



A FEW THOUGHTS IMPLICIT BIAS

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DISCLAIMER

- These are thoughts for discussion. Not an indication of how I would rule in any particular case.



INTRODUCTION

- The incarceration rate in Iowa is 11 times higher for African-Americans than for whites.
- 3 percent of Iowa's overall population is African-American, but 25 percent of Iowa's prison population is African-American.
- Iowa has the third most severe disparity in the nation.



INTRODUCTION

- I believe implicit bias is part of the explanation for this.
- Another driver ... mandatory minimum sentences.
- Ed Mansfield & Julia Steggerda-Corey, “Mandatory Minimum Sentencing: A Closer Look at Iowa” (Draft 2017).
 - Iowa has the highest mandatory minimum sentence in the country - 17.5 years - for first degree robbery (i.e., robbery armed with a dangerous weapon).
 - African Americans make up 59 percent of the offenders incarcerated in Iowa for first degree robbery.



INTRODUCTION

- More statistical analyses are needed – i.e., controlling for other factors and isolating race as a factor.



INTRODUCTION

- Implicit bias (my definition – not Kim’s more accurate one) is the bias you have that you may not be aware of.
- Daniel Kahneman, Thinking Fast and Slow (1981).
 - Two types of thinking. Slower, critical thinking and faster, reactive thinking.
 - Slower thinking takes time and effort. When you don’t have time, or you don’t or can’t make the effort, you slip into faster thinking.
 - You can avoid faster thinking by taking time and putting in the effort.
- Implicit bias is an example of faster thinking.
- But potentially you can overcome implicit bias by consciously paying attention to it.

IMPLICIT BIAS



IMPLICIT BIAS – JURY DELIBERATIONS

- *State v. Plain*, 898 N.W.2d 801 (Iowa 2017).
- The case involved a number of issues. 6 separate opinions were filed.
- The defendant had requested this instruction:
- “Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious belief, national origin, or sex.”
- The district court denied the request.

IMPLICIT BIAS – JURY DELIBERATIONS

- Majority: “[T]he cautionary instruction, which is a correct statement of antidiscrimination principles, would have been permitted under Iowa law.”
- “While there is general agreement that courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so. One of the ways courts have addressed implicit bias is by giving jury instructions similar to the one proposed by Plain in this case. We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method of doing so. As we conclude Plain was not prejudiced by the denial of the requested instruction in this case, we affirm on this issue.”

IMPLICIT BIAS – JURY DELIBERATIONS

- Cady, C.J., Wiggins, J., and Appel, J., would make it reversible error not to give an implicit bias instruction when requested.
- Appel, J.: “[I]mplicit bias is so pervasive and the harm from implicit bias so difficult to prove in a particular case that I conclude a criminal defendant is entitled to an implicit-bias instruction upon request.”
- “Research suggests that the problem of implicit bias may be moderated by attention to the issue.”
- “I conclude that there is strong scientific evidence of the existence of implicit bias. Whether an instruction will be effective is another question. Unlike the question of whether implicit bias exists, where there is a large literature, there is not a body of science demonstrating the impact of an implicit-bias instruction on a jury and, to the extent it exists, it appears inconclusive.”

IMPLICIT BIAS – JURY DELIBERATIONS

- “I conclude that a criminal defendant is entitled to an accurate, appropriately worded implicit-bias instruction upon request. In my view, the other instructions in this case did not adequately address the problem of implicit bias. Ideally, such an instruction should be given at the beginning of jury selection. I would not dictate the specific working of an implicit-bias jury instruction, but the model instruction of the ABA, Judge Bennett's instruction, and the implicit-bias instruction in the District of Columbia and California provide meaningful guidance.”

IMPLICIT BIAS – JURY DELIBERATIONS

- Waterman, J., joined by Mansfield, J., and Zager, J., concurred in the majority opinion and added:
- “Although I might decide to use such an instruction if I were a trial judge, I do not believe our court has enough information at this point to mandate such an instruction statewide whenever there is a defendant from a racial minority. Furthermore, no cases have been cited to us requiring trial courts to instruct on implicit bias. To date, all appellate courts addressing the question have confirmed that trial courts have discretion whether to instruct the jury on racial bias.”

IMPLICIT BIAS – JURY DELIBERATIONS

- “I do not question the proposition that all of us in the judicial system—including judges, jurors, and attorneys—are subject to many different forms of implicit bias. Racial bias may be the most persistent form of implicit bias. But it is one thing to say that implicit bias is a problem. It is another thing to mandate a special jury instruction on implicit bias as the designated solution to that problem. In my view, more research is needed before we substitute our judgment concerning such an instruction for that of our trial judges. Justice Appel's concurrence cites “strong scientific evidence of the existence of implicit bias” but, at the same time, dismisses the need for “social science evidence demonstrating utility” of an implicit-bias jury instruction. That reasoning is incongruous. We do not look for social science to prove the efficacy of jury instructions that simply set forth the applicable law or elements of a claim or defense. But when social science is *the basis* for a jury instruction, as it would be for one on implicit bias, some degree of social science *support* for the instruction is required. Yet no empirical study has been cited that an implicit-bias jury instruction improves juror decision-making. That dearth of support gives me pause.”

