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## Socioeconomic Bias in the Judiciary

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# SOCIOECONOMIC BIAS IN THE JUDICIARY

MICHELE BENEDETTO NEITZ\*

## ABSTRACT

Judges hold a prestigious place in our judicial system, and they earn double the income of the average American household. How does the privileged socioeconomic status of judges affect their decisions on the bench? This Article examines the ethical implications of what Ninth Circuit Chief Judge Alex Kozinski recently called the “unselfconscious cultural elitism” of judges.\*\* This elitism can manifest as implicit socioeconomic bias.

Despite the attention paid to income inequality, implicit bias research and judicial bias, no other scholar to date has fully examined the ramifications of implicit socioeconomic bias on the bench. The Article explains that socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations. The Article reviews social science studies confirming that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias. The Article verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

The Article contends that the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the document designed to regulate the behavior of judges, fails to effectively eliminate implicit socioeconomic bias. The Article recommends innovative revisions designed to strengthen the Code’s prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial decisions, and will bring this issue to the forefront of the judicial agenda.

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\*\* *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting).

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#### I. INTRODUCTION

In the early 1970s, Robert William Kras asked the United States Supreme Court to allow him to proceed in bankruptcy court without paying the requisite filing fees.<sup>1</sup> Mr. Kras lived in a small apartment with multiple extended family members and his younger child was hospitalized with cystic fibrosis.<sup>2</sup> Mr. Kras had been unemployed for several years, after losing his job with a life insurance company when the premiums he had collected were stolen out of his home.<sup>3</sup> His wife had to give up her employment due to her pregnancy, and she was focused on caring for their ill son. The family lived on public assistance benefits and had no real assets.<sup>4</sup>

<sup>1</sup> *United States v. Kras*, 409 U.S. 434, 437 (1973).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 438.

Mr. Kras was indisputably living in poverty. Hoping to improve his prospects for future employment, Mr. Kras desired a discharge in bankruptcy. However, Mr. Kras was turned away before he even reached the bankruptcy courtroom because he could not afford the \$50 in filing fees to submit his bankruptcy petition.<sup>5</sup>

The Supreme Court denied Mr. Kras's request to waive his filing fees, holding that the statute requiring payment of fees to access bankruptcy courts did not violate the United States Constitution. The majority opinion, written by Justice Blackmun, noted that the filing fees, when paid in weekly \$1.92 installments, represented a sum "less than the price of a movie and little more than the cost of a pack or two of cigarettes."<sup>6</sup> Justice Blackmun declared that if Mr. Kras "really needs and desires [bankruptcy], this much available revenue should be within his able-bodied reach."<sup>7</sup> Using disparaging words such as "little more" and "able-bodied," the Court presumed that any individual could afford the \$50 filing fee.<sup>8</sup>

In dissent, Justice Thurgood Marshall declared the majority of the Court had demonstrated a fundamental misunderstanding of the lives of poor people.<sup>9</sup> Justice Marshall explained, "It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."<sup>10</sup> Despite the majority's apparent belief that poor people go to the theater on a weekly basis, Justice Marshall made clear that poor people rarely, if ever, see a movie.<sup>11</sup> Instead, the "desperately poor" must choose to use their limited funds for more important things, including caring for a sick child as Mr. Kras was required to do.<sup>12</sup> Justice Marshall rebuked his colleagues for their insensitivity to the plight of poor people: "[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how [poor] people live."<sup>13</sup>

Nearly forty years later, the Chief Judge of the Ninth Circuit echoed Justice Marshall with similar observations about the assumptions of his colleagues on the bench. In *United States v. Pineda-Moreno*, a Fourth Amendment case upholding the placement of a Global Positioning System (GPS) device on a defendant's car parked outside his modest home, the Ninth Circuit denied the defendant's petition for a rehearing en banc on his motion to suppress the GPS evidence.<sup>14</sup> Dissenting from

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<sup>5</sup> *Id.* This amount represents approximately \$250 in 2011 dollars. Deborah L. Rhode, *Thurgood Marshall and His Clerks*, in *IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* 314, 321 (Todd C. Peppers & Aremus Ward eds., 2012).

<sup>6</sup> *Kras*, 409 U.S. at 449.

<sup>7</sup> *Id.*

<sup>8</sup> Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond United States v. Kras*, 2 AM. BANKR. INST. L. REV. 57, 60 (1994).

<sup>9</sup> *Kras*, 409 U.S. at 460 (Marshall, J., dissenting).

<sup>10</sup> *Id.* (Marshall, J., dissenting)

<sup>11</sup> *Id.* (Marshall, J., dissenting).

<sup>12</sup> *Id.* (Marshall, J., dissenting).

<sup>13</sup> *Id.* (Marshall, J., dissenting).

<sup>14</sup> *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216-17 (9th Cir. 2010).

the denial of the petition for rehearing, Chief Judge Kozinski took the analysis one step beyond the case's constitutional implications.<sup>15</sup> Chief Judge Kozinski deplored the fact that his fellow Ninth Circuit judges failed to appreciate how their decision, allowing the placement of the GPS tracking device on the defendant's car because he had not shielded it from public view, would impact poor people differently than wealthy people. Constitutional interpretation should not give preference to wealthy individuals, yet "when you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep."<sup>16</sup>

Why do some judges overlook the impacts of their decisions on poor people? Chief Judge Kozinski posited that the reason lies in "unselfconscious cultural elitism."<sup>17</sup> Most likely, the *Kras* Court and the *Pineda-Moreno* majority were not actively attempting to create laws favoring the rich over the poor. But this consequence is one result of the lack of socioeconomic diversity on the bench.<sup>18</sup> Chief Judge Kozinski noticed that "No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity, or sex, are selected from the class of people who don't live in trailers or urban ghettos."<sup>19</sup> Accordingly, his colleagues did not appreciate that "the everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live."<sup>20</sup>

Justice Marshall and Chief Judge Kozinski acknowledged the difference between judges and most of their litigants: Judges overwhelmingly come from wealthy backgrounds, and many have never walked in the shoes of economically disadvantaged people.<sup>21</sup> In effect, elite judges may render decisions that negatively impact poor individuals simply because they do not recognize that they are doing so.

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<sup>15</sup> *Pineda-Moreno*, 617 F.3d 1120. For a full examination of this case, see *infra* Part III.A.

<sup>16</sup> *Pineda-Moreno*, 617 F.3d at 1123.

<sup>17</sup> *Id.* (Kozinski, C.J., dissenting).

<sup>18</sup> *Id.* (Kozinski, C.J., dissenting).

<sup>19</sup> *Id.* (Kozinski, C.J., dissenting).

<sup>20</sup> *Id.* (Kozinski, C.J., dissenting).

<sup>21</sup> Of course, there are some judges who overcame great poverty and other challenges to achieve their roles on the bench. See, e.g., Bob Egelko, *Federal Judge Nominee Troy Nunley Works His Way Up*, SAN FRANCISCO CHRONICLE, July 9, 2012, available at <http://www.sfgate.com/default/article/Federal-judge-nominee-Troy-Nunley-works-his-way-up-3692208.php?cmpid=emailarticle&cmpid=emailarticle#photo-3170832> (describing Judge Troy Nunley's path from childhood poverty to a judgeship). Judge Nunley, a Sacramento County Superior Court judge, was nominated by President Obama to the U.S. District Court in Sacramento on June 25, 2010. But such judges are a rarity, particularly in the prestigious federal courts. For example, Supreme Court justices disproportionately come from three Ivy League law schools: Harvard, Yale, and Columbia. SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010 (2010). Eight of the nine current justices attended one of those three law schools. *Id.* Moreover, as discussed *infra* Part II.A., even those judges who came from poverty now earn much higher incomes than average Americans.

Opponents seeking to deny Chief Judge Kozinski's charge of elitism may point to the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the model standard of ethics intended to provide guidance for judicial behavior.<sup>22</sup> The Code specifically prohibits judges from employing bias on the basis of socioeconomic status when adjudicating cases.<sup>23</sup> Judicial ethicists might therefore argue that Chief Judge Kozinski's observations about the wealthy positions of judges are irrelevant to judicial decision-making processes; judges may be wealthier than some litigants, but the Code forbids judges from being influenced by socioeconomic bias. Yet the Code's success in preventing socioeconomic bias is subject to some debate. For example, did the conduct of the Supreme Court majority in *Kras* or the Ninth Circuit panel in *Pineda-Moreno* rise to the level of bias?

This Article examines the ethical implications of the "unselfconscious cultural elitism" of judges.<sup>24</sup> Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people. These gaps have contributed to patterns of judicial decision-making that appear to be biased against poor people as compared to others.

Although judges are required to decide cases in a neutral and impartial manner, every judge may be influenced in some way by his or her personal beliefs. Many judges, aware of the potential for this influence, actively work to separate their judicial determinations from their personal opinions. In some cases, however, a judge's particular viewpoints may result in biased decision-making processes—whether or not the judge is aware that such bias exists. Bias is defined as "inclination; prejudice; predilection," and judicial bias is "a judge's bias toward one or more of the parties to a case over which the judge presides."<sup>25</sup> Moreover, judicial bias may be subtle and implicit.

Part II of this Article begins with consideration of the two manifestations of bias at issue in this context: Socioeconomic bias and implicit bias. Socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations.

Because socioeconomic bias is subtle, most judges do not explicitly display bias against poor people. Nonetheless, new scientific research confirms that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, Part II explains that even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias.

Part III verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

Part IV assesses the role of the ABA Model Code of Judicial Conduct (the Code) in the elimination of such bias. The Model Code is designed to ensure fairness and neutrality on the bench. This section recommends changes designed to strengthen

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<sup>22</sup> See generally MODEL CODE OF JUDICIAL CONDUCT (2011).

