THE FICTION OF INTENT:

WHY THE EQUAL PROTECTION CLAUSE IS INCAPABLE OF REMEDYING INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

This article analyzes the way the discriminatory intent requirement, which the U.S. Supreme Court has read into the 14th Amendment's Equal Protection Clause, shields institutions of criminal justice, such as law enforcement, from allegations of racial discrimination, and it looks to pragmatism for potential solutions. The paper begins with an assertion that people of color are treated more harshly in the criminal justice system. The paper then examines the U.S. Supreme Court's de facto discrimination case law: its failure to account for implicit bias in criminal justice decision-making, and its narrow focus instead on legal positivism and formalism jurisprudence. Lastly, using a combination of pragmatism, legal realism, and critical race theory, the paper explores potential solutions for those who would challenge racial discrimination in the age of mass incarceration. With the increasing availability of social science and behavioral psychology to explain how discrimination happens in decision-making, both individually and systemically, this article argues that the legal system should begin to use these tools to begin to address the disparate treatment of people of color in the criminal justice system.

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This article was written by Erin in her personal capacity. The opinions expressed in this article are the author's own and do not reflect the view of the Oregon Judicial Department, the Oregon Court of Appeals, or any judge or staff at the Oregon Court of Appeals.

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INTRODUCTION

The racial disparity in the criminal justice system has received increased media attention lately, in large part due to the increased availability of video footage on social media that showcases police killings of unarmed black Americans.[83] Renewed popular attention forced policing and criminal justice reform as major issues during the 2016 presidential election. Hillary Clinton's official position was to push for reform through lowering mandatory minimum sentencing, dismantling the school-to-prison pipeline, and ending the increasing privatization of prisons.[84] Donald Trump repeatedly self-identified as the "law and order candidate," called for a reinstatement of New York's infamous stop-and-frisk practice in cities across the country,[85] promised to get tougher on crime, and said that racial profiling is "not the worst thing to do."[86] Now, with a Trump administration set to take over the U.S. Department of Justice and seat at least one Supreme Court Justice, it is imperative

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[83] For instance, the killings of Michael Brown, Eric Garner, Walter Scott, Alton Sterling, Philando Castile, Freddie Gray, and many others. *See, e.g.* Daniel Funke and Tina Sussman, "From Ferguson to Baton Rouge: Deaths of black men and women at the hands of police," *LA Times*, July 12, 2016, http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html.

[84] *See* HillaryClinton.com "Criminal Justice Reform" https://www.hillaryclinton.com/issues/criminal-justice-reform/, July 18, 2016.

[85] Lauren Carroll, "Donald Trump and Lester Holt clash over whether stop-and-frisk is constitutional in New York," *Politifact.com*, September 28, 2016, http://www.politifact.com/truth-o-meter/statements/2016/sep/28/donald-trump/debate-donald-trump-says-stop-and-frisk-constituti/.

[86] Emily Schultheis, "Donald Trump: US must 'start thinking about' racial profiling," *Face the Nation,* June 19, 2016, http://www.cbsnews.com/news/donald-trump-after-orlando-racial-profiling-not-the-worst-thing-to-do/.

that legal scholars and practitioners already concerned about racial bias in the criminal justice system work harder than ever to find meaningful ways to challenge racial bias, particularly hard-to-prove forms of bias, such as unconscious or implicit bias.

The first step is admitting we have a problem. An overwhelming amount of data exists that shows people of color are treated more harshly along the entire spectrum of the criminal justice system, from arrests and sentencing to parole and probation decisions.[87] In this paper, I have limited the focus to examine only arrests, though a similar analysis could be made at any other decision point. Using critical race theory, this paper examines how the "intent requirement"—or the requirement that a plaintiff prove a racially discriminatory intent in order to legally establish racial discrimination—has actually insulated the criminal justice system as a whole from claims of racial discrimination. I start with a survey of the data showing that, in fact, a problem exists. Next, I discuss the Supreme Court's *de facto* discrimination doctrine, with a focus on the formalism and legalism jurisprudence at play in the decisions.[88] Lastly, using a combination of pragmatism, legal realism, and critical race theory, I look for potential solutions for

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[87] *See, e.g.* "Fact Sheet: Trends in U.S. Corrections," The Sentencing Project, December 2015, http://www.sentencingproject.org/publications/trends-in-u-s-corrections/.

