

The Decisive Moment: Addressing Implicit Bias in the Law and Legal Profession

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Good morning Everyone. I would first like to thank the Onondaga County Bar Association (OCBA) and everyone associated with the planning of this program. Thank you for inviting me to participate and speak with you today. My discussion addresses broad themes about the profession regarding diversity, inclusion and implicit bias. These issues transcend any particular area of law practice, but my focus is especially on the criminal justice system.

Recently, I gave a talk entitled, “The Decisive Moment: Facing Ourselves and Facing Each Other on the Critical Path to Racial Justice.” This was an address as part of the inaugural Johnnie Mae Chappell Civil Rights Symposium and the scholarship that will bear her name. It was held at Florida Coastal Law School, in Jacksonville, FL, in September. I want to reprise parts of this talk with you this afternoon.

You should know a little about Johnnie Mae Chappell. First, about her life: She was 35 years old in March 1964. She was an African American woman, who was a loving wife and mother of 10 children. She worked hard as a housekeeper, engaging in honorable work. She was loved by her community and her large extended family. She was not a civil rights activist in the overt demonstrative ways we’re accustomed to defining activists. She held the dignity of someone who did their best in providing for her family, encouraging them, having faith in them, and leaving a legacy of love and perseverance. In a word, she was like any one of us, the majority of us – doing our best in the circumstances of our lives and seeking to make it better for those whom we love.

On March 23, 1964 – a fateful day – she had stopped to get a treat for her youngest child, Shelton, who was 4 mos. old at the time. On her way home, she discovered that she had dropped her wallet. As she retraced her steps along the highway, forces of racist hatred collided with her world, shattering it for her and her family.

Four men – J.W. Rich, Elmer Kato, Wayne Chessman, and James Alex Davis – drove by and by their own admission, “were looking for a *Black person* to shoot.” Of course, they used more choice language to describe Black people. And they later changed their stories. This shooting took place in the context of racial protests that were happening in downtown Jacksonville as Black citizens asserted their right to vote, their right to equal protection, and their equal rights in all areas of the local social and economic structure.

Mrs. Chappell’s case, unlike so many of the other cold cases from the civil rights era, was not a “whodunit” case. The perpetrators’ identities were readily known. There was even an admission of guilt. Instead, this was a case of devaluation of a Black woman’s life, first through

the casually callous racist acts of the perpetrators who took her life. This devaluation was compounded by intentional and negligent mishandling of the investigation by Florida law enforcement despite heroic efforts by Detectives Cody and Coleman to uncover the facts, and finally by the minimal sanction meted out by the all-White jury that convicted only one of the men – J.W. Rich – of negligent homicide, the lowest level of criminal homicide, despite an indictment on first degree murder. There was the inexplicable dismissal of charges against Elmer Kato, Wayne Chessman, and James Alex Davis for “lack of sufficient evidence.” J.W. Rich shot at a defenseless woman from a moving car with a shotgun. He served only 3 years in prison for this intentional act of hatred.

In 2008, CCJI began working with the Chappell family to investigate possible bases for reopening the case. We discovered that investigative records were not kept or were no longer available, making it impossible to go forward with a new case in state or federal court. While a new case or charges against the other defendants was unlikely, we nevertheless sought to provide information and answers to the family regarding the determinations that were made in the case with respect to charging and other critical decisions. The tampering with and absence of records made this task challenging.

Despite ostensible legal proceedings, justice remained elusive in the Chappell case. This is why we continue to focus on her case, her life and her legacy. And those of numerous others, who have received much less attention or process, in holding perpetrators or the legal system itself accountable for the untold numbers of unsolved racially motivated killings during the civil rights era.

And so, we continue to work for justice on behalf of all families – under the Emmett Till Civil Rights Era Unsolved Crimes Reauthorization Act, which is currently before Congress. It was in this context that I discussed “the decisive moment” in Jacksonville and discuss it with you now, not only for the civil rights era crimes which have been committed largely with impunity, but also for the legacy of a bias-laden system that continues to devalue Black lives and deny justice on the basis of race. As we live and breathe today, the “decisive moment” is once again upon us. Pun intended.

