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The Challenge

The newsletter of the Illinois State Bar Association's Standing Committee on Racial and Ethnic Minorities and the Law

Letter from the editor: Thoughts on implicit racial bias

BY KHARA COLEMAN

I have had a hard time taking my mind or my attentions away from the coverage of the death of Laquan McDonald. Since the public release of the dash camera video of his death in 2015, his name has hardly been *out* of the news. Neither has the name of the police officer who shot McDonald, who was later charged with McDonald's murder. From the days leading up to the trial, to the opening statements, through the key witnesses testimony and closing statements, I have followed this story and trial of former Chicago Police Department Officer Jason Van Dyke using a special news collaboration between Chicago's

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Illinois Supreme Court Committee on Equality on implicit bias in the courts

BY BEVERLY A. ALLEN

Professor Cynthia Lee of the Kirwin Institute at Ohio State University states in *The Primer on Implicit Bias* that, "implicit bias refers to the attitudes of stereotypes that affect our understanding, actions and decisions in an unconscious manner." An example of this phenomena is when you see an African American male walking down the street wearing a hoodie. You instinctively think that he is a criminal and may try to rob you, so you immediately cross the street. In reality, he is just a teenager going to the store to buy candy and a soda. Systemic implicit bias refers to the way racial bias has become infused with purportedly race neutral legal theories, such as retribution or rehabilitation and jurisprudential approaches to well-considered constitutional doctrines. In the criminal justice system, systemic implicit bias permeated every facet of the process from the police encounter to being charged and plea bargain, to trial and sentencing. This is born out in the news every day. People of color are treated as dangerous criminals, even for the smallest infractions such as a traffic violation or selling cigarettes on the sidewalk. Oftentimes, the police act

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WBEZ and the Chicago Tribune – a free podcast called 16 Shots. I think I know the basic facts as well as anyone else who has followed these events.

But the question remains: *Why* did this happen?

On Friday, October 5, 2018, a jury found Jason Van Dyke guilty of murder in the second degree and guilty of sixteen counts of aggravated assault with a firearm. Whether one believes the verdict to be just or unjust, I can't imagine that anyone wasn't surprised on some level by the verdict. Especially in a case like this, with such strong arguments presented on both sides, we can never be sure of how a jury will decide. For me, even after this verdict, I do not think my question has been answered. Mr. Van Dyke has been found guilty, but the verdict does not tell us WHY this happened, or tell us how to keep it from happening again.

I think that the "why" has something to do with implicit racial bias – and not just in policing. I think that there is implicit bias in all of us, and if we don't talk about it – name it, learn about it—then we can't deal with it. In this case, while following the developments in the Van Dyke case and trial, I always suspected that no matter how the verdict went, my heard would still be broken, because I don't see how a verdict alone can bring us to address implicit racial bias and the impact of implicit bias on the administration of justice.

So, yes, my heart is still broken.

Whenever the subject of racism comes up, there is a cacophony of adamant and heartfelt statements against acts of racism or racist practices. Almost everyone is able to state that they strive to treat all persons fairly and equally, regardless of race, color, or nationality. I think that this state of mind makes sense—it is an indisputably GOOD approach—but it fails to address all of the modern challenges to racial justice. What if the racism that we need to address is not overt? How do we commit ourselves to racial justice in a world in which an outcome can be racist, even if the intentions were essentially benign?

What does it mean to be so afraid of minority children that force is the first, and seemingly only, option for securing obedience?

Can we condemn a real subjective fear of a black boy as *objectively* unreasonable, and talk about the way implicit racial bias feeds such a fear?

Human beings are complicated. And I, for one, don't tend to believe that all situations can be viewed as clearly black and white, all good or all bad. I imagine that there are people, including law enforcement officers, who would never engage in overt and knowingly discriminatory practices. I also imagine that some of these people still hold implicit racial biases and such biases affect their actions and decisions.

