent national empirical study, I found that 92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial services officers ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias.³⁴ Again, mathematically impossible.

Justice Anthony Kennedy recently penned an excellent definition of the cognitive blind spot bias in judges, without naming it, when he wrote about the unconstitutional failure of a state supreme court justice to recuse himself in a criminal case: “Bias is easy to attribute to others and difficult to discern in oneself.”³⁵ Because of this very strong cognitive blind spot bias, judges and other courtroom actors are unlikely to question whether their decisions and actions are influenced by either explicit or implicit racial considerations. Without this self-examination, including taking IAT tests, judges, prosecutors, defense lawyers, probation officers and other court personnel are highly unlikely to accept any personal responsibility for their own complicity in sustaining a racialized system. As Professor Richardson observed, “courtroom actors need not be consciously biased in order for race to have pernicious and disturbing consequences on behaviors and judgments.”³⁶ Thus, an objective of this Essay and the training of judges and court staff about the IAT and implicit biases is to bring awareness not only to blind spot cognitive biases, but also to how these biases potentially allow implicit racial and other biases to flourish. Unquestionably, there is a growing awareness of the effects of implicit bias in the legal system. Yet, at a training last year for 500 trial court judges in Florida, fewer than ten responded that they had previously taken an IAT test. That is quite typical of other implicit bias trainings I have done for other courts. Experience in these trainings also indicate judges are unaware of their blind spots. If judges and court personnel are both unaware of their blind spots and implicit biases, this

32. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009).

33. *Id.* at 1226.

34. The data for this study and a series of spreadsheets analyzing the data are on file with the author.

35. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

36. Richardson, *supra* note 4, at 892.

can easily deceive them into “believing,” as Lena Olive Smith observed nearly ninety years ago, that “it is justice speaking to [them]; when in fact it is prejudice, blinding [them] to all justice and fairness.”³⁷

C. *Implicit Racial Bias in Sentencing*

Only two studies have given actual trial judges IATs—remarkably, also in conjunction with judicial sentencing decisions.³⁸ The only two studies on implicit bias in judges established, unnervingly, that judges (state judges in the first study and both state and federal in the second) have equal or greater implicit racial biases than members of the general public.³⁹ The results of these two studies are both complex and highly nuanced—the subject of their own law review articles—and are only generally summarized here.

In the first study, when state judges were explicitly told about the juvenile offenders’ race in a fight scenario where the juvenile was charged with battery, White judges convicted just as often with White and Black offenders.⁴⁰ However, Black judges were statistically significantly more likely to convict the offender when he was identified as White rather than Black.⁴¹ The focus of the study, though, was on the relationship between IAT scores and length of punishment. Judges (Black and White) who expressed a strong pro-White or pro-Black IAT preference did not sentence White and Black offenders differently.⁴² In a different part of the study, judges were asked to assign one of seven different dispositions in two juvenile cases.⁴³ The race of the juvenile was not explicit, but race was subliminally primed by words on a computer screen. Judges primed with African-American words⁴⁴ who had IAT White-positive/Black-negative scores treated the juvenile more harshly. Judges primed with African-

37. Juergens, *supra* note 7, at 448 (citation omitted).

38. Rachlinski et al., *supra* note 32, at 1210-11; Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. (forthcoming 2017) (manuscript at 8).

39. See Rachlinski et al., *supra* note 32, at 1208-11; Levinson, Bennett & Hioki, *supra* note 38 (manuscript at 8-10).

40. Rachlinski et al., *supra* note 32, at 1218.

41. *Id.*

42. *Id.* at 1219.

43. *Id.* at 1212-14.

44. These words included Harlem, basketball, gospel, dreadlocks, mulatto, etc. *Id.* at 1213, n.86. The words were primed, meaning they were flashed on the computer screen for only 153 milliseconds. *Id.* at 1212.

American words who had IAT White-negative/Black-positive scores treated the juvenile less harshly.⁴⁵

Turning to the second study, the authors, of which I am one, also found that both state and federal trial judges, like the state judges in the first study, had implicit biases equal to or greater than members of the general public.⁴⁶ We studied implicit biases against so-called privileged minorities, Asians and Jews. Because the vast majority of implicit bias studies focus on implicit bias regarding Blacks, we chose Jews and Asians, who are perceived by many to be “model minorities or “success stories.”⁴⁷ While social science research on these two groups show positive stereotypes related to, for example, education and business acumen, there are also strong negative stereotypes, such as slyness, lack of trustworthiness, and financial fraudulence.⁴⁸

Here is a very brief summary of just a few of the thirteen findings from our study:

- All judge cohorts studied—federal district judges, U.S. magistrate judges, and state trial judges from eight states selected at random—possessed similarly strong implicit biases against Asians and Jews;
- Federal and state judges displayed strong to moderate implicit bias against Asians (relative to Caucasians) on the stereotype IAT, such that Asians were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming) and Caucasians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous);
- Federal and state judges displayed strong to moderate implicit bias against Jews (relative to Christians) on the stereotype IAT, such that Jews were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming) and Christians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous);
- Federal district judges gave (marginally) longer sentences to Jewish defendants than Christian defendants. There were no significant differences in how these judges sentenced White as compared to Asian defendants;
- Magistrate judges’ sentences did not vary significantly based on the defendant’s group membership;
- State judges, contrary to prediction, sentenced White defendants to significantly longer sentences than Asian defendants;

45. *Id.* at 1212-21. For a thorough discussion of all of the results of this study, see *id.* at 1208-26.