<sup>23</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

<sup>24</sup> *Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, C.J., dissenting).

<sup>25</sup> BLACK'S LAW DICTIONARY 183 (9th ed. 2009).

the Code's prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial deliberations, thus minimizing the impact of such biases on poor litigants.

## II. THE CHALLENGES OF IDENTIFYING IMPLICIT SOCIOECONOMIC BIAS

### A. *The Economic Status of Judges*

Judicial salaries are much higher than those earned by average Americans. Nearly all state and federal judges in the United States earn a six figure salary. For example, in 2010, district court judges earned a set salary of \$174,000, and circuit court judges made \$184,000.<sup>26</sup> Supreme Court justices make over \$200,000.<sup>27</sup> Depending on the jurisdiction, state court judges may make more or less than federal judges. For example, state appellate judges earn salaries ranging from \$105,050 in Mississippi (the state with the lowest paid state appellate judges) to \$204,599 in California (the state boasting the highest salaries for its appellate judges).<sup>28</sup> In 2010, the median household income was \$49,445.<sup>29</sup> Thus, judges earn more than double the income of the average American.

Like all people, judges are influenced by their economic backgrounds.<sup>30</sup> Since people are "more favorably disposed to the familiar, and fear or become frustrated with the unfamiliar," the wealthy positions of most judges may prevent them from fully appreciating the challenges faced by poor litigants in their courtrooms.<sup>31</sup> Low-income people "are not just like rich people without money."<sup>32</sup> Workers in low-wage jobs are often teetering on the edge of abject poverty: "They cannot save, cannot get decent health care, cannot move to better neighborhoods, and cannot send their children to schools that offer a promise for a successful future."<sup>33</sup>

<sup>26</sup> *Judicial Salaries Since 1968*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalariescJudi.pdf> (last visited Jan. 23, 2013).

<sup>27</sup> *Id.* Notably, federal judges have not received reliable cost of living pay increases in the last decade, and are paid less than some federal employees in the executive branch and banking industries. *Federal and Judicial Pay Increase Fact Sheet*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx> (last visited Jan. 23, 2013).

<sup>28</sup> NAT'L CTR. FOR STATE COURTS (NCSC), 36(2) SURVEY OF JUDICIAL SALARIES (Jan. 1, 2011). These differences can be attributed to the cost of living discrepancies among various states.

<sup>29</sup> *Income Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011), [http://www.census.gov/newsroom/releases/archives/income\\_wealth/cb11-157.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html). This amount represented a 2.3% decline from the median in 2009 as a result of the recent recession. *Id.*

<sup>30</sup> Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 53 (1985).

<sup>31</sup> *Id.*

<sup>32</sup> Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1049 (1969-1970).

<sup>33</sup> DAVID SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 4 (2005).

Additionally, living in poverty “creates an abrasive interface with society; poor people are always bumping into sharp legal things.”<sup>34</sup> Thus, for poor people, everyday living requires the “the ability to live with [the] unrelenting challenges and chronic instability of being poor.”<sup>35</sup> Judges, on the other hand, generally have well-paid and stable employment positions.<sup>36</sup> This discrepancy creates an economic imbalance in courtrooms that may result in socioeconomic bias.

The difference in economic status between judges and litigants has not gone unnoticed, and the public is increasingly equating wealth with the ability to obtain fairness in American courts. A recent survey by the National Center for State Courts found that Californians believe the level of fairness in state courts is least for those with low incomes and non-English speakers.<sup>37</sup> Nationally, 62% of Americans believe the courts favor the wealthy.<sup>38</sup>

These statistics reveal the importance of evaluating judicial socioeconomic bias in American courtrooms. If judges’ decisions are influenced—consciously or unconsciously—by their elite and privileged status, the public trust in the American judicial system will continue to be undermined. Conversely, increased judicial attention to the problem of socioeconomic bias will signal to the public that judges recognize the importance of justice for all litigants, regardless of economic class.

#### B. Socioeconomic Bias vs. Class Privilege

The elite status of most judges enables them to enjoy the benefits of class privilege, meaning that their life experiences are different than those of lower-income people.<sup>39</sup> Some judges may not recognize their privileged positions, since they “believe that their success is based on their individual merit, gaining the ‘supreme privilege of not seeing themselves as privileged.’”<sup>40</sup>

<sup>34</sup> Wexler, *supra* note 32, at 1050.

<sup>35</sup> Eden E. Torres, *Power, Politics, and Pleasure: Class Differences and the Law*, 54 RUTGERS L. REV. 853, 863 (2002) (citing Alan Wald, *A Pedagogy of Unlearning: Teaching the Specificity of U.S. Marxism*, in PEDAGOGY, CULTURAL STUDIES, AND THE PUBLIC SPHERE 125, 143 (Amitava Kumar ed., 1997)).

<sup>36</sup> Federal judges enjoy lifetime tenure. U.S. CONST. art. III § 1. Appointed federal judges may serve specific terms. 28 U.S.C.A. § 631(a), (e) (West 2012) (District Court judges appoint magistrate judges to their respective jurisdictions to eight-year terms); *cf.* CAL. CONST. art. VI, § 16(d)(2) (When vacancies arise on the California Supreme Court or a court of appeal, the Governor appoints judges who hold office until the first general election following their appointment.) By contrast, elected judges may have to run for election to retain their positions. CAL. CONST. art. VI, § 16(c) (California superior court judges are elected to 6-year terms.)

<sup>37</sup> NAT’L CTR. FOR STATE COURTS (NCSC), TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (Dec. 2006), available at [http://www.courts.ca.gov/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courts.ca.gov/documents/Calif_Courts_Book_rev6.pdf).

<sup>38</sup> Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007).

<sup>39</sup> See *supra* Part II.A.

<sup>40</sup> Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1195 (2008) (quoting PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 163 (1990)).



Nevertheless, the influence of class privilege may contribute to implicit assumptions about members of particular socioeconomic groups, resulting in class bias. For example, class privilege may rise to the level of bias in the case of a judge who “acquired his judicial predispositions through the sympathies instilled by a corporation practice and other schools of privilege.”<sup>41</sup> This type of judge is “conscientiously predisposed to favor privileged classes,” and may then “carr[y] that predisposition into every case by him considered.”<sup>42</sup> While it can be difficult to recognize these predispositions, “the conscientious judge who believes in class privileges and undemocratic distinctions is . . . more pernicious than the judge who is occasionally corrupt.”<sup>43</sup>

Class privilege may also manifest as the presumption that all persons have similar experiences, exemplified by Justice Blackmun’s assumption in *Kras* that all persons could afford the price of a movie.<sup>44</sup> Unlike ordinary citizens, judges have a duty to receive information, fairly assess it, and incorporate it into their judgments without bias.<sup>45</sup> A judge who adjudicates cases based on the implicit assumption that all persons are situated similarly to that judge is not properly assessing or investigating the facts of a given case. Treating all parties as though they were socioeconomically identical rises beyond privilege to the level of bias, precisely because judges have a duty to consider the unique facts of every case.

### C. The Challenge of Identifying Socioeconomic Bias

#### 1. The ABA Model Code of Judicial Conduct’s Prohibition of Socioeconomic Bias

The American Bar Association’s Model Code of Judicial Conduct is intended to provide disciplinary guidance to all full-time judges, as well as “anyone who is authorized to perform judicial functions,” including a “justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.”<sup>46</sup> Although the first Canons of Judicial Ethics (Canons) were released by the ABA in 1924, the specific prohibition of bias based on socioeconomic status was not added until 1990. During the 1974 revisions to the Code of Judicial Conduct, language was proposed that would have prohibited judges from treating indigent or welfare litigants differently from their nonindigent counterparts.<sup>47</sup> The Committee revising the Code rejected this proposal, believing that such a specific standard was not required when a judge was already directed to be “faithful to the law.”<sup>48</sup> Since this standard applied regardless of a litigant’s status

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<sup>41</sup> Theodore Schroeder, *Social Justice and the Courts*, 22 YALE L. J. 19, 25 (1912).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *United States v. Kras*, 409 U.S. 434, 449 (1973).

<sup>45</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.2 and R. 2.3 (2011).

<sup>46</sup> MODEL CODE OF JUDICIAL CONDUCT § I(B) (2011).

<sup>47</sup> E. WAYNE THODE, THE REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 51 (1973).

<sup>48</sup> *Id.*

as an indigent or otherwise, further elaboration of the standard was deemed “counter-productive.”<sup>49</sup>

A different view prevailed during the 1990 revisions to the Code, when the Committee chose to include a list of specific classes of prohibited biases on the premise “that a specific listing of examples of prohibited bias or prejudice would provide needed strength to the rule.”<sup>50</sup> Thus, by 1990, the rule prohibiting judicial bias changed from a general guideline concerning a judge’s general obligation to remain impartial into a specific rule with clear examples of the types of biases prohibited by the Code.

The most recent version of the ABA Model Code of Judicial Conduct, released in 2007, retained the list of examples of bias and added the categories of gender, ethnicity, marital status, and political affiliation.<sup>51</sup> Thus, Rule 2.3 now provides that judges shall not “manifest bias or prejudice,” including but not limited to biases based on “race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”<sup>52</sup> This enumerated list is not meant to be exclusive; the language “included but not limited to” indicates that the list of prohibited biases provides illustrative examples.<sup>53</sup>

The inclusion of socioeconomic bias as one of the specific examples of bias in the 1990 Code and subsequent revisions may certainly be seen as progress, since it brings judicial attention to the fact that this type of bias exists. However, this obscure form of bias is not clearly explained, leaving judges uncertain about what is meant by the phrase “socioeconomic bias.”