Sometimes, those biases lead to the death of racial minorities. And that is a consequence we cannot continue to tolerate. I hope that this verdict takes us all a step closer to talking about implicit racial bias in a proactive way. ■

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Illinois Supreme Court Committee on Equality on implicit bias in the courts

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as judge, jury and executioner. Just ask the families of Michael Brown, Trayvon Martin, Eric Garner and Sandra Bland, to name a few. Because people both possess automatic associations that devalue Black lives relative to White lives and associate Black Americans with a need for punishment, bias enters into the system at the earliest stages- at the time when policy-makers are considering questions of where to police and how aggressively, and why to punish and by how much. In the justice system, minority groups consistently report the feeling that the courts treat them unfairly and worse than their white counterparts. Unconscious preconceptions of those involved in the legal process, including judges, attorneys, and jurors, can be detrimental to the public's assessment of the judiciary as a system that is fair, unbiased and transparent.

The very elusive question is this: How do we eradicate systemic implicit bias in the justice system? How do we create a justice system where everyone, regardless of race, ethnicity, gender, socioeconomic status, etc. are treated equally and fairly? In 2013, there was a discussion at the Future of the Courts Conference of the need to address public perceptions of fairness and equality in the actions of the judicial branch. As a result of that discussion, the Illinois Supreme Court formed the Committee on Equality that was charged with promoting equality and fairness in all aspects of the administration of justice in Illinois Courts. The Committee on Equality consists of a diverse pool of judges and lawyers appointed by the Supreme Court from across the state. Supreme Court Chief Justice Rita B. German proposed that, "all litigants, witnesses, jurors, and members of the public should appreciate that our courts are free from bias and prejudice and that cases are decided purely on the basis of the law and the particular facts of each case." Trying to debias the court systems in Illinois is a huge undertaking but a necessary one. The Illinois Supreme Court should be commended for its forward thinking in attempting to achieve this enormous goal. If successful, it is hoped that the methods developed by the Committee on Equality can be adapted in every aspect of the justice system, thereby eliminating, or at the very least, greatly diminishing the effects of implicit bias. ■

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A modern-day dual sword of Damocles: The current threat looming over sanctuary cities

BY JUANITA B. RODRIGUEZ

As immigration reform rises to the top of the nation's political agenda, emphatic rhetoric from both sides centers on sanctuary policies enacted by state and local governments. These innovative policies raise a multitude of legal and political issues that are presently playing out in as many as three hundred sanctuary jurisdictions.[1] This article reviews the current national conflict, which has two distinct threats: the threat of enforcement with courts often caught in the middle of federal obstruction of justice statutes as a sanction against officials in sanctuary jurisdictions; and, the threat of removal of all federal funding to sanctuary cities for noncompliance. This article will review what sanctuary cities are, what their policies provide for, the threats they face, and the root of the conflict that surrounds them. This article also examines certain national cases and centers locally on *City of Chicago v. Sessions* as it may provide key insight as to how the national battle may resolve.

What is a sanctuary city and what do sanctuary city policies provide for?

While there is no single universal definition for a sanctuary city, the broadest

definition is that "…it's a city (or a county, or a state) that limits its cooperation with federal immigration enforcement agents in order to protect low-priority immigrants from deportation, while still turning over those who have committed serious crimes."[2] Sanctuary cities in the United States date back to the 1980s, when church groups in the Southwest began to offer sanctuary in their churches for overwhelming numbers of displaced Central American refugees fleeing violence and being denied sanctuary.[3] Over the decades this spread across the United States and fostered the evolution of a number of sanctuary policies.[4] Sanctuary policies generally include a range of policy innovations governing local government entities and officials, mainly law enforcement, with respect to cooperation with Immigration and Customs Enforcement ("ICE"). Federalism forms the legal foundation for sanctuary policies—there is no duty on any state or local government to assist in the enforcement or even investigation of federal immigration matters under the Anti-Commandeering Doctrine.[5]

The current policy in the city of Chicago ("City") is its Welcoming City Ordinance, which restricts the interactions city police and other city employees may have with ICE.[6] City officials are barred from asking for anyone's immigration status, turning undocumented immigrants over to federal agents, or threatening to reveal the immigration status of a person to federal officials.[7] City officials are even barred from verbally abusing immigrants based on their race, citizenship, or country of origin.[8] In comparison, comprehensive policies, such as the California Values Act, prohibits "state and local law enforcement agencies…from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes," and, subject to exceptions, proscribe other activities such as enforcing "immigration holds" on people in custody absent enumerated exceptions.[9] More discrete policies, such as the City of Boston Trust Act, merely relieve local law enforcement from complying with "non-mandatory" civil immigration detainer requests by ICE and prohibit holding a person in custody who would otherwise be eligible for release, absent a *criminal* warrant (as opposed to an ICE *administrative* warrant).[10] In short, sanctuary policies will variably restrict local law enforcement from sharing information with ICE, restraining people for ICE, or even granting ICE access to local holding facilities to arrest people or review records.