[88] The seminal case for the discriminatory intent requirement is *Washington v. Davis*, 426 U.S. 229 (1976), which will be discussed in a later section of this paper, along with its progeny.

those who would challenge racial discrimination in the age of mass incarceration today.

I. THE PROBLEM

In 2015, Multnomah County, Oregon (of which Portland is the largest metro area) was chosen alongside larger cities such as New York and Los Angeles to participate in the MacArthur Foundation's Safety and Justice Challenge.[89] As a condition of the grant, participating jurisdictions were required to compile data specific to the racial and ethnic identities of those involved with the criminal justice system at various "decision points," or key moments when officials are required to use discretion.[90] The report was released in early 2016 and showed racial disparities at every single decision point.

Take for instance the first decision point: arrest. This point reflects police officers' decisions in who to approach, confront,

[89] Maxine Bernstein, "MacArthur Foundation awards Multnomah County grant to create fairer jail system," *The Oregonian*, May 27, 2015, http://www.oregonlive.com/portland/index.ssf/2015/05/macarthur_foundation_awards_mu.html.

[90] "Racial and Ethnic Disparities and the Relative Rate Index (RRI): Summary of the Data in Multnomah County," Safety + Justice Challenge, prepared by Jennifer Ferguson, Ph.D., available at https://multco.us/file/48681/download (hereinafter, "RED Report"). Two decision point models were used. The first, provided by the MacArthur Foundation, outlined seven decision points: Arrest, Prosecutorial Charging, Assignment of Counsel, Pretrial Release, Case Processing, Disposition and Sentencing, and Post-Conviction Supervision. The model used by police in Multnomah County, identified eight decision points: Community/Pre-Arrest, Pre-Booking, Booking, Arraignment, Jail/Courts, Re-Entry, Community Corrections/Support: Probation, and Community Corrections/Support:Parole. For the purpose of the report, first system of decision points guided the data, and the second was overlaid to correlate.

apprehend, and arrest. Interestingly, actual arrest data was not made available for this report for reasons that are not explained in the report; in lieu of actual arrest data for the first decision point, the authors looked at the number of cases referred to the Multnomah County District Attorney for prosecution.[91]

The numbers are shocking. For every 1,000 white people in Multnomah County in 2014, 36.1 individuals had cases referred to the District Attorney (DA); for every 1,000 black people, 153.1 cases were referred.[92] That means that black people in Multnomah County are 4.2 times more likely than white people to have an encounter with police referred to the DA for prosecution, either because they are being arrested at a rate 4.2 times higher than white people, or because the police refer them for prosecution at a rate 4.2 times higher, or some combination of the two. Black people were also 2.8 times more likely than white people to be arrested instead of receiving a citation in lieu of arrest.[93]

The trend in Multnomah County maps with national statistics, which show that people of color are disproportionately

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[91] RED Report at 6. Because this data came from the prosecutor, this data point also allowed researchers to also see when a person referred to prosecution had been issued a citation in lieu of arrest.
[92] RED Report at 7.
[93] Id. The comparison between white and black people shows the greatest disparity at this decision point. The referral rate for Hispanic people is slightly higher than that of whites, at 1.1 times higher, and the referral rate for both Native Americans and Asian/Pacific Islanders is a fraction of that for whites. The citation-in-lieu rates for Hispanic people, Native Americans, and Asian/Pacific Islanders are all lower than for whites.

arrested relative to white people. In 2006, an average African American was 2.5 times more likely to be arrested than an average white person.[94] When controlled for drug crimes, which we must in the age of the War on Drugs, the rate of African Americans arrested jumped to 3.5 times that of whites.[95]