The term “socioeconomic” is defined by *Webster’s New International Dictionary* as “of, relating to, or involving a combination of social and economic factors.”<sup>54</sup> Without any explanation of what these “factors” may be, this vague general definition is ambiguous. Yet the Code’s drafters failed to define the term “socioeconomic” in the “Terminology” section of the Code, and it is not defined anywhere else in the Code.<sup>55</sup> The same is true for the term “bias,” which is also not defined in the Code’s “Terminology” section.<sup>56</sup>

The failure to define these key terms is problematic in a Code intended to provide guidance and serve as the basis for disciplinary procedures for judges. Assuming the Code’s drafters intended to prohibit judicial bias against the poor and

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<sup>49</sup> *Id.*

<sup>50</sup> LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 18 (1992).

<sup>51</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

<sup>52</sup> *Id.*

<sup>53</sup> MILORD, *supra* note 50, at 18. Judicial bias has been extensively studied in other contexts. See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2011) (empirical study of judicial bias revealed that “[j]udges, it seems, are human. Like the rest of us, they use heuristics that can produce systematic errors in judgment.”)

<sup>54</sup> WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d ed.1986).

<sup>55</sup> MODEL CODE OF JUDICIAL CONDUCT, Terminology (2011).

<sup>56</sup> A definition of the term “bias” was proposed, but rejected. Am. Bar Ass’n (ABA) Joint Comm’n to Evaluate the Model Code of Judicial Conduct, Summary of Teleconference Minutes (Nov. 17, 2003). The Code does list examples of manifestations of bias. MODEL CODE OF JUDICIAL CONDUCT R. 2.3, cmt. 2 (2011).

disadvantaged economic classes as well as the wealthy and privileged classes, it is unclear how these groups should be characterized. As a term, “the poor” can include “all races, colors, ethnicities, regions, and ages of people, although it is heavy on women and children . . . . in short, those who at some period of time populate the low end of the income distribution scale in the United States are indescribably varied and multifaceted.”<sup>57</sup> Yet, the Code makes no mention of how the term “socioeconomic” should be considered in this context. Thus, judges are prohibited from engaging in a type of bias that is undefined in the Code, raising concerns about the enforceability of the Code’s prohibition against socioeconomic bias.

## 2. The Unique Nature of Socioeconomic Bias

Socioeconomic bias is different from other forms of bias. First, this type of bias is distinctive because American law treats socioeconomic status differently than other identities. There is no fundamental right to be wealthy or “free of poverty,”<sup>58</sup> and the Constitution does not protect socioeconomic rights by assuring all Americans economic stability.<sup>59</sup> Unlike race or gender, poverty is not a classification deserving strict or intermediate scrutiny, and the federal government does not ensure full participation in the economic life of the nation.<sup>60</sup> Thus, there is no constitutional provision requiring judges to stop and carefully deliberate the impact of their decisions on poor people.<sup>61</sup> In addition, the focus of most legal scholars and activists on race, gender, and other bases for bias has “shifted attention away from socioeconomic class.”<sup>62</sup> For example, judicial ethics scholars have extensively considered racial and gender bias, but have placed little to no emphasis on socioeconomic bias in courtrooms.<sup>63</sup> In light of our country’s historical oppression of women and minority populations, this focus makes sense. However, the growing gap between rich and poor people in the United States demands renewed attention to the problem of judicial bias against the poor.<sup>64</sup>

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<sup>57</sup> Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 358 (2010) (citing JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 20-21 (2001)).

<sup>58</sup> Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 111 (2009).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 112-13.

<sup>61</sup> Similarly, there is no constitutional or statutory requirement for employers, government agencies, landlords, etc., to consider socioeconomic status in the same way as race or gender.

<sup>62</sup> Barnes & Chemerinsky, *supra* note 58, at 124.

<sup>63</sup> Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994) (“There is little research on the issue of poverty bias.”).

<sup>64</sup> The economic gap between rich and poor persons is rising in the United States. From 1973 to 2008, the top 1% of Americans saw their share of national income more than double, from 8% to 18%. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118(1) Q. J. OF ECON. (Feb. 2003) (updated to include the years 1998-2008). The 2008 financial crisis had a significant effect on the share of total net worth for American households: In 2010, the wealthiest 1% held 34.5% of the nation’s wealth, while the bottom

Second, and more problematic, is the fact that class bias is “much more elusive to define” than other forms of bias.<sup>65</sup> Poor populations are disproportionately people of color, and the “line between poverty and racial bias is very blurred.”<sup>66</sup> Judges rarely display explicit bias against poor litigants in courtrooms, and statements about poverty are deemed less inflammatory than racist or sexist comments made by a judge.<sup>67</sup>

Moreover, although a person may be born into poverty, the concept of the “American dream” implies that “unlike race and gender, poverty is not immutable.”<sup>68</sup> As a result, many members of society view poor people as responsible for their socioeconomic status.<sup>69</sup> This viewpoint has historical roots in the early American conception of poor people as lazy or immoral.<sup>70</sup> The poor have traditionally been stereotyped as “welfare queens” whose behavior merits the “reasonable suspicion and disdain of broader society.”<sup>71</sup> Poor persons who apply for welfare benefits may be viewed as “presumptive liars, cheaters, and thieves.”<sup>72</sup>

This stereotype has severe implications for the fate of poor people in the United States: If an individual’s laziness or immorality is responsible for making someone poor, why should society (and by extension the justice system) not treat poor people accordingly? The President’s Crime Commission issued a report in 1972

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half of American households held only 1% of all American wealth. Dan Froomkin, *Half of American Households Hold 1 Percent of Wealth*, HUFFINGTON POST, July 19, 2012.

<sup>65</sup> Barnes & Chemerinsky, *supra* note 58, at 125 (2009). Other types of biases, such as gender bias, may be more readily identifiable in the courtroom. For example, a New York judge’s statement in 1997 that “[E]very woman needs a good pounding now and then” is a clear manifestation of gender bias. *In re Roberts*, 689 N.E.2d 911, 913 (N.Y. 1997).

<sup>66</sup> Nugent, *supra* note 63, at 49.

<sup>67</sup> Manifestations of bias against the poor may be overlooked or unnoticed. For example, California Municipal Court Judge Stephen Drew was publicly admonished in 1995 for a number of improper judicial actions. Among the facts giving rise to Judge Drew’s admonishment was his failure to appoint counsel for an unemployed defendant, stating that he was potentially employable. Judge Drew ordered the defendant to apply for work to afford private counsel. This action demonstrated socioeconomic bias, but it alone did not result in disciplinary action; it was considered as only one of numerous improprieties committed by Judge Drew on the bench. Comm’n on Judicial Performance, *Judicial Performance Commission Issues Public Admonishment of Judge Stephen Drew (July 29, 1995)* (public admonishment release for Judge Stephen Drew of the Tulane County Municipal Court, Dinuba Division), available at [http://cjp.ca.gov/res/docs/Public\\_Admon/Drew\\_07-96.pdf](http://cjp.ca.gov/res/docs/Public_Admon/Drew_07-96.pdf).

<sup>68</sup> Barnes & Chemerinsky, *supra* note 58, at 122 (“The American Dream is that, through hard work, a person can rise from even a seriously disadvantaged background.”).

<sup>69</sup> *Id.* at 125.

<sup>70</sup> Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 407 (2010) (this viewpoint “has animated public discourse since the European settlement of North America and served to exclude the poor from equal participation in our civic life for over two centuries.”).

<sup>71</sup> Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 772-73 (2011).

<sup>72</sup> Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009).

recognizing the dangers of a system in which wealthy judges adjudicate criminal cases brought against poor litigants:

[M]any defendants are not understood by and seem threatening to the court and its officers. Even such simple matters as dress, speech, and manners may be misinterpreted. Most city prosecutors and judges have middle class backgrounds and a high degree of education. When they are confronted with a poor, uneducated defendant, they may have difficulty judging how he fits into his own society of culture. They can easily mistake a certain manner of dress or speech, [as] alien or repugnant to them, but ordinary enough in the defendant's world as an index of moral worthlessness. They can mistake ignorance or fear of the law as indifference to it. They can mistake the defendant's resentment against social evils with which he lives as evidence of criminality.<sup>73</sup>

Thus, judges are not immune from the influence of this stereotype.<sup>74</sup> In some cases, the fact that poor people are different than lawyers and judges may serve as the basis for socioeconomic bias in courtrooms. Judges, lawyers, and other officers of the court are perceived by themselves as hardworking, and they act in expected ways. Poor people may act or appear differently, which can be interpreted by judges as a failure to exhibit some of the admirable qualities of the members of the legal profession. Because the experiences of poor litigants are unfamiliar to judges, socioeconomic bias may infect a judge's own decision-making processes.<sup>75</sup>

For example, a study commissioned by the Georgia Supreme Court in the mid-1990's concluded that the justice system is biased against the poor.<sup>76</sup> According to an assistant district attorney who participated in the Georgia study, poor people were more likely to end up in court, notwithstanding their skin color, because "the problems lie not directly with race but rather with financial and social problems."<sup>77</sup> The study included "attitude surveys" of judicial officers, court clerks, and lawyers. Survey comments suggested that "[t]he real evil is not racial bias but lack of empowerment for the poor; [p]oor people of little education are victims of bias; [t]his is also a class/money problem; i.e.—the better dressed, educated, and wealthier litigants are treated better by everyone in the court system."<sup>78</sup> As the study noted, socioeconomic bias in courtrooms affects minority populations more seriously, since these populations are a "greater portion of the economically and educationally

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<sup>73</sup> Ochi, *supra* note 30, at 8 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 50 (1967)).