The concept of “the decisive moment” comes from the theory of the iconic photographer Henri Cartier Bresson. As Cartier Bresson says, “Photography is the simultaneous recognition, in a fraction of a second, of the significance of an event as well as of a precise organization of forms which give that event its proper expression.” To properly capture the situation, Cartier Bresson instructs that “you have to be sure that you have not left any holes, that you’ve captured everything, because afterwards, it will be too late.” It means approaching a situation, image, or person, with openness, without preconceived notions. “It is possible,” stresses Cartier Bresson, “indeed necessary, to *educate your eye*.”

As a photographer myself, I have always found value in this concept, in various contexts, for as Cartier Bresson says, “There is nothing in this world that does not have a decisive moment.” I return to this theme in talking to you today because it seems evident to me that we are at a decisive moment in our history, our society, our community, and most certainly, in our profession. We must educate our eyes to the realities before us in terms of longstanding and

present concerns about racial justice and all its intersectional dimensions. We are a nation in crisis. A justice crisis.

The great sociologist scholar Dr. W.E.B. DuBois wrote in *The Souls of Black Folk*, that “The problem of the twentieth century is the problem of the color line.” DuBois was talking about the time preceding, during and especially immediately following the Civil War, when legions of newly emancipated formerly enslaved persons were left to face the promise but also the vicissitudes of freedom on their own. The Reconstruction Amendments – the 13th (abolishing slavery), the 14th (citizenship, due process, and equal protection), and 15th (voting rights for Black men) – were passed, but were largely unenforced and Black men, women and children were unprotected from former slave owners who continued to deny their personhood, citizenship and right to control their franchise, their labor, and their destiny. Legislative efforts and the creation of institutions, including the Freedmen’s Bureau in 1865, were designed to provide legal, educational, material, and social resources for Black citizens to enjoy and prosper from their new status. There were many accomplishments during the post-bellum era and under the Freedman’s Bureau, including the growth of Black religious, social, educational, and financial institutions. But implementation and resourcing of the agency was lackluster, consumed by fraud, and generally disorganized, so that it failed to meet the needs of the masses of Black people to surmount the structural caste system of racial and economic injustice that pervaded the country.

Who amongst any of us would dare to disagree that DuBois’ observation in the 20th Century is ever true today? Do we also not see today the need to recognize the “decisive moment” in a series of events – deadly events – that have plagued our society since its inception, and that have taken on greater urgency in recent times as they have proliferated in virtually every geographical corner of American society and has focused our eye on the destructive, brutal force of racism and racist violence in US society. In my own work, this is reflected by the ongoing need for identification of victims and accountability for the perpetrators of racist violence during the civil rights era of the 1960s, and the current scourge of police and civilian killings of mostly unarmed Black and Brown men and women, generally without consequence.

As members of our profession, these matters must concern us greatly. As the title suggests, “The Decisive Moment” requires “*Facing Ourselves* and *Facing Each Other* on the Critical Path to Racial Justice.”

Let us focus on the issues of policing and communities of color:

By now, we know the ever-growing list of names:

Trayvon Martin

Michael Brown

Tamir Rice

Eric Garner

Laquan McDonald

Freddie Gray

Walter Scott

Keith Lamont Scott

Samuel Dubose

Jonathan Sanders

Philando Castile

Paul O'Neill

Terence Crutcher

Victor Larosa

And we know the places:

Ferguson, MO

Minneapolis, MN

Baltimore, MD

North Charleston

Charlotte

Cincinnati

Mississippi

Chicago

Tulsa

Jacksonville

Yes, all of the situations are different, but they bear a striking similarity in the dubiousness of police accounts of the need for lethal force, often precipitously used against Black subjects. In these decisive moments, the Black male body was seen as intrinsically menacing and worthy of death, no matter the allegation, the infraction, or the reality of innocence. Officer Darren Wilson, for instance, justified the murder of Michael Brown, who was unarmed, upon describing that he “looked like a demon.” A *demon*? One hears the echoes of 14-year-old Emmett Till – *He didn't look like a boy*, said his killers. And Rodney King – *He had superhuman strength*, said the LAPD officers who beat him mercilessly. These are all rationalizations informed by our society's racist past and present that has inculcated such stereotypical views about Black men into the national psyche. These tropes are so powerful and so justifying, that even video footage of victims with their hands up, or of shots in the back while running away, or of excessive force, do not overcome them.