Why is the criminal justice system in America so racially disparate? The simple answer is to say that the crime rate for black people is higher than for white people: in other words, that black people commit more crimes.[96] This answer insulates the criminal justice system itself from any blame, and assumes that if the data shows black people are arrested more often, they must be guilty more often. This rationale, however, does not hold up under examination. African Americans are 3.5 times more likely to be arrested for a drug crime, but people of all races have been shown to use drugs at remarkably similar rates. If anything, white youth are more likely to use and sell drugs than black youth.[97] And even if the

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[94] Christopher Hartney and Linh Vuong, "Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System," National Council for Crime and Delinquency, 3, March 2009, http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.
[95] Id.
[96] This rationale was implied by Donald Trump during the 2016 presidential election when he tweeted a graphic of false crime statistics that asserted, among other things, the number of whites killed by black people is 81%. *See* John Greenberg, "Drumpf's Pants on Fire tweet that blacks killed 81% of white homicide victims," *Politifact*, November 23, 2015, http://www.politifact.com/truth-o-meter/statements/2015/nov/23/donald-trump/trump-tweet-blacks-white-homicide-victims/.
[97] *See, e.g.* U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Summary of Findings from the 2000 National Household Survey on Drug Abuse,* NHSDA series H-13, DHHS pub.

statistics are later proven to be wrong, the argument is tautological. If crimes by white people are less likely to be reported or prosecuted, then of course the crime rate would be higher for black people than for white people because the crime rate only reflects those crimes that are prosecuted.

Pushing past the simple answer requires that we begin to grapple with the flaw in what many probably take for granted as the foundation of our modern legal system: equal protection. The United States Constitution guarantees all people equal protection under the law,[98] and the Supreme Court has forbidden racial discrimination except in the most compelling circumstances.[99] How could this very same legal system produce a system of punishment that has such a disparate effect on people of color?

Michelle Alexander articulates a two-step process for how we got here, which is worth examining. "The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring

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no. SMA 01-3549 (Rockville, MD: 2001), reporting that 6.4 percent of whites and 6.4 percent of blacks were illegal drug users in 2000.

[98] U.S. CONST. amend. XIV, § 1.

[99] One of the only circumstances in which racial discrimination is permitted is within prisons, where the government may racially segregating prisoners in order to prevent racial gang violence. Johnson v. California, 543 U.S. 499 (2005). Otherwise, the Court has rejected even benign discrimination. *See, e.g.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (rejecting a school's use of racial classification to bring racial balance to Seattle school district because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

that conscious and unconscious racial beliefs will be given free reign."[100] Fourth Amendment cases have held that, as long as police officers can identify a factual pretext for stopping a suspect, those stops are constitutional.[101]

The second step is that the Court has "[c]lose[d] the courthouse doors to all claims by defendants and private litigants that the criminal justice system operates in a racially discriminatory fashion [by d]emand[ing] that anyone who wants to challenge racial bias in the system offer, in advance, clear proof that the racial disparities are the product of *intentional* racial discrimination."[102] How and why the Court came to settle on discriminatory intent as the benchmark for racial discrimination is discussed at length below.

II. THE INTENT REQUIREMENT

The Equal Protection Clause of the Fourteenth Amendment guarantees all citizens the right to equal protection of the laws. Many of the most important Civil Rights era victories were fought and won in this legal arena.[103] However, essentially three main anti-

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[100] THE NEW JIM CROW, 103 (2010).
[101] *See Terry v. Ohio*, 329 U.S. 1 (1968) (setting a very low constitutional bar for police in requiring only "reasonable suspicion" for a stop); *see also* Whren v. United States, 517 U.S. 806 (1996). It is hard to talk about discrimination in arrests by police without discussing the Court's Fourth Amendment precedent, and the effect it has had on the disparate impact jurisprudence. Because the scope of this paper is limited to Equal Protection, Fourth Amendment jurisprudence is given only a cursory review, however, a more robust paper would examine the interplay between the two.
[102] Alexander at 103 (emphasis added).
[103] See, e.g. Brown v. Board of Education, 349 U.S. 294 (1955); Loving v. Virginia, 388 U.S. 1 (1967);

discrimination cases have insulated the criminal justice system from all but the most overt claims of racial discrimination.