46. Levinson, Bennett & Hioki, *supra* note 38 (manuscript at 36-45).

47. *Id.* (manuscript at 18).

48. *Id.* (manuscript at 21-22).

- For federal judges, the political party of the appointing president did not predict different IAT scores;
- And judges' self-reported agreement with Asian stereotypes was correlated with their agreement with Jewish stereotypes.⁴⁹

At bottom, these two studies—the only ones to administer IATs to actual judges—reached two similar but important conclusions. While judges have equal to or greater implicit biases against Blacks, Asians, and Jews than White members of the general public, for the most part, judges are able to control biases when deciding on the length of sentences. In the Rachlinski study, sentencing did not reflect racial bias, except when race was subliminally primed.⁵⁰ Of course, in the real world, the race of a defendant being sentenced is explicit, not subliminally primed. The Rachlinski study also found that on the question of “conviction” rather than the length of a sentence, Black judges, who demonstrated a pro-Black bias on their IATs, were less likely to convict a Black defendant relative to a White defendant.⁵¹ In the second study, we found that state court judges gave longer sentences to the White defendant than the Asian defendant even though their IAT scores demonstrated a strong anti-Asian bias.⁵² Also, we found that federal judges gave longer sentences (a finding of marginal significance) to Jewish defendants than Christian defendants and that this was correlated with anti-Jewish and pro-Christian IAT scores.⁵³

While these two studies are important, they have significant limitations. The presentation of hypothetical sentencing scenarios in a research context may not accurately reflect how real-world sentencing decisions are made—especially in the overburdened and under-resourced courts like Cook County that Professors Van Cleve and Richardson discuss. Indeed, Professor Richardson theorizes that “systemic triage”—the pressurized decision-making by courtroom participants in overburdened courts—is ripe for implicit bias to racialize justice.⁵⁴ This is true regardless of the absence of judges' and other courtroom participants' conscious or explicit racial bias.⁵⁵

As Rachlinski and his colleagues concluded, implicit biases among judges are widespread and can influence judgments, but when judges are aware of po-

49. *Id.* (manuscript at 36-45).

50. *See supra* notes 40-45 and accompanying text.

51. *See supra* note 41 and accompanying text.

52. *See supra* note 49 and accompanying text.

53. *Id.*

54. Richardson, *supra* note 4, at 878-80.

55. *Id.* at 881.

tential biases, they seem to have the cognitive skills to avoid their influence.⁵⁶ The authors' data did not permit them to determine "whether a desire to control bias or avoid the appearance of bias motivates judges in their courtrooms the way it" did in their study.⁵⁷ Certainly awareness of a judge's implicit biases is a first step. Professor Richardson notes that "awareness of implicit bias" and "doubting one's objectivity" are promising interventions.⁵⁸ However, it remains unclear whether awareness alone, even coupled with doubting one's objectivity will allow judges to minimize their implicit biases in decision-making. One recent study observed that judges are now well sensitized to Black-White racial bias and are seemingly "able to avoid it for that reason."⁵⁹ This conclusion was based on a discussion at the beginning of the Pizzi article that concluded many studies examining the length of sentences do not find disparity based *solely* on race.⁶⁰

Before any definitive conclusions can be drawn about the effects of judicial racial implicit biases on sentencing, more and larger empirical studies must be performed. These studies should include Hispanic defendants, because at least at the federal level, there are currently more incarcerated Hispanic (35.2%) than Black (34.4%) or White (27.0%) offenders.⁶¹ More importantly, because any individual or specific judges' implicit biases could affect the length of their sentences, it is imperative to raise judicial awareness of the potential impact that implicit biases may have on sentencing and judicial decision-making. This needs to be accomplished through judicial training.

But even if judges are sensitized to avoid sentencing disparity based solely on race, judges are not well sensitized to the new frontier of implicit racial bias: bias against those with darker skin tone and greater Afrocentric features. I now turn to this emerging issue, where most sentencing judges are totally unaware of the potential for implicit racial bias based on skin tone and Afrocentric features.⁶²

56. Rachlinski et al., *supra* note 32, at 1225.

57. *Id.* at 1225.