What is the current threat to sanctuary cities and how did this conflict start?

Sanctuary policies are facing two distinct threats from the current administration: the threat of enforcement of federal obstruction of justice statutes as a criminal sanction against officials in sanctuary jurisdictions, and the threat of removal of all federal funding to sanctuary cities. The conflict began when President Trump signed Executive Order 13768 ("Executive Order"), entitled "Enhancing Public Safety in the Interior of the United States" on January 25, 2017.[11] In response to this order, the bulk of litigation has revolved around the threat against the removal of federal funding from sanctuary cities. The threat of sanctions on non-compliant local officials is very real but has yet to result in actual charges or incarcerations—this will be addressed as the First Sword. Sanctuary city advocates decry the prospective "mass arrest" of U.S. mayors.[12]

The First Sword: The threat of enforcing of federal obstruction of justice statues against city officials

Harsh threats have been made to impose criminal sanctions against uncooperative local officials. In January of 2018, acting ICE Director Thomas Homan asserted that the Department of Justice should file charges against municipalities that do not cooperate with federal immigration authorities. "For these sanctuary cities that knowingly shield and harbor an illegal alien in their jail and don't allow us access, that is, in my opinion, a violation of 8 U.S.C. § 1324. That's an alien smuggling statute."[13] More recently, in a Senate Judiciary Committee hearing, Department of Homeland Security Director Kirsten Nielson stated that the justice department was "reviewing what avenues might be available" to hold sanctuary city leaders accountable for their respective policies.[14] It is therefore incumbent upon local sanctuary jurisdictions to fully acquaint themselves with all possible obstruction statutes available to federal authorities to intimidate, threaten or indeed hold criminally liable local officials complying with non-cooperation sanctuary provisions. Under federal law, there are several general obstruction statutes a non-compliant city official may face such as: Obstruction of Proceedings before Departments, Agencies, and Committees (18 U.S.C. § 1505); Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy (18 U.S.C. § 1519); Conspiracy to Commit Offense or to Defraud the United States (18 U.S.C. § 371); and, Bringing in and Harboring Certain Aliens (8 U.S.C. § 1324).[15]

First, understanding the process by which information is shared between local law enforcement and federal offender databases is important. Several national databases routinely accessed by local law enforcement include gang databases (GangNET). ICE has its own system that accesses GangNET and other investigative systems developed by private contractors."[16] Police officers can also access the National Crime Information Center database.[17] With either database, local police are free to notify ICE of a potential person of interest, but there is no automatic initiation of an official proceeding.[18]

However, the "Secure Communities (S-Comm)" program, restarted on January 25, 2017, by Executive Order is more problematic.[19] S-Comm employs integrated databases and partnerships with local and state jailers to integrate ICE and its deportation procedures.[20] Inquiries using fingerprints or biometric data of a person in custody that results in a "hit" arguably automatically triggers a federal immigration "proceeding."[21] "[T] his happens even in cities that have adopted policies that limit their role in immigration enforcement activities."[22] As such, an official proceeding is now automatically initiated and federal obstruction statutes

come into play. While the state and local authorities have no duty to enforce federal immigration law, every person and entity has a duty to not interfere, impede, or corruptly influence a federal proceeding, including investigations. Under obstruction statutes, the term "official proceeding" includes a proceeding before a federal government agency that is authorized by law. 18 U.S.C. § 1515(a)(1)(C). This definition is important because virtually all "obstruction" charges relate to an official proceeding.

Specifically, 18 U.S.C. § 1505 (Obstructing Congressional or Administrative Proceedings) sanctions whoever *corruptly* influences, obstructs, or impedes the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States. "As used in § 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b).