Organizations such as the Washington Post have kept statistics on law enforcement killings. Reports reveal that in 2015, police officers killed at least 102 unarmed Black people. In that year alone, 37 percent of unarmed people killed by police were Black, while Black people constitute only 13 percent of the US population. In only 10 of the 102 cases where an unarmed Black person was killed, were officers charged with criminal offenses.

In as much as the wrenching recitation of the names of so many Black men evokes outrage, it is not the complete story. The Black Lives Matter Movement did important and necessary work in revealing the travesties of these killings, forcing a national conversation and legal reform. Black women also have suffered these injustices, however. The organization, Say Her Name, co-founded by law professor Kimberlé Crenshaw, has documented Black women's experiences of police brutality, often lethal, which has received far less attention. Their numbers also continue to grow.

Black women's experiences of police violence are similar to that of Black men, and also can be compounded by sexual abuse. We know also that Black women who are lesbians or transgender can be specifically targeted where gender-race-sexuality intersect and form the justification for violence and abuse. One need only recall the treatment of Sandra Bland, whose brutal treatment for a traffic stop in Waller County, TX, captured on video the violence perpetrated against Black women, who often are viewed as less deserving of humane treatment by law enforcement.

In 2015, at least six Black women were killed in encounters with police. As Say Her Name reports, "Just before Freddie Gray's case grabbed national attention, police killed unarmed Mya Hall – a Black transgender woman – on the outskirts of Baltimore. Also, in April 2015, police fatally shot Alexia Christian while she was being handcuffed in the back of a police cruiser.

Rekia Boyd, was 22 years old when off-duty Chicago Det. Dante Servin ended her life on March 21, 2012. Servin approached a group of friends in a Chicago Park around midnight and complained of noise. He never identified himself as a police officer. When the group turned to leave, Servin – angry – fired several shots from a semiautomatic weapon into the group from his car. He shot from over his shoulder, hitting one member of the group in the hand, and shooting Rekia Boyd in the back of the head. The officer was ultimately acquitted of manslaughter charges, and the City was forced to settle a \$4.5 Million civil suit. CCJI worked with the family of Rekia Boyd to examine the questionable practices of the State's Attorney and the Chicago Police Review Board, as well as the judge's decision in the case.

So, to the Michael Browns, also add:

Rekia Boyd

Alexia Christian

Shanetel Davis

Miriam Carey

Malissa Williams

LaTonya Haggerty

Michelle Cusseaux

Pearlier Golden

Kayla Moore

Tarika Wilson

Janisha Fonville

Yvette Smith

Meagan Hockaday

...and many others.

Despite the diversity in their life experiences, as my colleague Prof. Michael Pinard at the University of Maryland School of Law has stated, “they mirror the countless Black men, women, boys and girls whose daily and long-ignored experiences, stories, shouts, whispers and cries” are represented in reports such as the Civil Rights Division of the United States Department of Justice report on the Baltimore Police Department. DOJ reported that out of 300,000 reported stops by the Baltimore Police Department between 2010 and 2015, only 3.7 percent resulted in any kind of citation or arrest. This suggests that rather than the constitutional standard of reasonable suspicion, these stops were motivated by unlawful grounds rooted in bias and stereotype. As DOJ reported, the Baltimore Police Department “has long violated the constitutional rights, dignity, and humanity of Baltimore’s Black residents.” According to DOJ, “racially disparate impact is present at every stage of BPD’s enforcement actions, from the initial decision to stop individuals on Baltimore streets to searches, arrests and uses of force.” This takes place on a daily basis, where “officers relentlessly stop, search, interrogate, disrespect, arrest and abuse them because they are someplace where the officers have decided and dictated they do not belong – even on a public street, on the grounds of a public housing development or on their front steps. The DOJ report concluded that Baltimore police supervisors “explicitly condoned trespassing arrests that do not meet constitutional standards.”