IMPLICIT BIAS – JURY DELIBERATIONS

- Was the proposed instruction in *Plain* an implicit bias instruction?

IMPLICIT BIAS – JURY DELIBERATIONS

- Compare the following from an American Bar Association publication:
- “Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
- “Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
- “Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.”
- “Focus on individual facts, don’t jump to conclusions that may have been influenced by unintended stereotypes or associations.
- “Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group? ...”



IMPLICIT BIAS – JURY SELECTION

- Another issue besides **jury instructions**...
- **Challenges for cause.** If a juror gives an initial answer that indicates bias, to what extent should rehabilitation of that juror be allowed?
- *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017).
- Murder prosecution. The victim died from multiple stab wounds. It wasn't disputed that the defendant was gay, made unwelcome sexual advances toward the victim, and ultimately stabbed the victim to death. The issue was whether the defendant acted in self-defense or not.



IMPLICIT BIAS – JURY SELECTION

- A written questionnaire asked each potential juror the following question: “The defendant in this case is gay. Would this fact in any way influence your ability to be fair and impartial if you were selected to be a juror in this case?” A potential juror put an X next to “yes” and, in the place provided for an explanation, wrote “I would try to keep an open mind, but I would have a hard time overlooking it.”
- Lengthy individualized voir dire of the juror followed and the juror was ultimately *not* dismissed for cause, so the defendant had to use a peremptory challenge on him.
- The supreme court held that the potential juror should have been excused for cause.



IMPLICIT BIAS – JURY SELECTION

- Majority opinion by Appel, J.: “Where a potential juror initially repeatedly expresses actual bias against the defendant based on race, ethnicity, sex, or sexual orientation, both in a pretrial questionnaire and in voir dire, we do not believe the district court can rehabilitate the potential juror through persistent questioning regarding whether the juror would follow instructions from the court.”



IMPLICIT BIAS – JURY SELECTION

- Waterman, J., joined by Mansfield, J., and Zager, J., would not have found an abuse of discretion by the trial judge:
- “On the question noting that the defendant is gay and asking whether this would in any way influence your ability to be fair and impartial, the juror admitted, “I would try to keep an open mind, but I would have a hard time overlooking it.” Yet he also agreed that he would “listen to and consider all the evidence before making a final decision in this case.” He did not mark as true or mostly true statements that “being gay is immoral” or “being gay is a sin.” In response to the last question, he stated that he thought he would be a good juror in the case and “would try to keep an open mind.””



IMPLICIT BIAS – JURY SELECTION

- The trial judge said:
- “[M]y problem is he has said that he's going to have it in the back of his mind and that this defendant would be better off not having him as a juror. After he said that, he still continues to express the opinion that he could be fair and unbiased and be able to try a fair case.”
- Waterman, J.: “This ruling seems to me entirely defensible. The test on a for-cause challenge should not be whether a prospective juror has something “in the back” of their mind or whether one of the parties would “do better” with a different juror. Those are precisely the kinds of answers that ought to trigger the use of a peremptory strike, but they are not enough to mandate that a juror be excused for cause. All of us walk around with our own notions, biases, and experiences and, in any given case, would make a better juror for one side rather than the other. That is what peremptory strikes are for.”



IMPLICIT BIAS – JURY SELECTION

- Was *Jonas* a case about implicit bias or overt bias?



IMPLICIT BIAS - HIRING

- Implicit bias may manifest itself to the greatest extent in **hiring**. Hiring decisions in the end are often personal, without objective criteria.
- This is one reason why we recognize the disparate impact theory in employment law.
- Our court has a hiring case touching on implicit bias.
- *Pippin v. State*, 854 N.W.2d 1 (Iowa 2014). A class action alleging discrimination against African-Americans by the entire executive branch of the State of Iowa.
- A defense verdict following trial was unanimously affirmed by our court.



IMPLICIT BIAS - HIRING

- However, Waterman, J., concurring, joined by Mansfield, J., and Zager, J., observed:
- “[T]here undoubtedly was subjectivity and—as the plaintiffs credibly demonstrated—implicit bias in multiple State hiring decisions during the relevant time period...”
- “I reiterate the importance of separately analyzing the different processes used by the various departments. In some departments, African-American applicants fared better than white applicants at certain stages; in others they fared worse, even much worse. This suggests that the different screening processes used by the departments may have had different impacts on applicant success...”
- “For example, based on the record in this case, I have concerns about the various résumé screening devices used by State departments at the step-two level. It is certainly possible that inappropriate screening devices may have been used in some of the departments in which Miller found a statistically significant disparity between blacks and whites at step two. But, it is just a possibility and not an aspect of the case that the plaintiffs chose to pursue.



JUDICIAL BRANCH TRAINING

- The Judicial Branch has also responded by requiring all employees to participate in implicit bias training.