First, *Washington v. Davis*[104] laid the groundwork by articulating the "discriminatory purpose" requirement. In that case, the plaintiffs were two black men who applied to be police officers in the District of Columbia. The police department required that all applicants take a written test, which was proven to have no relation to the actual job and which disqualified large numbers of African American applicants.[105] Plaintiffs challenged the test requirement as a violation of equal protection. Showing a breathtaking lack of imagination, the Court admitted it had "difficulty understanding how a law establishing a racially neutral qualification for employment [could be] nevertheless racially discriminatory."[106] In doing so, the court set the benchmark standard that plaintiffs challenging facially neutral laws had to prove the government had a "discriminatory racial purpose."[107]

Proving a discriminatory purpose would require plaintiffs, or defendants challenging their criminal convictions, to have access to discovery related to an allegedly discriminatory government practice. However, in a later case, the Court declared that a plaintiff

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[104] 426 U.S. 229, 240 (1976).
[105] Id. at 235.
[106] Id. at 245.
[107] Id. at 241.

was not even entitled to discovery in a case of selective prosecution unless he had provided a "threshold showing" that the government had declined to prosecute similarly-situated individuals.[108] The defendant in that case, Armstrong, was a black man convicted for dealing crack cocaine, who challenged his prosecution as racially discriminatory on the basis that every single crack cocaine case prosecuted by the federal authorities in his jurisdiction involved black defendants.[109] The Court required a threshold showing before Armstrong was entitled to discovery, but didn't explain how exactly a plaintiff would make this threshold showing without access to discovery.[110]

After *Washington* and *Armstrong*, not only are those who seek to challenge the criminal justice system's racial bias required to prove that the government had a discriminatory intent in order to prevail under the Equal Protection Clause, which is a difficult enough standard. They must also make a threshold showing of discriminatory intent without access to any discovery of government documents.

Without access to discovery, parties might naturally turn to social sciences and data to show a discriminatory intent. After all, in *Washington v. Davis* the Court clarified that "an invidious

[108] U.S. v. Armstrong, 517 U.S. 456, 458 (1996).
[109] Id. at 458.
[110] Id. at 465-466.

discriminatory purpose may often be inferred from . . . the fact, if it is true, that the law bears more heavily on one race than another."[111] In *McCleskey v. Kemp*,[112] however, the Court all but foreclosed social science data as a means of proving discriminatory intent. McCleskey was a black defendant sentenced to death for killing a white person. After he was convicted and sentenced, he challenged his sentence as discriminatory. McCleskey's central argument was supported by a robust study conducted by several university professors, which showed black defendants who killed white victims in Georgia, as McCleskey had, were over four times more likely to receive the death penalty than white defendants who killed black victims.[113] Even when controlled for 39 non-racial variables, the results remained.[114] Yet despite the statistical evidence that the race of the defendant and the race of the victim were likely predictors of whether the death penalty was sought and obtained in Georgia, the Court held that there was no proof that, in McCleskey's particular case, the government intended to discriminate.[115]

III. FORMALISM, LEGALISM, AND BAD PRECEDENT

What these cases have in common is a commitment to some combination of formalism and legalism. Without much, if any,

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[111] 426 U.S. at 242.
[112] 481 U.S. 279 (1987).
[113] Id. at 287.
[114] Id.
[115] Id. at 293.

concern for the norms of justice and equality, formalism-as-legalism takes a geometric approach to analyzing law by putting types of cases into discrete categories, and then defining the rule of law, element by element, and applying the rule methodically and scientifically to the facts.[116] Viewed through the lens of formalism, the law is self-contained and does not concern itself with frivolous matters such as social good. As such, legalism particularly upholds the dual notions of precedent and the legal institution.[117]

The Court's opinion in *Armstrong* embraces the "black people must commit more crimes" rationale, discussed above. In denying Armstrong access to discovery, Chief Justice Rehnquist's arguments reflect a faith in and desire to insulate law enforcement institutions: "Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts… It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function."[118] The Court essentially engaged in a priority analysis: the sanctity of the legal system, and a desire to insulate it from the cumbersome discovery demands, are worth the

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[116] *See* Anthony T. Kronman, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION, Cambridge, Mass: Belknap Press of Harvard University Press, 170-74 (1993).
[117] Anthony Kronman, "Precedent and Tradition," 99 Yale L.J. 1029, 1043 (1990).
[118] 517 U.S. at 465.

risk that police in Georgia might have selectively sent only those drug cases involving black defendants to the federal prosecutor.