<sup>74</sup> Budd, *supra* note 71, at 773 ("This conception of the indigent influences judicial perceptions as well.").

<sup>75</sup> Nugent, *supra* note 63, at 49.

<sup>76</sup> Ga. Supreme Court Comm'n on Racial & Ethnic Bias in the Court Sys., *Let Justice be Done: Equally, Fairly, and Impartially*, 42 GA. ST. U. L. REV. 687, 700 (1996).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

disadvantaged.”<sup>79</sup> To compound the problem, persons living in poverty are increasingly marginalized and alienated from other members of society.<sup>80</sup>

Thus, those seeking to quantify socioeconomic bias on the part of judges face a daunting challenge: The elusive nature of socioeconomic bias, and the fact that it is often obscured by racial or gender bias, make it difficult to recognize. In fact, the more insidious form of socioeconomic bias is likely to be implicit—an unconscious bias against the poor on the part of the judges.<sup>81</sup>

Of course, many judges are sympathetic to the plight of the economically disadvantaged, and actively work to be aware of their own personal biases.<sup>82</sup> As discussed in Part II.C *infra*, this awareness may work to reduce the prevalence of biases against poor litigants in courtrooms.<sup>83</sup> However, not all biases are overtly recognized and consciously reduced; unconscious beliefs about poor people may play a larger role in judicial decision-making than has been previously acknowledged.

### 3. The Challenge of Identifying Implicit Bias

Any type of bias can be explicit or implicit. The term “explicit bias” is used to indicate that a person recognizes his or her bias against a particular group, believes that bias to be appropriate, and acts on it.<sup>84</sup> This is the type of bias that “people knowingly—and sometimes openly—embrace.”<sup>85</sup>

Explicit bias on the basis of race or ethnicity has declined significantly over time, and is now mostly viewed as “unacceptable” in society.<sup>86</sup> As discussed above, judges are prohibited by the ABA Model Code of Judicial Conduct from displaying such bias on the bench.<sup>87</sup>

Implicit bias is a more subtle form of bias. It is unintentional,<sup>88</sup> representing “unconscious mental processes based on implicit attitudes or implicit stereotypes which play an often unnoticed role in day to day decision-making.”<sup>89</sup> An individual

<sup>79</sup> *Id.* at 701.

<sup>80</sup> Budd, *supra* note 71, at 772.

<sup>81</sup> See *supra* Part II.C.

<sup>82</sup> Torres, *supra* note 35, at 854 (“ . . . it is important to think about the way in which working-class Chicana/o defendants, law students, and lawyers will be experienced by judges, juries, professors, and opposing council [sic] who may be of a different class, ethnic, or racial background.”).

<sup>83</sup> Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 963-64 (2006).

<sup>84</sup> Irene V. Blair et al., *Unconscious (Implicit) Bias and Health Disparities: Where do We Go from Here?*, 15 PERMANENTE 71, 71 (2011).

<sup>85</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

<sup>86</sup> Blair et al., *supra* note 84, at 71.

<sup>87</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.3(b) (2011).

<sup>88</sup> Blair et al., *supra* note 84, at 71.

<sup>89</sup> John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 3 (2010).

who is careful not to display explicit bias against a particular group may nonetheless be influenced by “situational cues,” such as a person’s accent or race, which are feeding unconscious stereotypes.<sup>90</sup> This type of bias is “largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly . . . that people have no time to deliberate.”<sup>91</sup>

Even those persons who diligently and consciously combat their own explicit biases may be influenced to act on the basis of unconscious prejudices.<sup>92</sup> This raises a particular problem for judges, who are directed by the Code to act free of bias and risk being accused of judicial misconduct if they make decisions in favor of one group over another. This also raises concerns for litigants in courtrooms, who may be disadvantaged by a judge’s prejudice without the litigants—or even the judge—being aware of it. For example, well-meaning judges may not intend to adjudicate cases in accordance with social stereotypes regarding the poor. However, the “caricature of the poor” may influence a judge’s decision “whether or not the courts consciously acknowledge the connection.”<sup>93</sup>

Thus, it is critical to recognize the role that implicit bias may play in judicial decision-making. But given the unconscious and automatic nature of implicit bias, how can its existence be identified or measured? Simply asking survey questions, as did the Georgia Supreme Court in the study referenced in Part II.C.2., may expose explicit bias but will not reveal the presence of implicit bias.

*i. The Implicit Association Test*

Recognizing this problem, a psychologist from the University of Washington developed the “Implicit Association Test” (IAT) in 1995 to measure unconscious biases.<sup>94</sup> The computerized test “seeks to measure implicit attitudes by measuring their underlying automatic evaluation.”<sup>95</sup>

The IAT can take different forms, and has been used in hundreds of studies spanning many disciplines.<sup>96</sup> The most common test “consists of a computer-based sorting task in which study participants pair words and faces.”<sup>97</sup> The test presumes

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<sup>90</sup> Blair et al., *supra* note 84, at 71; Mahzarin R. Banaji et al., *How (Un)ethical are You?*, 81 HARV. BUS. REV. 56, 57 (2003).

<sup>91</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006); *see also* Anthony G. Greenwald, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998) (“Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer’s awareness of that causation.”).

<sup>92</sup> Banaji et al., *supra* note 90, at 57 (implicit bias “is distinct from conscious forms of prejudice, such as overt racism or sexism.”).

<sup>93</sup> Budd, *supra* note 71, at 774.

<sup>94</sup> Banaji et al., *supra* note 90, at 57; Blair et al., *supra* note 84, at 71. For access to the IAT, *see Project Implicit*, <https://implicit.harvard.edu/implicit/demo/takeatest.html> (last visited Jan. 23, 2013).

<sup>95</sup> Greenwald, *supra* note 91, at 1464.

<sup>96</sup> Blair et al., *supra* note 84, at 72 (“including psychology, health, political science, and market research.”).

<sup>97</sup> Rachlinski et al., *supra* note 85, at 1198.

that participants will respond more quickly to a concept that has a stronger association for that particular individual.<sup>98</sup> Subjects are asked “to rapidly classify words or images displayed on a computer monitor as ‘good’ or ‘bad.’”<sup>99</sup> The speed with which the participants respond demonstrates the “well-practiced associations” they hold between a particular object and attribute, which essentially measures their implicit beliefs.<sup>100</sup> In other words, the researchers infer that “the larger the performance difference, the stronger the implicit association or bias for a particular person.”<sup>101</sup>

There is some scholarly dispute about the usefulness of IAT results in predicting actual behavior.<sup>102</sup> For example, some scholars argue that the IAT may not be a measure of unconscious bias, but rather a “subtle measure of conscious bias that study participants are unable to conceal.”<sup>103</sup>

Despite this debate about the IAT’s limitations, legal scholars have used IAT results over the last decade to examine implicit biases in antidiscrimination law,<sup>104</sup> including employment discrimination law,<sup>105</sup> and bias in jury selection.<sup>106</sup> One study, conducted in 2009, analyzed IAT results from a large sample of trial judges nationwide.<sup>107</sup>

Led by Jeffrey Rachlinski, a professor at Cornell Law, the study sought to understand why racial disparities persist in the criminal justice system. Judges were asked to complete the IAT in a form “comparable to the race IAT taken by millions

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<sup>98</sup> Blair et al., *supra* note 84, at 72.

<sup>99</sup> Irwin & Real, *supra* note 89, at 3. For example, in tests measuring implicit racial bias, white respondents tend to respond faster “when ‘black and bad’ items require the same response and the ‘white’ and ‘good’ items require another response, compared to when ‘black’ and ‘good’ responses are the same and ‘white’ and ‘bad’ responses are the same.” *Id.* at 72.

<sup>100</sup> IMPLICIT RACIAL BIAS ACROSS THE LAW 17 (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>101</sup> Blair et al., *supra* note 84, at 72.

<sup>102</sup> See, e.g., Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?*, 58 EMORY L.J. 1053, 1064 (2009) (“In IAT results, ‘levels of implicit bias consistently diverge from levels of conscious bias, but it is difficult to know whether that apparent divergence reflects a real underlying difference or is merely an artifact of the systematic understatement of levels of conscious bias. Conscious bias might well be underreported.”); see also Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons From “Big Judge Davis,”* 99 KY. L.J. 259, 321 (2010-2011).

<sup>103</sup> Banks & Ford, *supra* note 102, at 1111.

<sup>104</sup> Jolls & Sunstein, *supra* note 91.

<sup>105</sup> Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

<sup>106</sup> 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 (2010). For a comprehensive look at implicit racial bias in various areas of law, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100.

<sup>107</sup> Rachlinski et al., *supra* note 85, at 1232.



of study participants around the world.”<sup>108</sup> The study found that implicit biases on the basis of race were “widespread” among judges.<sup>109</sup> In addition, “these biases can influence their judgment.”<sup>110</sup> On a positive note, the study’s authors noticed that judges were aware of potential biases and, if motivated to do so, could compensate for implicit bias and avoid its influence.<sup>111</sup>

It is perhaps no surprise that “judges, like the rest of us, possess implicit biases.”<sup>112</sup> However, the results of the Rachlinski study present significant implications for judicial ethics guidelines, and the dialogue must be broadened in scope. If judges are found to harbor implicit biases based on race, it is reasonable to assume that implicit biases based on other factors, including socioeconomic status, may also subtly influence judicial decision-making.<sup>113</sup>

*ii. How Can We Measure Implicit Socioeconomic Bias?*

The IAT has not yet been used to analyze implicit *judicial* bias based on socioeconomic status. However, two recent studies used the IAT to analyze socioeconomic bias in other contexts.