Likewise, 18 U.S.C. § 1519, Obstruction of Investigations by Destruction of Evidence, criminalizes "whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible item with the intent to impede, obstruct, or influence the investigation of any matter within the jurisdiction of any department or agency of the United States or the proper administration of any matter within the jurisdiction of any department or agency of the United States." In addition, 18 U.S.C. § 371,Conspiracy To Obstruct, imposes fines and imprisonment, "[i]f two or more persons conspire either to commit any offense against the United States . . . or any agency thereof in any manner or for any purpose, and do any act to effect the object of the conspiracy." Finally, 8 U.S.C. § 1324, Bringing and Harboring Certain Aliens, while directed at those who knowingly smuggle and harbor undocumented aliens, also criminalizes any person who "aids or abets the commission of any of the preceding acts"—which include concealing, harboring, shielding from detection, or attempting to shield from detection persons known to be unqualified aliens.

Participation in the S-Comm program potentially puts local law enforcement at risk because inquiry hits trigger an official proceeding. For instance, if a Chicago police officer, in furtherance of the Welcoming City Ordinance denies ICE access to persons or information, or lock ups once such a proceeding is initiated, such action may be characterized as "influencing, obstructing, or impeding" the proceeding. Withholding access to records may be deemed "concealment" or a "cover up" with the intent to impede, obstruct, or influence an investigation. Ignoring or rejecting an ICE administrative hold request (typically 48 hours past the time the person would normally be released absent immigration status issues) may be deemed to be "aiding and abetting…concealing, harboring, shielding from detection or attempting to shield from detection, persons known to be unqualified aliens." Any of the above acts, if done by two or more persons triggers a conspiracy violation under 18 U.S.C. § 371.

Not surprisingly, sanctuary jurisdictions have attempted to opt out of the S-Comm program since 2014, when the Obama administration discontinued the program. However, prior to 2014, S-Comm was initiated through a series of bilateral agreements between ICE and local jurisdictions. However, ICE is no longer observing such agreements. Since the Executive Order, ICE is likely to consider program participation by local agencies to be mandatory. Therefore, the ability of a jurisdiction to opt out of S-Comm will need to be addressed via the federal courts. [23]

The Second Sword: The threat of removing all federal funding from sanctuary cities

The Executive Order, in another attempt to shut down sanctuary cities, directed Attorney General Jeff Sessions and the Secretary of Homeland Security to ensure that "sanctuary jurisdictions" not receive ***any*** "federal funds."[24] Immediately, Santa Clara and San Francisco counties and the city of San Franciscofiled suits challenging the Executive Order, both moving for Californian injunctive relief to bar its enforcement.[25] The preliminary injunctions were granted on the same or similar grounds, that Santa Clara and San Francisco were likely to succeed on their claims, that the Executive Order violates separation of powers principles, the Spending Clause, and the Fifth and Tenth Amendments to the Constitution.[26] As of today the Executive Order remains enjoined.[27]

Blocked from cutting off *all* funding to sanctuary jurisdictions, Sessions shifted to blocking off specific grants to sanctuary cities. The most notable grant targeted is the Edward Byrne Memorial Justice Assistance Grant, commonly known as the Byrne JAG program ("Byrne JAG"). [28] Byrne JAG is a formula grant allowing federal funds to support many areas, including local law enforcement, local prosecution, and local courts.[29] Sessions and the DOJ imposed three new conditions on Byrne JAG namely: "'(1) certify compliance with [8 U.S.C.] section 1373'[30], which prohibits restrictions on the sharing of citizenship and immigration status information [compliance condition]; (2) 'permit personnel of [DHS] to access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States' ('access condition'); and (3) 'provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien' ('notice condition')."[31] These three conditions—compliance, access, and notice—were swiftly challenged in the courts by a number of cities, including the city of Chicago.[32]

In *City of Chicago v. Sessions*, the Northern District of Illinois granted the City's motion for "…a preliminary injunction against the attorney general's imposition of the notice and access conditions on the Byrne JAG grant. The city of Chicago established a likelihood of success on the merits as to these two conditions and irreparable harm if an injunction does not issue." [33] However, the City was denied on the granting of the compliance condition.[34] The court found that the compliance condition in 8 U.S.C. § 1373, had both Congressional authorization and was Constitutional under the Spending Clause and the Tenth

Amendment. Three motions later, the city of Chicago filed a motion to reconsider to get the compliance condition enjoined but was denied.[35] Additionally, the United States Conference of Mayors' motion to intervene as of right was also denied.[36] To date, enforcement of the compliance condition seems an effective tool to target and eliminate formula grants to sanctuary cities. This is likely to be an ongoing approach used by the current administration to bring to heel sanctuary cities that will not comply with administration's approaches on immigration enforcement.