Much the same rationale is articulated in the *McCleskey* opinion. Authored by Justice Powell, the majority opinion reasons that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof that the discretion has been abused."[119] Powell continues that, even though the Court accepted the Baldus Study to be accurate, McCleskey could not prevail because he did not prove that in *his* case decisions were guided by an intent to discriminate."[120] This particular result forecloses future practitioners from using generally applicable social science or statistical data to attack discriminatory laws, no matter how clear the discrimination. It also shows the same commitment to insulating the criminal justice as the *Armstrong* decision.

Powell justifies the result in *Armstrong* with a "parade of horribles" argument that even a first-year law student would find embarrassing. He argues that, if Equal Protection was pursued against disparate impact cases using the type of social science data provided by McCleskey, the entire legal system could be held accountable for "unexplained discrepancies" in every area of the

[119] 481 U.S. at 297.
[120] Id. at 292-293.

law.[121] The Court's opinion appears inexplicably unaware that calling these unexplained discrepancies into question is, for those who would pursue equal protection under the laws, the entire point. To his credit, Justice Powell later said that, of all the cases that came before him, *McCleskey* is the vote he wishes he could change.[122] Unfortunately, Justice Powell's hindsight revelation cannot now change decades of precedent.

IV. THE FICTION OF INTENT

The most frustrating aspect of the Court's insistence in adhering to the "discriminatory intent" standard is the refusal to acknowledge what modern science has been proving for decades: discrimination is rarely conscious or intentional. In 1999, unarmed Amadou Diallo was shot at 41 times by four police officers at the door to his apartment when one of the officers mistook the wallet in Diallo's hand for a gun.[123] Since then, much social science has been devoted to understand the psychological mechanism that allowed the police officer to see a gun in Diallo's hand when none existed.

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[121] Id. at 314.
[122] "Justice Powell's New Wisdom," *The New York Times* (June 11, 1994), http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html.
[123] Jane Fristsch, "The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges," *The New York Times*, Feb. 26, 2000, http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.

This incredibly common phenomenon falls under the umbrella term of implicit bias, which describes the "mental processes draw[n] on racial meanings that, upon conscious consideration, we would expressly disavow."[124] Studies show that people of all races are more likely to mistake a benign object for a weapon if it is held by a black person.[125] Studies also show overwhelming evidence of unconscious ingroup favoritism, or the tendency of dominant sub-cultures (for instance, white people) to favor their own group and have unconscious negative attitudes toward members of the "outgroup" (for instance, people of color).[126] These kinds of implicit biases have no relation to a person's explicit beliefs about race and racism.[127]

Social science's understanding of implicit bias raises serious questions about whether the Court's intent requirement is appropriate. As one scholar put it, the intentional/unintentional standard creates a false dichotomy because it does not reflect much of what we know about racism.[128] It imports into racial

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[124] Jerry Kang, "Trojan Horses of Race," 118 Harv. L. Rev. 1489, 1508 (March, 2005).
[125] Id. at 1493.
[126] Id. at 1512.
[127] Id.
[128] Charles R. Lawrence III, "The Id, The Ego, and Equal Protection Reckoning with Unconscious Racism," 39 Stan. L. Rev. 317, 322 (1987) ("I argue that this is a false dichotomy. Traditional notions of intent20 do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.").

discrimination cases the notion of "fault," wherein an actor can be guilty only if she can be proven to meet the discriminatory scienter requirement. By extension, the discriminatory intent standard protects those "innocent" actors who unwittingly discriminate, thereby ensuring that racism in its most common form continues to thrive.

Early civil rights scholars understood that discrimination was ultimately a moral question. They believed that, while the law may not be able to legislate charity and justice into individuals' minds, the law could nevertheless play a moral role by minimizing the most damaging effects of discrimination.[129] However, the intent requirement works in a surprisingly opposite way, to provide a moral shield for all but the most overt acts of conscious racism.