Baltimore, of course, is not unique. The pain and distrust expressed by the citizens there are endemic in other communities and are found in the culture of racism – explicit and implicit racism – that so many members of communities of color experience in interactions with law enforcement. There is Ferguson, of course. There also is Syracuse, as recent events reveal.

In *Floyd, Clarkson, Dennis, Ourlicht and Class vs. City of New York*, Judge Shira Scheindlin ruled against New York City’s “stop and frisk” practice in her 2013 decision. Using the Police Department’s data, she found that “the NYPD made 4.4 million stops between January 2004 and June 2012. Over 80 percent of these stops were of Blacks or Latinos. They were stopped and questioned, often on a public street. They were also frisked more than half the time. A weapon was found in only 1.5% of these frisks.” She continued, “That means, that in 98.5% of the 2.3 million frisks, no weapon was found.” Findings in the case included the facts that:

Eight percent of all stops led to a search of clothing – ostensibly for a weapon or contraband. In 9 percent of these searches, a weapon was felt. In 91 percent of the time, it was not. In 14 percent of the searches, contraband was felt. In 86% of the time, it was not. Six percent of all stops resulted in an arrest, and 6 percent resulted in a summons. 88% of the 4.4 million stops resulted in no further law enforcement action. Greater force was used against Black and Latinos who were stopped, compared to whites.

Apropos the situations in New York, Chicago and elsewhere, as the DOJ report concluded, the Baltimore Police Department evinced a “cultural resistance to accountability.” As Prof. Pinard says: “Sit with that for a moment.” As Pinard incisively points out, “Reform is not enough...Reform does not peel away ‘cultural resistance.’ Culture is ingrained: it is a shared set of values that develops and sets in over time. As a result, the existing law enforcement culture must change.” New York Times columnist Charles Blow put it this way: “We can no longer afford to buy into the delusion that this moment of turmoil is about discrete cases or their specific disposition under the law. *The system of justice itself is under interrogation. America as a whole is under interrogation.* ... This moment is about the enormous, almost invisible structure that informs [an officer’s response, Black people’s desire to flee for their lives, Black parents anxiety about the safety of their children].” Blow continues, the moment is about “the enormous, almost invisible structure that informs those fears – the way media and cultural presentations disproportionately portray Black people, Black men in particular, as dangerous and menacing and criminal.” We must ask, how else do we explain the death of Terence Crutcher, in Tulsa, when Officer Betty Jo Shelby expressed that she was “overcome with fear that [Crutcher], who had not responded to her order and was walking away from her with his hands up, was going to kill her.” A single gunshot to the chest. The officer was charged with heat-of-passion manslaughter.

Lest you think this moment only pertains to African Americans, consider that Tom Angel, the now former Chief of Staff in the Los Angeles County Sheriff’s Department, resigned after he was found to share a series of racist and sexist jokes with other law enforcement agents between 2012 and 2013. The Los Angeles Times reported on 15 pages of emails with jokes about Muslims, Catholics, Latinos, African Americans and women.

