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Reforming America's Federal Criminal Sentencing

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Legal 255: Bias in the American Legal System

## **1.) Introduction**

Judicial decision-making processes have a potential influence on disadvantaged individuals in the Federal Criminal Justice System. Kalief Browder, a black teenager from The Bronx, New York, was taken into custody at the age of sixteen, even though he insisted he had no involvement in the stealing of a backpack. Because he couldn't afford bail, he was kept in pretrial detention at Rikers Island for three years, enduring harsh treatment and long spells of isolation. Browder experienced many delays and rescheduling of his case during his imprisonment at Rikers Island because of inadequate administration and crowded court calendars. Browder was released after the charges against him were dropped which ended his three year incarceration. Nevertheless, his psychological well-being took a significant toll due to the mental strain and harsh environment he encountered at Rikers. Two years following his release from prison on parole, Browder took his own life. Nicolas Paolucci, who is a spokesperson for the city law department, mentioned that Kalief Browder's narrative was a driving force behind implementing multiple changes in the justice system to avoid a recurrence of such a tragedy. (NPR, 2019). The Browder case shows how the justice system can be greatly impacted by socioeconomic factors: Browder could have potentially avoided pretrial confinement if he had the financial means to pay for bail.

Studies indicate that judges tend to show bias in court by treating individuals differently based on their socioeconomic status when determining punishments in criminal cases. Factors such as economic status, level of education, job status, and access to resources can influence how judges make decisions in the federal sentencing processes. Judges may create bias by giving harsher or more lenient punishments based on the defendant's financial status. Concentrating on

reforming socioeconomic bias in courts is important because its presence creates racial disparities and inequalities between low and high income families. There are several reforms that could be implemented to work on socioeconomic bias in courts.

## **2.) Description of Legal Activity**

The federal sentencing takes place after a defendant has been found guilty for a committed federal crime. There are five stages that explain the process. To start with, there is the determination of guilt: This may occur through a jury trial and verdict, or it may occur with a guilty plea from the defendant. The case advances to the sentencing stage if the defendant is found guilty. However, before the sentencing a probation officer carries out a pre-sentence investigation. Information regarding the defendant's background, criminal history, personal circumstances, and the specifics of the offense are all being gathered during this process. The probation officer puts together a report and recommends a sentence to the court. At that point, the judge is responsible for the sentencing hearing. Both the prosecutor and the defendant's side have the chance to present arguments along with relevant evidence about sentencing. Victim impact statements, character witnesses, mitigating circumstances, and other elements are included in this. When deciding on the proper punishment, the court takes into account the pre-sentence report, statutory guidelines, and other relevant data. The judge issues the punishment after taking into account all of the evidence. Federal sentencing may involve community service, probation, supervised release, fines, compensation to the victims, or any combination of these punishments. If there are significant or minor circumstances that call for an exemption from the sentencing guidelines, the court may do so. Finally, the defendant has the opportunity to appeal the verdict or punishment once it has been handed out. Legal mistakes that were made during the trial or sentence procedure are usually the basis for appeals. A successful

appeal could result in the case being remanded for a new trial or sentencing. However, federal sentencing can happen at different stages of the court case, based on whether the defendant enters a guilty plea or faces a trial. If a defendant agrees to plead guilty in return for a more lenient punishment, federal sentencing occurs right after the plea. However, a trial conviction takes place if the defendant is found guilty by a jury or judge in the trial and sentencing usually happens after the verdict is made.

### **3.) Potential for Bias**

When determining punishments, judges consider a number of factors in a defendant like the type and seriousness of the offense, previous criminal history, and sentencing guidelines. The main focus of judges during the process of sentencing includes ensuring that the punishment fits the crime and encouraging justice, rehabilitation, deterrence, and public safety. This process is where potential for socioeconomic bias is strongest: It can infiltrate the federal sentencing process by influencing judicial discretion, affecting pre-sentence investigation, access to legal representation, and sentencing options.

Judges could, for instance, believe that defendants from underprivileged backgrounds should receive harsher sentences or that defendants from wealthy backgrounds should receive lighter sentences. This is usually because judges are more financially and economically privileged than the litigant standing in front of them. Even though the criminal justice system claims to serve all members of society equally, it discriminates against lower class individuals, the majority of whom are minorities, increasing their likelihood of imprisonment and harsher sentencing than members of higher social classes. The disparity in offenses prosecuted, the differences in police treatment, and the disproportionate number of incarcerated minorities are the causes of this judicial and socioeconomic bias. In a study about crime and socioeconomic