Going back again to the easy answer, this "moral shield" explains why those like Donald Trump who deny discrimination in the criminal justice system reach so readily for the easy explanation. In their view, if only overt and conscious racists are at fault for discrimination, there is no discrimination in the vast majority of situations of racism, especially when a system and not an individual is challenged. Because they do not see instances of implicit bias as racism, it is easy for them to believe that people of color must be

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[129] Erwin N. Griswold, DISCRIMINATION AND THE LAW, The University of Chicago Press, Foreward page v. (1965).

overrepresented in our criminal system because they are more likely to be criminal than their white counterparts. Through this fairly simple logic, a racist conclusion is derived from antidiscrimination jurisprudence.

The idea of fault is appropriate when an individual is being charged with a crime, but the logic begins to break down when the defendant is a government system. In the criminal system, there are a myriad of defenses for individuals who did not commit their crime intentionally, and this comports with traditional notions of justice: that people should not be punished for unintentional acts.[130] Classic utilitarians divorce intent from the effects of an action, and reason that because truly unintentional acts cannot be deterred, they should not be punished.[131] And retributivists reason that, because unintentional acts are devoid of a guilty mind, the actor does not deserve to be punished. These justifications make sense when thinking about the individual defendant in the criminal law context.

In the context of challenged government actions, however, where the relief sought is not punishment of the guilty actor but injunctive or equitable relief (*i.e.* that the government stop discriminating), the intent rationale appears preposterous. To those

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[130] H.L.A. Hart, for instance, most famously articulated the need for requiring some degree of intent on behalf of the criminal. *See* H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY, Oxford University Press, Inc., New York, 2008.
[131] *See, e.g.* Jeremy Bentham, PRINCIPLES OF MORALS AND LEGISLATION, 49-51 (2015) http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf.

being discriminated against, it matters not one whit whether the government acts intentionally or not, but whether the discrimination as a means of oppression is affecting their lives.

Some scholars call this dichotomy the victim/perpetrator perspective.[132] The victim perspective views discrimination as a condition: a complex web of systems, beliefs, and policies that function to maintain the condition of an underclass. The perpetrator perspective looks at racial discrimination in terms of discrete actions by individual perpetrators, with a focus on fault and causation. Only those perpetrators who can be identified as blameworthy will have their actions scrutinized by the courts.

A victim perspective requires a positive remedy: society must take positive action to reverse the causes of discrimination and its effects. In contrast, the remedy of the perpetrator perspective is negative: namely, it only requires that the perpetrator's discrimination cease. Through the discriminatory intent requirement, our system of justice has adopted the perpetrator perspective in the context of constitutional challenges to racial discrimination, with the victim's perspective serving as, at best, an afterthought.

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[132] *See* Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," Critical Race Theory: Key Writings That Formed the Movement, 29, Kimberle Crenshaw, et al., Eds. The New Press: New York, 1995.

The distinction between negative and positive remedies has been a central tenet to the critical legal studies' (CLS) critique of civil rights law.[133] The difference is between the right of victims to enjoy equal treatment (positive rights) and the requirement that a perpetrator refrain from discriminating (negative rights). As one CLS scholar argued, "the predominance of negative rights creates an ideological barrier to the extension of positive rights in our culture."[134] This ideological barrier is visible in *Washington*, *McClesky*, and *Armstrong*, where the Court admitted its trouble in imagining how a facially neutral law could be nevertheless discriminatory[135] and reserved the possibility of a legal remedy only for the victims of the most overt, intentional discrimination· The ideological barrier is also visible in *McClesky*, where the Court rejected the evidence that black defendants on trial for capital murder were four times more likely than their white counterparts to receive a death sentence, because there was no evidence that the state legislature enacted the death penalty statute with an intent to discriminate.[136] This ideological barrier is on shocking display in