And in San Francisco, one of the most diverse cities in perhaps the most diverse state in the nation, the Department of Justice just completed a report citing the Police Department for its treatment of African Americans. Namely, the police were criticized for the use of force in traffic stops. Calling them “significant deficiencies,” the report found there was a “24 percent higher chance that African Americans were pulled over by police given the overall percentage of Black drivers in the city.” (Mayor Edwin M. Lee, requested the review after SF officers fatally shot Mario Woods, an African American man in 2015. The Woods incident on December 2, 2015, involved the 26-year-old’s refusal to drop a knife upon officer’s command, but as he was walking away from officers with his arms at his sides when he was killed. There were at least 15 shots fired by 5 officers at Woods. Later, in May, another SF officer fatally shot Jessica Williams, 29, an African American woman who was unarmed. She was suspected of driving a stolen car. There was also the killing of Luis Gongora, 45, who was holding a knife, was shot by an officer within 30 seconds of arrival on the scene.) There have been a number of questionable

shootings of African Americans and Latinos in recent years. Nine of 11 instances of deadly force from May 2013 to May 2016, involved people of color. The report found that while Blacks and Latinos were more likely to be stopped (more than any other racial/ethnic group), they were *less* likely to be found with contraband. The report made 272 recommendations. Chief among them were properly documenting use-of-force episodes and consistently implementing policies and training related to officers' use of force. These concerns are compounded by the Department's behavior in sending racist and homophobic text messages about residents of San Francisco.

On Tuesday (10/12/16), the Supreme Court heard argument on a case involving jury deliberations that were infected by racial or ethnic bias. The case, *Pena Rodriguez v. Colorado*, arose from statements made during jury deliberations in a 2010 sexual assault trial. According to other jurors' sworn statements, one of the jurors stated, "I think he did it because he's Mexican, and Mexican men take whatever they want." The dilemma is between the secrecy of jury deliberations and the Sixth Amendment's guarantee of an impartial jury. One does not know the outcome of the case and obviously, *Batson* [*Batson v. Kentucky*] was not enough of a protection to ferret out this juror's racial animus. But imagine being the accused in a case in which such a statement is made. What do you imagine that means in terms of the fairness of the decision-making in your case?

So, next, let us focus on the profession itself: Why should this concern us, in the legal profession? Our country is riven with division, on virtually every front. The Presidential campaign and those on state and local levels, as well, bear this out starkly. With seemingly so little to bind us – in perception, if not in reality – the rule of law becomes even more important. Law is supposed to be the principle in which all citizens can find respect even if they do not prevail in a given dispute or on a given policy or legislative issue. But law falls short and confidence is broken when the institutions that are supposed to ensure fairness are equally riven with bias. Unfortunately, that is the state of the profession and its institutions.

The concerns raised by these issues are part of a constellation of problems that belie the stated and constitutionally enshrined beliefs in equality and equal opportunity. As the NYS Bar Association's Diversity and Inclusion committee put it: "Issues of race – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system, educational differences, mistrust of minority ethnic groups or religions, bias crimes, police conduct, overt discrimination, and even implicit or unintended bias by well-meaning people – remain among the most critical and divisive issues of our time."

Our profession should be leading the way, but even amongst organizations that recognize that these issues are important, our profession lags behind others – in hiring, promotion, and leadership positions of women and people of color. A 2014 report by the New York City Bar includes statements from 55 law firms that signed a public statement of commitment to enhance diversity and inclusion revealed: "New York City law firms continue to experience higher rates of attrition among minority and women attorneys: 23.6% of minority attorneys and 21.3% of women of all levels of seniority left signatory firms in 2014, compared to 14.7% of white men."

As the report further recognized, “The results do not arise in a statistical vacuum.” The accounts from attorneys of color and women attorneys describe professional experiences in which they are constantly made to feel their “otherness” within a predominantly white male environment. These experiences stem from subtle and implicit bias to overt forms of discriminatory speech and behavior and are not confined to the law office itself, but also to the larger society in which we live. For instance, included in the report was the account of one African American attorney who reported that police officers had stopped and aggressively questioned and/or frisked him dozens of times over the years, including within a block of the firm’s offices...and when he was wearing normal business attire. Isn’t it astounding and profoundly disturbing, to say the least, that almost every African American man, no matter what profession, lack of profession, attire – business or casual, activity or non-activity...under any circumstances, tells story after story of being stopped by police in this country. This includes stories by the *President of the United States* and the former Attorney General of the United States. If there are any tennis fans here or if you followed the news, you might remember that in 2015, the tennis star James Blake stood talking on his cell phone in front of the Grand Hyatt Hotel in midtown Manhattan during the U.S. Open when a plain clothed police officer rushed him and threw him to the ground. Arrested. Wrong man. Unarmed. Excessive force. The officer did not report the arrest. The public only knew about it because of the video and James Blake’s public statement. Blake: Harvard educated. Should that matter? Was that the difference? Was that the reason why the Mayor and the Police Commissioner issued immediate public apologies? Even if he were the right suspect, was the treatment warranted?