status, Psychology Professor Nathan Brown stated, “The United States criminal justice system is in effect a funneling process from arrest to sentencing. This allows socioeconomic discrimination to occur at every stage of the process and therefore shapes the population of criminals that reach prison.” (Brown, 2002). In other words, if someone from a better and higher class gets arrested on drug charges, their behavior is more likely to be interpreted as a product of their circumstances which gives them access to options like probation and rehabilitation. In contrast, a poor person arrested on drug charges is usually perceived as a drug abuser and put to jail. Judges and jurors, under this biased system “are more likely to attribute the criminal behavior of those of high socioeconomic status to their dispositions, while they attribute the criminal behavior of those of high socioeconomic status to their situation.” (Brown, 2002). Additionally, less lawyers are taking pro bono cases, so it allows a smaller percentage of lawyers to serve the people most in need of legal services and it results with judicial discretion to be easily invaded by socioeconomic bias. This is a clear facet in the legal industry: “Less than eight percent of all lawyers are in any way concerned with criminal law... of the 800,000 lawyers in the United States less than one percent represent the indigent accused.” (Stone, 1991). Furthermore, socioeconomic bias creeps in pre-sentence investigation when probation officers find out, for example, that the defendant has a low-income background as well as a low education level.

Consequently, this can diminish poor people’s constitutional rights. In the United States v. Pineda-Moreno, the police appeared at Mr. Pineda-Moreno’s driveway in the middle of the night to install a GPS tracking device in his vehicle. Police were able to follow Mr. Pineda-Moreno’s movements with the GPS to conspire if he’s producing marijuana. Pineda-Moreno argued that his Fourth Amendment rights to search and seize were infringed by the police’s actions on his private property. The court disagreed stating that his property is “only

a semi-private area" (U.S v. Pineda Moreno, 2010) because there are no special features on his driveway like barriers. If Pineda-Moreno had been able to afford a gate, a garage, or some other method of hiding his car from the street, his privacy rights would have been protected. The Fourth Amendment's privacy safeguards were mentioned by Judge Kozinski. He talked particularly about the relationship between Fourth Amendment rights being restricted and poverty. Realizing that wealthy individuals can safeguard their privacy with "the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols." (U.S v. Pineda Moreno, 2010). Chief Judge Kozinski explained that those who are not able to afford such protections will be subject to police searches on their property. (Neitz, 2013).

#### **4.) Reform proposal**

A fair trial must be guaranteed to all plaintiffs regardless of their financial situation when they enter the courthouse. While solving this difficult problem might not be very simple, there are solutions that can help deal with these issues. The code created to govern the conduct, the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), falls short of fully abolishing implicit socioeconomic bias.

In order to eliminate this bias, judicial discipline is one way to do so in simple ways. To further explain, judges who violate the Code's ban on socioeconomic bias should be reprimanded or removed. Judicial discipline under the Code would not work as it stands. Given that implicit (and hence unconscious) prejudices account for the majority of judicial socioeconomic bias instances, judges may not be conscious of the mistakes they are committing. In fact, no one has advocated for penalizing the judges in the Ninth Circuit who showed implicit socioeconomic bias in the Pineda-Moreno case. Thus, it is unrealistic to penalize judges for their implicit prejudices. However, if "we should worry about decent judges who are susceptible to the same

sort of cognitive errors that affect the rest of us, instead of worrying about crooked judges." (Neitz, 1991) then how can the legal system (as well as judicial disciplinary processes) guarantee that decisions made by judges are impartial and fair? The ABA Model Code of Judicial Conduct is a document intended to regulate judicial behavior, thus it makes sense to use it to put stronger debiasing techniques into practice.

The implicit socioeconomic bias on the bench would be made more visible by a few adjustments to the Code. The Code's removal of socioeconomic bias from the list of discriminatory practices should focus attention on this issue, which has been lacking. Socioeconomic bias deserves its own sentence, not to be ranked as the second-to-last type of forbidden bias. By highlighting socioeconomic bias in this way, judges would be encouraged to consider the potential that their personal financial situation influences the decisions they make as judges. Furthermore, it would strengthen the position of plaintiffs by emphasizing how crucial it is that this type of bias be prohibited by the Code. With this stronger Code wording to back up their arguments, plaintiffs who feel socioeconomic bias improperly influenced their cases would probably feel more empowered to oppose a judicial decision. In addition, the issue of implicit prejudice must be mentioned in the Code. During the public comment process for the 2007 Code changes, this issue was brought up. Judge Mark Cady of the Iowa Supreme Court and Jennifer Juhler of the Iowa State Court Administrator's Office suggested the following improvements in a statement they submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct: "Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice." and "A judge should take part in activities designed to uncover subconscious bias and to learn as much about how to understand the role of such bias in decision-making."

Nevertheless, there are other ways to reduce implicit socioeconomic bias besides just making the Code clearer. Regular training should be required for all judges. For instance, within the first several weeks of a judicial appointment and again during the first year of appointment, all newly appointed judges in California are required to participate in two ethics courses. Federal judges and court staff can participate in continuing education programs offered by the Federal Judicial Center, and the federal judicial system's education and research organization. There are also updates on judicial ethics in these training sessions. Giving judges the chance to identify and deal with their own unconscious prejudices would be more beneficial since educating people about potential biases, encouraging them to examine their biases, and holding them responsible should have some impact on how bias manifests itself in conduct.

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