58. Richardson, *supra* note 4, at 887.

59. William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2015).

60. *Id.* at 328-31.

61. U.S. SENTENCING COMM'N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON—MARCH 2016, at 1 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP_March2016.pdf [<http://perma.cc/Q2CH-75WQ>].

62. In my implicit bias educational efforts with more than 1,500 judges from Alaska to Florida, I can count on one hand the number of judges that were aware of the studies on skin tone, Afrocentric features, and sentencing. This includes over 500 judges in a jurisdiction where the

II. THE NEXT FRONTIER: SKIN-TONE, AFROCENTRIC FEATURES, AND THE LENGTH OF SENTENCING

Professor Richardson recognized that skin color triggers automatic and unconscious implicit racial biases.⁶³ Skin tone bias has deep roots in America. The widespread assumption about the inferiority of those with dark skin partly justified both the colonial and antebellum eras of American history.⁶⁴ Gunnar Myrdal noted the passage from Charles S. Johnson: “The evil of and ugliness of blackness have long been contrasted in popular thinking with the goodness and purity of whiteness.”⁶⁵ Social scientists have established the link between darker skin and lower educational achievement, family income, and socioeconomic status.⁶⁶ Dark-skinned blacks are also more likely to grow up in segregated neighborhoods and less likely to marry and be elected to political office.⁶⁷

Emerging empirical research strongly suggests that the newest frontier of implicit racial bias in sentencing is the relationship between darker skin tones, stronger Afrocentric features, and longer sentences.⁶⁸ This cutting-edge re-

first major study was done on Afrocentric features and their impact on increasing the length of sentences. Only four of the judges were aware of the study.

63. Richardson, *supra* note 4, at 876.

64. King & Johnson, *supra* note 6, at 92-93.

65. 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1382 n.13 (1944) (quoting CHARLES S. JOHNSON, GROWING UP IN THE BLACK BELT 257 (1941)).

66. Amanda Mae Petersen, *Beyond Black and White: An Examination of Afrocentric Facial Features and Sex in Criminal Sentencing* 7 (June 25, 2014) (unpublished Ph.D. dissertation, Portland State University), http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=2855&context=open_access_etds [<http://perma.cc/PDF5-TTMS>].

67. *Id.*

68. Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004) (determining upon examination of male inmates in Florida that, while race did not affect the length of a sentence, stronger Afrocentric features did for both Blacks and Whites); King & Johnson, *supra* note 6 (finding, using data from the Minnesota Sentencing Guideline Commission, that darker skin tone and greater Afrocentric features are related to harsher criminal sanctions—especially for White defendants, mirroring the Blair et al. study); Pizzi et al., *supra* note 59 (describing laboratory studies and studies involving real sentencing in Florida that established that people and judges use Afrocentric features to trigger stereotypes of Blacks, and that, while race did not lengthen sentences, both Blacks and Whites received longer sentences if they have stronger Afrocentric features); Jill Viglione et al., *The Impact of Light Skin on Prison Time for Black Female Offenders*, 48 SOC. SCI. J. 250 (2011) (finding, based on an analysis of data from a large sample of female defendants incarcerated in North Carolina, that skin tone perceived as darker by prison correctional officers correlated with longer sentences); Jacque-Corey Cormier, *The Influence of Phenotypic Variation on Criminal Judgment* (Fall 2012) (unpublished Ph.D. dissertation, Georgia State University) <http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi>

search is based upon sentencing data and images of Afrocentric facial features and skin tone of actual offenders from Florida, Minnesota, Oregon, and North Carolina. The studies used sophisticated regression analyses to determine that the variables of darker skin tone and greater Afrocentric facial features were the cause of longer sentences. Thus, it is not race alone, but Afrocentric features like darker skin tone, wider noses, coarser hair, darker eyes, and fuller lips that influence the length of a criminal sentence, because defendants with these characteristics are perceived as more likely displaying a Black stereotype of aggressiveness, criminality, dangerousness, and recidivist law-breaking.⁶⁹ After posting a short summary of this article on a criminal law blog, Judge Richard Kopf, a federal district judge in Lincoln, Nebraska, replied: “I confess that I have known this—the Afrocentric feature effect—in my heart for a long time. It is very difficult for me to overcome—it as almost like it is hard-wired.”⁷⁰

Indeed, strong Afrocentric features can lead to dire consequences, including death. In one well-known study, Professor Jennifer Eberhardt and colleagues established that, where a white victim was involved, a Black defendant with strong Afrocentric features was twice as likely to be given the death penalty by a Philadelphia jury than a Black defendant with weak Afrocentric features.⁷¹

Studies have shown, with consensus, that it is easy to classify both Blacks and Whites on a scale of strength of Afrocentric features.⁷² Thus, it should not be surprising that judges in sentencing are fully cognizant of the strength of Afrocentric features in people they sentence, albeit subconsciously and therefore implicitly. Nor should it be surprising that, when the more well-known overt category of race (Black-White) does not seem to have a strong influence on the length of a sentence because of judges’ abilities to mitigate race, skin tone and Afrocentric features do.⁷³ This suggests that much greater awareness

?article=1000&context=etd [http://perma.cc/DBZ9-K5BB] (finding, using 200 jury-eligible participants asked to assume the role of jurors, that stronger Afrocentric features resulted in a recommendation of prison more often than probation and a longer sentence); Petersen, *supra* note 66 (finding that the race of Oregon inmates did not determine the length of a sentence, but that Afrocentric facial features interact with sex to produce longer sentences for Black males but not Black females).