These are practical, legal, as well as ethical concerns. Bar associations across the country recognize the importance, as demographics in the nation change and as we are all increasingly part of an interwoven global community. There is *value* to diverse viewpoints and skills in the legal profession and in society broadly. The Department of Justice has found it critical to address these matters and earlier this year instituted a requirement for Implicit Bias Training for lawyers and investigators. The ABA, too, has found it imperative to address these issues, reflected in passage of Resolution 109, which amends Model Rule of Professional Conduct 8.4 that finds professional misconduct for lawyer discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” New York and other states are following suit by considering amendments to their rules of professional ethics and conduct.

As I have focused on today, the concerns around implicit bias have particular import in the area of criminal justice. Implicit bias in the criminal justice system can determine issues of policing, legal representation of victims and defendants, employment, hiring and promotion decisions, jury deliberations, and sentencing determinations, including stark differences between liberty and life.

This is the decisive moment. We must decide what it means to have a shared vision of the humanity of all members of our society and community. What it means and what it takes to create a city and region in which everyone participates and has access to justice, resources, *air*, food, housing, employment, *safety*, hopes and dreams. We cannot simply recount these stories of real-life experiences or our professed intentions to do better. We must indeed do better.

The body of literature is pretty replete – we all have some form(s) of bias. Most of it is unconscious. The good news is that it does not have to remain that way. We do not have to remain biased. Awareness is the key – we must train our eye, as Cartier Bresson might say. Tools such as the Implicit Association Test or “IAT” help to reveal various unconscious associations with implicit, invidious bias and stereotypes. Law professors Sue Bryant and Jean Koh Peters have provided important insights and information for legal education and the legal profession in their article, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *Clinical Law Review* 33 (2001).

Bryant and Koh’s Five Habits can form the basis of cross-cultural training for legal professionals: (1) Degrees of Separation and Connection (recognizing similarities and differences between selves and clients to see how misunderstandings, biases or stereotypes might arise, and to recognize points of commonality). (2) The Three Rings (involving a deeper examination into the ways in which cultural values and norms in the law may affect the client as well as the attorney-client relationship in order to devise more effective legal strategies). (3) Parallel Universes (considering multiple or alternative reasons for a client’s behavior, rather than negative assumptions). (4) Pitfalls, Red Flags, and Remedies (promoting culturally sensitive communication by identifying potential areas of misunderstanding and preparing potential responses to correct misimpressions or difficulties in communicating between attorneys and clients). And (5) The Camel’s Back (involving self-reflection and awareness of one’s own biases in order to eliminate or reduce negative impact on the attorney-client relationship).

These and many other tools are available to us.

This is a decisive moment. A critical moment. We must do better. I believe that not only is the safety and well-being of citizens and members of law enforcement at stake; not only is the rule of law at stake; but I believe democracy itself is at stake the longer we refuse to face ourselves and face each other. There must be confidence and trust based on transparency and accountability by all actors in our legal system.

The good news is that not only are we capable, but if your presence today is any indication, we are also willing. We care – about our society, our neighbors, and our profession. It can be dispiriting, but I refuse to despair that we cannot and will not right this ship. I believe that you – young lawyers, new lawyers, experienced lawyers, *all* lawyers – are part of the solution to ensure that the law applies equally to everyone and to create a society that is fair, inclusive and respectful of all persons.

Thank you.