The first study, published by the American Medical Association (AMA) in 2011, analyzed IAT scores in order to “estimate unconscious race and social class bias among first-year medical students” at the Johns Hopkins School of Medicine in Baltimore.<sup>114</sup> The IAT portion of the study used a race test and a “novel” social class IAT to identify implicit prejudices based on membership in upper or lower social classes.<sup>115</sup> The study included clinical vignettes based on race and social class, in order to analyze the “relationship between unconscious bias and clinical assessments and decision making.”<sup>116</sup>

The study produced striking results: 86% of the first-year medical students displayed “IAT scores consistent with implicit preferences toward members of the upper class.”<sup>117</sup> These results were “significantly different” from the student’s stated preferences, meaning that implicit bias was prevalent in a majority of the medical

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<sup>108</sup> *Id.* at 1209.

<sup>109</sup> *Id.* at 1225.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1232.

<sup>113</sup> Banaji et al., *supra* note 90, at 56 (2003) (at least 75% of IAT test takers show implicit biases “favoring the young, the rich and whites.”); *id.* at 58.

<sup>114</sup> Adil H. Haider et al., *Association of Unconscious Race and Social Class Bias with Vignette-Based Clinical Assessments by Medical Students*, 306 J. AM. MED. ASS’N 942 (2011).

<sup>115</sup> *Id.* at 942. The social class IAT used terms such as “wealthy,” “well-to-do,” “poor,” and “disadvantaged.” *Id.* at 943. This social class portion of the IAT has not yet been completely validated. *Id.*

<sup>116</sup> *Id.* at 944. The high and low socioeconomic class determinations were completed using patient occupations. *Id.*

<sup>117</sup> *Id.* at 949. 69% of the students displayed implicit preferences toward white people. *Id.*

students despite their spoken beliefs that they did not hold such prejudices.<sup>118</sup> These findings have important implications for the medical profession, since implicit social class biases held by physicians may be a contributing factor to disparities in the health care system.<sup>119</sup>

The second study, conducted by Irish professors from University College Dublin and the University of Limerick, was also published in 2011. This study sought to “establish the presence of prejudice against people from disadvantaged areas” in the context of social attitudes in Ireland, in order to examine how such prejudice creates “further social exclusion.”<sup>120</sup> The study’s authors created an IAT using pleasant and unpleasant words with pictures of Limerick city landmarks and disadvantaged areas.<sup>121</sup> Of the 214 Irish participants, 88 were residents of disadvantaged areas, while 126 were from other, more affluent areas.<sup>122</sup>

Like the AMA study, the Limerick study revealed significant implicit bias on the basis of socioeconomic status. In fact, all participants exhibited negative associations with persons from the disadvantaged parts of Limerick City.<sup>123</sup> Participants who themselves resided in disadvantaged areas were no less biased.<sup>124</sup> The portion of the study examining explicit bias found similar outcomes. All participants viewed persons from disadvantaged areas as “less concerned for others and less responsible” than individuals from non-disadvantaged areas.<sup>125</sup> The study’s authors concluded that residents of poorer communities face prejudice not just on the part of outsiders, but also from within their own communities.<sup>126</sup>

Hence both studies examining implicit bias based on socioeconomic class identified the presence of such bias, one in a group of American medical students and the other in an economically diverse group of Irish residents. Together, these results offer evidence to support the theory that implicit socioeconomic bias exists in varied populations.

There is no reason to believe that judges are exempt from implicit bias against the poor and disadvantaged. In light of the extraordinary discretionary power granted to judges in the United States, and the potential impact of judicial determinations on the lives of individual litigants, this possibility could hold

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<sup>118</sup> *Id.* The discrepancy between results showing implicit bias and self-reported explicit attitudes is a common feature of IAT tests. See IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 17-18

<sup>119</sup> Haider et al., *supra* note 114, at 949.

<sup>120</sup> Niamh McNamara et al., *Citizenship Attributes as the Basis for Intergroup Differentiation: Implicit and Explicit Intergroup Evaluations*, 21 J. CMTY. APPLIED SOC. PSYCH. 243, 246 (2011).

<sup>121</sup> *Id.* at 247.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 251.

<sup>124</sup> *Id.* Other IAT studies have also found individuals from “bias-affected groups” who “sometimes harbor implicit biases against their own group.” IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 18.

<sup>125</sup> McNamara et al., *supra* note 120, at 251.

<sup>126</sup> *Id.* at 252.

significant consequences for the fairness of the judicial system. It is also crucial to identify implicit biases because recognition of such bias may enable judges to minimize its influence.<sup>127</sup>

How can we measure whether implicit bias on the basis of socioeconomic status exists in American courtrooms? In the absence of systematic empirical data, this Article will examine cases demonstrating the prevalence of implicit bias against the poor in American courtrooms.

### III. IMPLICIT SOCIOECONOMIC BIAS IN FOURTH AMENDMENT AND CHILD CUSTODY CASES

#### A. *Implicit Socioeconomic Bias in Fourth Amendment Cases*

As the federal courts slowly chip away at the constitutional rights of poor people,<sup>128</sup> the implicit biases of federal judges who are removed from the realities of poor people are becoming increasingly apparent. This section will examine two recent Fourth Amendment cases through the lens of judicial socioeconomic bias. These cases reveal the failures of federal judges to appreciate the unique challenges faced by low-income populations.

The first case, *United States v. Pineda-Moreno*, is notable for the dissenting opinion written by Ninth Circuit Chief Judge Alex Kozinski.<sup>129</sup> The police came onto Mr. Pineda-Moreno's driveway in the middle of the night to attach a GPS tracking device to his car.<sup>130</sup> Using this device, police were able to track Mr. Pineda-Moreno's movements.<sup>131</sup> After he was charged with conspiracy to manufacture marijuana and manufacturing marijuana, Mr. Pineda-Moreno sought to suppress the evidence obtained from the GPS tracking device.<sup>132</sup>

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<sup>127</sup> Rachlinski et al., *supra* note 85, at 1225.

<sup>128</sup> See, e.g., *Sanchez v. Cnty of San Diego*, 464 F.3d 916 (9th Cir. 2006); see also Budd, *supra* note 71, at 751; Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

<sup>129</sup> *United States v. Pineda-Moreno*, 617 F.3d 1120, 1120 (9th Cir. 2010). Eighteen months after the opinion discussed in this Article was published, the United States Supreme Court held in *United States v. Jones* that attachment of a GPS tracking device to a vehicle, and subsequent use of the GPS device to monitor the vehicle's movements on public streets, was a Fourth Amendment search. *United States v. Jones*, 132 S. Ct. 945, at Syllabus (2012). In light of the *Jones* decision, the Supreme Court vacated the judgment in *Pineda-Moreno* and remanded the case to the United States Courts of Appeals for the Ninth Circuit. The Ninth Circuit held on remand that the police's conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent, and suppression of the GPS evidence was not warranted. *United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012). The Supreme Court denied a petition for writ of certiorari in the case on January 22, 2013. *Pineda-Moreno v. United States*, 133 S. Ct. 994 (2013). The ultimate disposition of this case does not impact the observations about socioeconomic bias made by Chief Judge Kozinski in his dissent to the denial of rehearing en banc. Nor does the Ninth Circuit's decision on remand affect the analysis described herein.

<sup>130</sup> *Pineda-Moreno*, 617 F.3d at 1121.

<sup>131</sup> *Id.*

<sup>132</sup> *Pineda-Moreno*, 591 F.3d at 1214, *vacated*, 132 S. Ct. 1533 (2012).

Pineda-Moreno claimed that the police actions on his property violated his Fourth Amendment search and seizure rights.<sup>133</sup> The court disagreed, reasoning that the driveway was “only a semi-private area,” and that “[i]n order to establish a reasonable expectation of privacy in [his] driveway, [Pineda-Moreno] must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it.”<sup>134</sup>

Pineda-Moreno’s petition for rehearing en banc was denied.<sup>135</sup> In his dissenting opinion, Chief Judge Kozinski noted the legal erosion of Fourth Amendment privacy protections. He specifically discussed the connection between poverty and diminished Fourth Amendment rights.<sup>136</sup> Recognizing that wealthy persons are able to protect their privacy with “the aid of electric gates, tall fences, security booths, remote cameras, motions sensors and roving patrols,” Chief Judge Kozinski explained that those who are not able to afford such protections will be subject to police searches on their property.<sup>137</sup> In contrast, if Mr. Pineda-Moreno had been able to afford a gate, a garage, or some other method of shielding his car from the street, his privacy rights would have been protected.<sup>138</sup>

Chief Judge Kozinski was clearly frustrated by his fellow judges’ failure to recognize how their ruling would impact poor people. The Ninth Circuit judges either did not understand or chose to ignore the fact that this decision created a two-tiered structure of privacy rights: Wealthy people with gates and garages would be protected from police incursion onto their properties, while poor people who parked on the street would be subject to police searches without Fourth Amendment protection. This is the crux of implicit socioeconomic bias: Judges without exposure to the lives of low-income people simply don’t appreciate the realities faced by poor individuals. As a result, these judges make critical legal decisions from a place of privilege, detrimentally impacting people from lower economic classes.

Similar implicit bias against the poor is apparent in *Sanchez v. County of San Diego*, another Fourth Amendment case.<sup>139</sup> San Diego County implemented a program in 1997 requiring all welfare applicants to consent to a warrantless home visit from an investigator.<sup>140</sup> This mandatory visit, which included an interview and a “walk through” the home by district attorney fraud investigators, was designed to ensure that applicants were not committing welfare fraud.<sup>141</sup> An applicant who

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (quoting *Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir. 1991)).

<sup>135</sup> *Pineda-Moreno*, 591 F.3d at 1215.