For now, both federal obstruction and harboring statutes and the denial of specific federal funding grants remain a modern-day sword of Damocles hanging above the heads of local sanctuary jurisdiction officials. This threat is conceivably not outside of the reach of local courts which are given the power from the state government to ensure due process and the Constitutional rights of the individuals appearing before them on routine domestic, traffic or misdemeanor matters for example. In practice, the Executive Order can use the local law enforcement and local courts as their investigators and jailors for undocumented persons in ways not originally intended or authorized by immigration enforcement laws. The Executive Order arguably significantly compromises state sovereignty applicable to local courts by removing their respective jurisdiction over such individuals appearing before them and therefore depriving their authority to ensure due process—to which undocumented persons are also entitled—and when applicable hold them accountable to the local community. Consequently, the upcoming 2018 local and nationwide elections will be the most influential with respect to the polarizing issue of immigration enforcement and implicated federal and state civil rights and notions of due process. ■

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Five courtroom tips for new lawyers

BY JAMEIKA MANGUM

Welcome to the legal profession. You've been sworn-in, and now it's time to embark on your new career. Here are five tips that will help you navigate the courtroom:

1. Know your judge

When a case is filed, it's usually assigned to a judge. In Cook County, law division cases are initially assigned to a motion judge. Some judges issue standing orders. Standing orders contain information relating to courtroom procedures for a specific judge. You can search the court's website for judges' standing orders.

I started my career as prosecutor, and I was assigned to various judges over extended periods of time. Appearing before the same judge daily allowed me to learn more about how judges run their courtrooms differently.

In your spare time, consider going into a courtroom and observing a hearing, trial, or status call. Recently, Judge Lyons (Cook County Circuit Court Judge-Law Division) hosted a lunch and learn program for young lawyers. Judge Lyons offered tips on practicing in his courtroom. Check the ISBA's website for upcoming events/CLEs in which judges are involved. Get to know your judge before appearing before him/her.

2. Be kind to the clerk

Tip number two may seem obvious, but being rude to a court clerk is unacceptable. If a court clerk is not happy with your conduct, he/she can make it difficult to practice in that particular courtroom. For example, your cases can always be called up last, which can mean spending extra time away from the office. As a professional, it's important to treat others with respect. It's easy to be kind to the court clerk.

3. Be prepared

You should review your file(s) prior to appearing at a hearing, trial, etc. It can be a waste of the court's time if an attorney appears before a judge, and is unable to answer basic questions regarding a case.

If you are covering a case for another attorney, find out the status of the case, and be prepared to let the court know what's happening with the case. I've assisted other lawyers by covering court calls, and I try to get as much information as possible about the case that is being covered.

Additionally, a failure to prepare can have a negative impact on your reputation. Make sure you are prepared at all times.

4. Find a mentor

A legal mentor can help you navigate your new career. If you find a mentor in your practice area, this person may have experienced many of the issues you may be juggling. A mentor can give you courtroom tips, and discuss trial techniques with you. It can be helpful to bounce ideas off of a more experienced lawyer.

The ISBA offers a Lawyer-to-Lawyer Mentoring program. You can find more information about the program at https://www.isba.org/mentoring.

5. Conduct legal research

After three years of law school, you've passed the bar examination, and you're ready to jump right into practicing law. There are publications available regarding trial techniques that can be helpful prior to trial. I've found *Trial Techniques* by Thomas Mauet to be helpful prior to trial.

Some of the Illinois Supreme Court and Illinois Appellate Court opinions are online for your review. As a solo practitioner, I found the Illinois Institute for Continuing Legal Education (IICLE) publications to be very informative. Be sure to conduct legal research prior to a hearing or trial. ISBA members can access FastCase free of charge. Westlaw Next is also a great resource. Conducting legal research allows you to stay up-to-date on legal trends. ■

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