69. King & Johnson, *supra* note 6, at 30–31; Cormier, *supra* note 68, at 12, 26; Petersen, *supra* note 66, at 1–2.

70. Mark W. Bennett, *The Next Frontier of Implicit Racial Bias in Sentencing*, MIMESIS L. (Sept. 14, 2016), <http://mimesislaw.com/fault-lines/the-next-frontier-of-implicit-racial-bias-in-sentencing/12741> [http://perma.cc/F8F6-QK3Y].

71. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

72. See, e.g., Irene V. Blair et al., *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSON. 5 (2002).

73. Petersen, *supra* note 66, at 2.

of the potential effects of darker skin tone and greater Afrocentric features on the length of sentences is needed.

I strongly recommend that each state and federal court entity explore the urgent need to train not only sentencing judges but other professionals that have major input into the sentencing process, like probation officers, who write pre-sentence reports, and defense and prosecution lawyers, who also recommend the length of sentences. It is especially important to train probation officers because of their high blind spot bias to racial discrimination⁷⁴ and their singular role in preparing pre-sentence reports and frequently recommending a sentence. This training should be conducted by a member of the growing body of social scientists, law professors (often with a deep understanding of and/or an advanced degree in cognitive psychology), and other scholars in the implicit bias field.⁷⁵ The training should include each judge taking a number of IATs; a detailed explanation of how the IAT works, including how it is scored; social science studies on IAT scores and decision-making; and the emerging neuroscience of implicit bias, especially the fMRI studies on race, face identification, and amygdala (the brain's fear center) activation. Additionally, implicit bias training should be incorporated into new judges' training. And, because of the dramatic increase in the volume and breadth of research on implicit bias, it should also be part of any continuing education of judges.⁷⁶ One of my suggestions in my training is to eliminate the photograph of the offender on the front page of the pre-sentence report. The photograph is a classic psychological prime that can easily trigger implicit bias in the judges' evaluation of the rest of the pre-sentence report.

Progressive courts should consider collaborating with academic social scientists to study the effects of this new frontier in implicit bias on sentencing in their own courts. In my training of judges on implicit bias, only a tiny percentage—far less than 1%—have been aware of racial implicit bias and IAT scores as they relate to sentencing. Even fewer knew anything about the relationship between darker skin tone and more Afrocentric facial features subconsciously impacting the length of sentences. That is why implicit bias and its relationship to darker skin tone and more Afrocentric features is truly the “New Frontier.” I am

74. See *supra* note 34 and accompanying text.

75. While the field is rapidly expanding, I know of only one law school and professor that routinely teaches a law school class in implicit bias: Professor Victoria Plaut, Professor of Law and Social Science and Associate Dean of Equity and Inclusion at Berkeley Law, who has taught the class since 2011. There are several other law professors and a few judges (especially Judge Bernice B. Donald on the United States Court of Appeals for the Sixth Circuit) with whom I have co-trained and who do an excellent job.

76. Rachlinski and his colleagues reached the same conclusion regarding training. Rachlinski et al., *supra* note 32, at 1228.

optimistic that once sentencing judges become aware of how these subconscious implicit biases work, awareness will help them combat the pernicious effects. Further empirical research is necessary to determine whether increased judicial awareness of the potential impact of offenders' darker skin tones and greater Afrocentric features minimizes the length of sentences.

CONCLUSION

Professor Gonzalez Van Cleve's ethnography, *Crook County: Racism and Injustice in America's Largest Criminal Court*, reveals massive overt racism in the criminal courts of Cook County. Professor Richardson's critique of the book establishes that, in addition to overt racism, there are more serious problems of implicit racial bias in the criminal justice system that Professor Gonzalez Van Cleve did not address. I fully concur and offer my own critique that, at least for sentencing discrimination, the new frontier in empirical research strongly suggests that skin tone and Afrocentric facial features are important and crucial variables underlying implicit racial bias. As cognitive social scientists and members of the academy explore this new frontier, and as judges are educated and informed about the effects of skin tone and Afrocentric features in judicial decision-making, it is my hope that these important issues will be lifted from the shadows of American courtrooms and judges' subconsciousness.

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