<sup>136</sup> *Pineda-Moreno*, 617 F.3d at 1123; *see also* Budd, *supra* note 71, at 765.

<sup>137</sup> *Pineda-Moreno*, 617 F.3d at 1123.

<sup>138</sup> *Id.*

<sup>139</sup> *Sanchez v. Cnty of San Diego*, 464 F.3d 916, 916 (9th Cir. 2006). When the Ninth Circuit denied Rocio Sanchez’s petition for rehearing en banc, Judge Harry Pregerson filed a dissenting opinion noting that, “This case is nothing less than an attack on the poor.” *Id.* at 969 (Pregerson, J., dissenting).

<sup>140</sup> *Id.* at 918.

<sup>141</sup> *Id.* at 919.

refused the home visit would be deemed as failing to “cooperate” and would be denied benefits.<sup>142</sup>

Welfare applicants filed a class action lawsuit claiming that the home visit program violated the U.S. and California Constitutions and California welfare regulations. The U.S. District Court held the program constitutional, relying on the U.S. Supreme Court’s determination in *Wyman v. James* that “rehabilitative” visits to welfare recipients’ homes were constitutional.<sup>143</sup>

When the case reached the Ninth Circuit, a divided panel affirmed the lower court’s decision. The majority opinion, written by Judge Tashima, equated San Diego County’s home visits with the rehabilitative home visits at issue in *Wyman*. Since the visits were not related to a criminal investigation, and welfare applicants could deny consent to the home visits without incurring criminal consequences, the majority held that the home visits were reasonable.<sup>144</sup> Additionally, the majority held that the County’s welfare system constitutes a “special need” beyond general law enforcement purposes, finding that, on balance, the government interests at stake justified the privacy intrusion of a home visit.<sup>145</sup> Judge Raymond C. Fisher dissented from the majority opinion, writing that the San Diego program in *Sanchez*, which allowed district attorney investigators with no social work training to enter welfare applicants’ homes for the purposes of fraud detection, differed from the rehabilitative visits at issue in *Wyman*.<sup>146</sup>

The majority opinion in *Sanchez* has significant implications for the privacy rights of poor people, and the case has been thoroughly considered in that context by other scholars.<sup>147</sup> From a judicial ethics perspective, the majority’s opinion exposes implicit socioeconomic bias and a profound disregard for the realities of poor people.

For example, explaining the court’s justification for the premise that home visits are not searches under the Fourth Amendment, Judge Tashima wrote that “there is no penalty for refusing to consent to the home visit, *other than denial of benefits*.”<sup>148</sup> But as the Supreme Court recognized in *Goldberg v. Kelly*, welfare aid represents “the very means by which to live” for poor people.<sup>149</sup> For many welfare applicants, receipt of benefits represents the difference between life and death. Yet in effect, the *Sanchez* court assumed that welfare applicants do not actually need benefits.<sup>150</sup> The

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 922-23; *Wyman v. James*, 400 U.S. 309, 320 (1971); *see also* Recent Cases, *Constitutional Law—Fourth Amendment—Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits—Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), 120 HARV. L. REV. 1996, 1997 (2007).

<sup>144</sup> *Sanchez*, 464 F.3d at 925.

<sup>145</sup> *Id.* at 927-928.

<sup>146</sup> *Id.* at 932 (Fisher, J., dissenting).

<sup>147</sup> *See* Budd, *supra* note 71, at 771 (2011); Recent Cases, *supra* note 143, at 1996.

<sup>148</sup> *Sanchez*, 464 F.3d at 921 (emphasis added).

<sup>149</sup> *Goldberg v. Kelly*, 297 U.S. 254, 264 (1970); *see also* Recent Cases, *supra* note 143, at 2002.

<sup>150</sup> Recent Cases, *supra* note 143, at 2002.

court's treatment of welfare aid as an option which can be easily denied "evinces a stark refusal to acknowledge the dire situation of welfare recipients."<sup>151</sup>

Judge Fisher's dissent, like Chief Judge Kozinski's in *Pineda-Moreno*, pointed out that the court's analysis would likely be different if it were the judges' own residences subject to intrusion by government investigators. Observing that the San Diego home visit program essentially permits "snooping" in "medicine cabinets, laundry baskets, closets and drawers for evidence of welfare fraud," Judge Fisher doubted "my colleagues in the majority would disagree that an IRS auditor's asking to look in such places within their own homes to verify the number of dependents living at home would constitute snooping."<sup>152</sup>

Judge Fisher's point highlights the implicit socioeconomic bias in this case. According to the majority, poor welfare recipients being forced to open their homes to government examination makes sense, since the government must ensure poor people are not committing fraud. But requiring wealthy individuals to do the same thing for purposes of detecting tax fraud would be unjustifiable.

Embedded in this line of reasoning is the unspoken belief that poor people are often dishonest and deserving of government inspection.<sup>153</sup> The *Sanchez* court, "while not confessing bias" in an explicit manner, demonstrated bias "without apology or pretense" and embraced "the stereotype of the immoral poor."<sup>154</sup> This is, of course, an unmistakable example of implicit socioeconomic bias.

Statements made during oral argument in *Sanchez* illuminate this point more clearly. Judge Kleinfeld, perhaps inadvertently, revealed a fundamental misconception of the lives of poor people:

I mean, you walk in and you see the \$5,000 widescreen TV, and the person says, "oh, I have all this trouble supporting my children 'cause I don't have a man to help me in the house, and there's obviously a man to help her in the house—and that's seeing if the charity is going where it's supposed to go . . . . And you open a closet and you see four suits . . . and the golf clubs of the person that doesn't live there, supposedly—same thing, isn't it?"<sup>155</sup>

As Professor Jordan Budd explains, when a federal judge adjudicating a welfare case "suggests that the question plausibly turns on the prospect of welfare recipients cashing government checks to help cover the cost of greens fees, business attire, and in-home theatre systems, the reality of judicial bias is apparent."<sup>156</sup> Even Judge Kleinfeld's choice of words is revealing: According to Supreme Court precedent, welfare benefits are not considered to be "charity."<sup>157</sup> Much like the Supreme Court

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<sup>151</sup> *Id.*

<sup>152</sup> *Sanchez*, 464 F.3d at 936.

<sup>153</sup> For a discussion of stereotypes about the poor, see *supra* Part II.C.2.

<sup>154</sup> Budd, *supra* note 57, at 406.

<sup>155</sup> *Id.* at 403.

<sup>156</sup> *Id.*

<sup>157</sup> Recent Cases, *supra* note 143, at 2001-02 ("The *Sanchez* majority, by dismissing the unconstitutional conditions doctrine—according to which 'government may not grant a

judges excoriated by Justice Marshall in *Kras* for their lack of awareness of the real challenges facing poor people, the majority in *Pineda-Moreno* and *Sanchez* came to their conclusions from mistaken assumptions about people who live in an economic class different from their own. These judicial assumptions have consequences; the implicit beliefs about poverty underlying these court opinions resulted in a substantial abrogation of the constitutional protections of poor persons.

### B. Implicit Socioeconomic Bias and Child Custody Determinations

Federal judges are not the only members of the bench who exhibit implicit socioeconomic bias. In family court, child custody determinations may also be affected by implicit judicial bias against poor parents.

The general standard for determining which parents should take custody of a child is the “best interests of the child” test, which “asks judges to determine custody ‘according to the best interests of the child’ and to ‘consider all relevant factors.’”<sup>158</sup> Most states and the District of Columbia provide statutory factors to be considered in such cases.<sup>159</sup> A handful of states draw the relevant factors from common law.<sup>160</sup>

Some states require judges to consider the capacity of a parent to provide a child with material needs, including food, clothing, and medical care.<sup>161</sup> It is certainly true that the ability to provide necessary resources should be considered in determining where to place a child.<sup>162</sup> But beyond these basic needs, most states do not include the wealth of either parent as a factor to consider in child custody cases. Indeed, a few states, such as California, prohibit judges from considering “the relative economic positions of two parents” as a “basis upon which to base a determination of child custody.”<sup>163</sup>

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benefit on the condition that the beneficiary surrender a constitutional right?—reverted to a pre-*Goldberg* vision of welfare.”).

<sup>158</sup> Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2075 (1993).

<sup>159</sup> See, e.g., D.C. CODE § 16-914(a)(3)(A)-(Q) (2001); ALASKA STAT. ANN. § 25.24.150(C)(1)-(9) (West 2012); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(I)-(XI) (West 2012); CONN. GEN. STAT. ANN. § 46b-56(c)(1)-(16) (West 2012); DEL. CODE ANN. tit. 13, § 722(a)(1)-(8) (West 2012); FLA. STAT. ANN. § 61.13(3)(a)-(t) (West 2012); GA. CODE ANN. § 19-9-3(a)(3)(A)-(Q) (West 2012); IDAHO CODE ANN. § 32-717(1)(a)-(g) (West 2012); 750 ILL. COMP. STAT. ANN. 5/602(a)(1)-(10) (West 2012); IND. CODE ANN. § 31-17-2-8(1)-(8) (West 2012); NEV. REV. STAT. ANN. § 125.480(4)(a)-(l) (West 2012); VA. CODE ANN. § 20-124.3(1)-(10) (West 2012).

<sup>160</sup> See, e.g., *Martin v. Martin*, 623 So. 2d 1167, 1169 (Ala. Civ. App. 1993); *Wagner v. Wagner*, 674 A.2d 1, 19 (Md. 1996); *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *Martin v. Martin*, 846 N.Y.S.2d 696 (N.Y. App. Div. 2007); *Johnson v. Johnson*, 163 S.E.2d 229, 232 (S.C. 1968); *Wiedenfeld v. Wiedenfeld*, 774 N.W.2d 288, 291 (S.D. 2009); *Vazquez v. Vazquez*, 292 S.W.3d 80, 85 (Tex. Ct. App. 2007).

<sup>161</sup> See, e.g., LA. CIV. CODE ANN. art. 134(3) (2012); MICH. COMP. LAWS ANN. § 722.23(c) (West 2012); VT. STAT. ANN. tit. 15, § 665(b)(2) (West 2012).

<sup>162</sup> Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 220 (2000) (“The view that financial resources are not relevant to children’s positive experience of life is rightly dismissed as ‘idealistic.’”).

<sup>163</sup> *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986); see also R.I. GEN. LAWS ANN. § 15-5-16(d)(2) (West 2012) (“In regulating the custody and determining the best interest of children,

Despite these statutory and common law guidelines, child custody is an area of adjudication with a great deal of judicial discretion.<sup>164</sup> This discretion may give “free reign to . . . distorting unconscious biases, resulting in custody awards that are not necessarily in the best interests of a child.”<sup>165</sup> Judicial discretion, coupled with the fact that most judges are economically privileged and may “exaggerate” the importance of wealth in a child’s life, creates the potential for implicit socioeconomic bias in child custody cases.<sup>166</sup>

For example, the Supreme Court of North Dakota recently reversed a child custody determination in *Duff v. Kearns-Duff*, holding that the lower court impermissibly relied on wealth as a relevant factor.<sup>167</sup> North Dakota’s statutory factors do not include the consideration of economic status,<sup>168</sup> and case precedent explicitly held that “money alone” does not signify a parent’s inclination to provide for the children.<sup>169</sup> Even so, the lower court in *Duff*, faced with making a “difficult choice for custody between two apparently fit parents,” resolved the case by relying on the parties’ recent financial contributions to the marriage.<sup>170</sup> Since the mother in *Duff* was a radiologist earning \$600,000 annually, while the father was enrolled in a doctoral program at North Dakota State University, the mother had supported the family “almost exclusively” for the last few years.<sup>171</sup> The lower court held that the mother’s income should be viewed in her favor, and granted custody to her.<sup>172</sup>

The father appealed to the state Supreme Court, arguing the lower court’s decision to award custody to the parent earning the most money was erroneous.<sup>173</sup> The Supreme Court agreed, rejecting the idea that a parent’s financial contribution to a marriage is rationally related to the best interests of the children.<sup>174</sup> The Supreme

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the fact that a parent is receiving public assistance shall not be a factor in awarding custody.”); OHIO REV. CODE ANN. § 3109.04(F)(3) (West 2012) (“When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent’s financial status or condition.”); VT. STAT. ANN. tit. 15, § 665(c) (West 2012) (“The court shall not apply a preference for one parent over the other because of the financial . . . resources of a parent.”).

<sup>164</sup> For an assessment of judicial ethics issues in juvenile courts, see Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97 (2011).

<sup>165</sup> Frantz, *supra* note 162, at 227.

<sup>166</sup> *Id.*

<sup>167</sup> *Duff v. Kearns-Duff*, 792 N.W.2d 916 (N.D. 2010).

<sup>168</sup> N.D. CENT. CODE ANN. § 14-09-06.2(1) (West 2012).

<sup>169</sup> *Duff*, 792 N.W.2d at 920 (citing *P.A. v. A.H.O.*, 757 N.W.2d 58 (N.D. 2008)).

<sup>170</sup> *Id.* at 921.

<sup>171</sup> *Id.* at 920.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 919.

<sup>174</sup> *Id.* at 920.



Court held that the lower court misapplied state law with its reliance on financial contributions, and remanded the case for reconsideration.<sup>175</sup>

The lower court's decision in *Duff* was clearly influenced by the belief that a wealthier parent is better able to raise her children. As the Supreme Court pointed out, this is not a legally correct assumption upon which to build a child custody determination. But the fact that the lower court defied case precedent to include wealth as a relevant factor indicates the presence of socioeconomic bias: The father was penalized solely for the fact that he made less money than his spouse.

This case exemplifies the complex nature of socioeconomic bias. The lower court arguably displayed explicit socioeconomic bias in his decision, since the mother's wealth was openly relied upon as the basis for the custody decision. However, neither the North Dakota Supreme Court nor any other observer has called for the lower court judge to be disciplined for socioeconomic bias. Thus, though the judge's assumptions about wealth were inaccurate, legally erroneous, and served as the basis for judicial bias, his assumptions were not questioned by judicial disciplinary authorities.

Yet, this is also a case of *implicit* socioeconomic bias; without any proof, the lower court judge presumed that wealth equaled the best interests of the children. Nothing in the case record would support this assumption. To reach this conclusion, the judge must have held an implicit belief that a wealthy parent is a better parent than a less wealthy parent.

A similar pattern of implicit socioeconomic bias is apparent in *West v. West*, a 2001 case.<sup>176</sup> In *West*, the Supreme Court of Alaska reversed a decision granting sole custody to a father on the ground that the father was going to remarry.<sup>177</sup> The mother relied on her parents to assist with caring for her child. She could not afford to stay home all day with her son, but instead needed to work for a living.

In a conclusory fashion, the lower court had accepted that living in a two-parent household, rather than with a less wealthy single working mother, would be in the best interest of the child. The Supreme Court vacated and remanded the case, holding that the lower court's "assumption that a divorced parent who remarries can provide a better home than an otherwise equally competent parent who remains single" is erroneous.<sup>178</sup>

The Supreme Court chastised the lower court judge for its "unexplained assumption that the added physical convenience of in-home care that [the child] might receive from his new second parent" outweighed the "less tangible, but potentially vital emotional benefits he might receive by maintaining his close and

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<sup>175</sup> *Id.* at 921.

<sup>176</sup> Some child custody cases demonstrate implicit socioeconomic bias with an erroneous emphasis on a parent's need to place a child in childcare while the parent works. See, e.g., *In re Marriage of Bryan and Shannan Loyd*, 106 Cal. App. 4th 754 (2003) (finding that trial court's decision based on fact that mother could provide better care for children because she was home during the day, in contrast to father's need to place children in daycare while he worked, was an abuse of discretion); *Ireland v. Smith*, 214 Mich. App. 235, 246 (1995) ("[T]rial court committed legal error in considering the 'acceptability' of the parties' homes and child care arrangements"; media frenzy surrounding case created an appearance of bias requiring a different judge to hear the case on remand. *Id.* at 251.).

<sup>177</sup> *West v. West*, 21 P.3d 838 (Ala. 2001).

<sup>178</sup> *Id.* at 839.

already-established ties to [his mother] and his maternal grandparents.”<sup>179</sup> The Supreme Court also found fault with the lower court for ignoring the potential stress that comes from living with a step-parent.<sup>180</sup>

The lower court judge in *West* manifested implicit bias based on socioeconomic grounds. The judge did not overtly cite financial considerations in his decision, and there was no evidence in the record that the child would receive superior care with his father and stepmother than with his single working mother.<sup>181</sup> Nevertheless inherent in the lower court’s conclusion that the father’s two-parent household “will be the better one for [the child]’s future”<sup>182</sup> is the implicit belief that a stay-at-home stepparent who could afford not to work would provide a better home than a working parent. If this belief were permitted to guide child custody determinations, the wealthier parent who could stay at home would always be deemed the better parent.

These cases raise troubling implications for family court adjudications. While some degree of judicial discretion is necessary in family court, judges should not be permitted to be influenced by stereotypes regarding the connection between economic wealth and one’s fitness as a parent. In addition, there are fewer published appellate opinions from family courts than from federal district courts.<sup>183</sup> As a result, litigants may not even be aware that their financial status is being inappropriately considered by the judge deciding their case. These risks highlight the need for action to address implicit socioeconomic bias in judicial determinations.

#### IV. PROPOSED RECOMMENDATIONS

The problem of implicit socioeconomic bias on the part of judges is increasingly recognizable, raising significant concerns for judicial ethics observers. Litigants must be assured of fairness when they enter a courtroom, regardless of their economic status. Although this elusive problem may not be easily resolved, the proposals discussed herein represent low-cost ways to address these concerns.

##### *A. Judicial Discipline: An Ineffective Solution*

A deceptively simple solution to the problem of implicit socioeconomic bias on the bench would be judicial discipline: Reprimand or remove those judges who violate the Code’s prohibition of socioeconomic bias. Unfortunately, judicial discipline under the Code in its current form would not succeed. Recognizing that most incidents of judicial socioeconomic bias are based on implicit (and therefore unconscious) biases, “judges may not be aware of the errors they are making. The result is still corruption and bias, but this explanation does not rely on some ethical

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<sup>179</sup> *Id.* at 843.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 842.

<sup>183</sup> In 2011, only twenty-two published appellate opinions originated from family courts. Westlaw search of database “California State Reported Cases” using search terms (DA(aft 12-31-2010 & bef 01-01-2012) & “family court”). In 2011, there were 422 published opinions from California District Courts alone. Westlaw search of database “California Federal District Court Reported Cases” using search terms DA(aft 12-31-2010 & bef 01-01-2012).

failing on the part of the judge.”<sup>184</sup> Indeed, no observer has called for disciplining the Ninth Circuit judges who demonstrated implicit socioeconomic bias in the *Pineda-Moreno* or *Sanchez* cases, or the judges in the child custody cases discussed above. Thus, disciplining judges for unconscious biases is not a realistic solution.

But if “instead of worrying about crooked judges, we should worry about decent judges who are susceptible to the same sort of cognitive errors that affect the rest of us,” how can the justice system (and judicial disciplinary systems) ensure that judicial decisions are fair and unbiased?<sup>185</sup> The natural place to implement more effective debiasing strategies is within the document designed to guide judicial behavior: The ABA Model Code of Judicial Conduct.

### B. Clarifying the ABA Model Code of Judicial Conduct

Several changes in the Code would bring awareness of implicit socioeconomic bias on the bench. First, the Code must properly define the term “socioeconomic” in its Terminology section. The definition should be more specific than that offered by *Webster’s New International Dictionary*,<sup>186</sup> and should include the following language:

Socioeconomic: of, relating to, or involving a combination of social and economic factors, including living situation, employment status, financial net worth, and family circumstances.

This expanded definition would instruct judges about the varied factors within the term “socioeconomic,” offering clear guidance to judges seeking to avoid socioeconomic bias on the bench. Moreover, because socioeconomic bias is often unconscious, expanding this definition would make judges more aware that this type of bias exists.

Second, the Code should bring much-needed focus to the problem of socioeconomic bias by removing this form of bias from the enumerated list of prohibited bias. Rather than being listed as the second-to-last form of prohibited biases, socioeconomic bias merits a separate sentence. A sentence should be included at the end of Rule 2.3(b) reading:

A judge shall pay particular attention to avoid bias or prejudice on the basis of a litigant’s socioeconomic status.

Singling out socioeconomic bias in this way would encourage judges to reflect on the possibility that their own economic status affects their judicial decision-making process. In addition, it would empower litigants by stressing the importance of the Code’s prohibition of this form of bias. Litigants who believe their cases were inappropriately influenced by socioeconomic bias would likely feel empowered to challenge a judicial determination with this stronger Code language to support their claims.

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<sup>184</sup> W. Bradley Wendel, Symposium, *Judicial Ethics and Accountability: At Home and Abroad: The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 38-39 (2010).

<sup>185</sup> *Id.*

<sup>186</sup> *See supra* Part II.C.1.

Third, the Code must include some reference to the problem of implicit bias. This issue was raised during the public comment period for the 2007 revisions to the Code. In a statement submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Jennifer Juhler of the Iowa State Court Administrator's Office and Judge Mark Cady of the Iowa Supreme Court recommended the following additions:

- (1) Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice.
- (2) 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. Each judge must be diligent to a process of self-examination to minimize the impact of personal bias in the administration of justice.<sup>187</sup>

These suggested comments were not adopted by the ABA Commission. In light of studies demonstrating the prevalence of implicit bias, as well as cases revealing implicit socioeconomic bias on the bench, the Commission's rejection of these comments was inappropriate. As the history of the Code of Judicial Conduct demonstrates, judicial standards should evolve with our new understanding of implicit bias.

Implicit bias may be difficult to identify, especially in the elusive form of socioeconomic bias, but the Code should bring awareness to judges that this type of bias may be pervasive. Inclusion of the comments above would pressure judges to consider implicit bias in all forms. Since many persons can overcome implicit biases with enough knowledge and intent to do so,<sup>188</sup> the Code's recognition of this problem would serve as a catalyst to persuade judges to minimize implicit bias on the bench.

### C. Judicial Trainings

Clarifying the Code is not the only way to minimize implicit socioeconomic bias. Indeed, some would argue that the impact of the Code is limited, since "[j]udicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct."<sup>189</sup>

Although judges may not regularly review the Code of Judicial Conduct, all judges must attend regular educational trainings. For example, every new judge in California takes part in two ethics courses within the first year on the bench, one within the first few weeks of a judicial appointment and the second within the first year of appointment.<sup>190</sup> Federal judges are also thoroughly trained in their first

<sup>187</sup> Jennifer Juhler, Domestic Abuse Coordinator, Iowa State Court Adm'r Office & Justice Mark Cady, Iowa Supreme Court, *Morality, Decision-Making, and Judicial Ethics* (not dated) (unpublished article submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct), available at [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/resources/comm\\_code\\_cady\\_undatedddt\\_summ.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/resources/comm_code_cady_undatedddt_summ.authcheckdam.pdf).

<sup>188</sup> Rachlinski et. al., *supra* note 85, 1225.

<sup>189</sup> Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

<sup>190</sup> Am. Bar Ass'n (ABA) Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Minutes of the Public Hearing and Meeting 180 (Mar. 26, 2004), available at [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/meetings/transcript\\_](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/meetings/transcript_)

years on the bench, with week-long orientation programs offered to district judges and separate trainings for appellate judges.<sup>191</sup> The Federal Judicial Center, the education and research agency of the federal judicial system, conducts continuing education trainings for federal judges and court employees.<sup>192</sup> These trainings include updates on judicial ethics.<sup>193</sup>

The National Center for State Courts, recognizing the pervasive nature of implicit bias on the bench, produced a film and other resources about implicit bias as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts.<sup>194</sup> This campaign includes: (1) an implicit bias "tool box" with resource materials to raise awareness; (2) a video discussing "implicit bias in the justice system; and (3) a curriculum/ follow-up discussion outline that can be tailored to specific jurisdictions."<sup>195</sup> It is encouraging to note that implicit racial and gender biases on the part of judges are increasingly recognized by scholars and judicial training experts. However, these training materials must be expanded to include implicit socioeconomic bias.

Admittedly, not all forms of judicial training may be useful. Simply learning about unconscious bias generally may not change judicial behavior.<sup>196</sup> It would be more valuable to provide judges the opportunity to recognize and address their own implicit biases, since "making someone aware of potential biases, motivating them to check those biases, and holding them accountable should have some effect on the translation of bias to behavior."<sup>197</sup>

An effective training model would therefore include the presentation of an Implicit Association Test to judges, specifically designed to test implicit socioeconomic bias. The IAT test has been characterized as "a powerful and personalized starting point in educating about implicit bias."<sup>198</sup> Once judges discover that they may hold implicit biases against the poor, the training should provide explanatory hypotheticals to demonstrate how this implicit bias can affect

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032604.authcheckdam.pdf. Even a temporary judge in California must receive mandatory training in judicial ethics. CAL. RULES OF COURT GOVERNING TEMP. JUDGES R 2.812(c)(2) (2007),

<sup>191</sup> *The Federal Judicial Training Center Offers Training and Research*, FED. LAW., Oct. 2009, at 36-37, available at [http://www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/\\$file/FedL1009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/$file/FedL1009.pdf).

<sup>192</sup> *About the Federal Judicial Center*, FED. JUD. CTR., <http://www.fjc.gov/>.

<sup>193</sup> FED. LAW., *supra* note 191, at 36-37.

<sup>194</sup> *Implicit Bias in the Judicial System*, AM. BAR ASS'N, [http://www.americanbar.org/groups/litigation/initiatives/good\\_works/implicit\\_bias\\_in\\_the\\_judicial\\_system.html](http://www.americanbar.org/groups/litigation/initiatives/good_works/implicit_bias_in_the_judicial_system.html).

<sup>195</sup> *Id.*

<sup>196</sup> Banks & Ford, *supra* note 102, at 1100 ("[G]reater awareness of unconscious bias would not prompt courts to strike down practices that, for a variety of reasons, they don't want to strike down.").

<sup>197</sup> Sande L. Buhai et. al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, 185 (2011).

<sup>198</sup> McKoski, *supra* note 102, at 321.

judicial determinations. The cases discussed in Part III, *supra*, would provide glaring examples of this effect. Finally, rather than simply admonishing judges to avoid the influence of this bias, the judges should be asked to brainstorm about concrete ways to minimize implicit socioeconomic bias in their own decision-making processes. In this way, judges can create their own methods to combat implicit biases. The ideas generated during these brainstorming sessions could be shared with other judges in subsequent trainings. Regardless of the specific format, judges must be made aware of the prevalence of implicit socioeconomic bias on the bench.

Off-site visits represent another way for judges to combat implicit biases. Studies show that implicit biases are “malleable” and may be reduced through exposure to examples that go against stereotypes.<sup>199</sup> Federal judges visit federal prisons as part of their orientation programs, in order to “view firsthand the conditions that defendants they sentence will confront.”<sup>200</sup> Similarly, judges could visit low-income neighborhoods to learn more about the struggles faced by poor persons in their jurisdictions. Housing court judges could visit housing projects and other low-income homes. The *Pineda-Moreno* majority may have benefited from visiting the home of Mr. Pineda-Moreno; seeing the street where Mr. Pineda-Moreno parked may have sparked an understanding of the differences between his life and theirs.

#### V. CONCLUSION

When Justice Marshall retired, one of his colleagues on the bench observed that Justice Marshall “characteristically would tell us things that we knew but would rather forget; and he told us that we did not know due to the limitations of our own experience.”<sup>201</sup> Some judges need to be reminded that their own experiences are often limited to the world of the privileged elite. Without those reminders, the discrepancy between rich judges and poor litigants can result in socioeconomic bias.

Studies showing the pervasive nature of implicit bias highlight the need to devote more attention to identifying socioeconomic bias in its implicit form. Indeed, a review of Fourth Amendment and child custody cases reveals that this bias is indeed present in American courts. It falls squarely within the role of the ABA Model Code of Judicial Conduct to alert judges to the problem of implicit socioeconomic bias. However, without specifically defining the term “socioeconomic” or even addressing implicit bias, the Code in its current form is failing in this task. Revising the Code and requiring training would help to put the issue of implicit socioeconomic bias on the judicial agenda.

The widening social and economic gap between America’s rich and poor must remain outside the doors of our courtrooms. Judges may enjoy the privileges of economic wealth in their personal lives, but they have an obligation on the bench to further the fact and appearance of fairness in their decision making.

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<sup>199</sup> Greenwald & Krieger, *supra* note 83, at 963-64.

<sup>200</sup> FED. LAW., *supra* note 191, at 36-37.

<sup>201</sup> Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).