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[133] *See, e.g.* Mark Tushnet, "An Essay on Rights," 62 Tex. L. Rev. 1363, 1392-93, 1984.
[134] Id. at 1394.
[135] "As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." Washington, 426 U.S. at 245.
[136] McClesky, 481 U.S. at 298. The Court also rejected McClesky's theory that the state of Georgia had historically acted with a discriminatory intent. The Court acknowledged the "undeniable" legacy of racism in the United States, but

Armstrong, where the Court rejected the Ninth Circuit's decision below and its premise that "people of *all* races commit *all* types of crimes—[no] type of crime is the exclusive province of any particular racial or ethnic group"; the Court cited statistics showing that "[m]ore than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black."[137] Because our legal system has so strongly chosen negative rights over positive ones, some CLS scholars advocate for abandoning the notion of "rights" altogether.[138]

In response, critical race scholars have argued that the CLS rights critique is dismissive of the interest of the people of color that they protect.[139] Rights, they argue, remain a powerful tool for people of color, both practical and rhetorical. Practically speaking, rights are an important and anti-democratic trump card against an oppressive majoritarian society.[140] Symbolically, the specter of

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declined to import the intent of long-ago lawmakers to modern-day legislators. Id. at 298 n.20.

[137] Armstrong, 517 U.S. at 469 (citations and quotation marks omitted). Although the crack cocaine epidemic inarguably ravaged communities of color, by citing *sentencing* data to support its argument that some crimes are the exclusive province of one particular race, the majority of the Court sidesteps Armstrong's claim that only black people were being *prosecuted* for crimes involving crack cocaine. A defendant cannot be sentenced if he is not first prosecuted. Justice Stevens's dissent, citing the exact same statistical source as the majority opinion, points out that "[w]hile 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack." Id. at 479-80.

[138] *See* Tushnet, supra note 54.

[139] *See* Harlon L. Dalton, "The Clouded Prism: Minority Critique of the Critical Legal Studies Movement," 22 Harv. C.R.-C.L. L. Rev. 435, 441 (1987).

[140] Alan Dershowitz, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS, 16-17, (2004).

equal rights is powerfully attached to the image of Dr. Martin Luther King, Jr., and it remains fiercely motivational for communities of color.[141] And lastly, the CLS rights critique offers no solutions. It would dismantle a still valuable tool for civil rights practitioners and offer nothing in its place besides "mind puzzles."[142]

There is no denying that, as it is currently interpreted by the Court, the equal protection clause presents a difficult, if not impossible, hurdle for those who want to challenge the disparate impact that police practices in America have on people of color, at least if they wish to do so under the United States Constitution. Perhaps there are ways around the discriminatory intent requirement that don't throw out the traditional rights discourse that so many continue to find valuable.

V. PRAGMATIC SOLUTIONS

During the September 28, 2016, presidential debate, when asked what he would do to heal the racial divide in America, Donald Trump said that he would restore "law and order"[143] and reinstitute New York's stop-and-frisk police policy nationwide.[144] Moderator

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[141] Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," 22 Harv. C.R.-C.L. L. Rev. 401, 417 (1987).
[142] Dalton at 440.
[143] For a thorough discussion of how the phrase "law and order" has come to replace more overt terms of racism and white supremacy in modern political discourse, *see* Michelle Alexander, THE NEW JIM CROW, 40-58.
[144] Lauren Carroll, "Donald Trump and Lester Holt clash over whether stop-and-frisk is constitutional in New York," *Politifact*, September 28, 2016,

Lester Holt did not ask Trump how he expected a policy infamous for racial profiling to heal racial tension, but Holt did challenge Trump on the constitutionality of stop-and-frisk. Trump denied that stop-and-frisk had been ruled unconstitutional, and instead attacked the judge for being biased and the mayor of New York for not pursuing an appeal.[145] The case, or group of cases, challenging stop-and-frisk in New York, *Floyd v. City of New York*,[146] is an instructive one for examining the discriminatory intent requirement. It is one of the few instances where a judge has found a sweeping police practice to be a violation of the equal protection clause in the absence of an explicit admission or some other similar evidence.

The case came before Judge Shira Scheindlin, of the Southern District of New York, in a bench trial.[147] The plaintiffs were black or Hispanic people who had been stopped by the New York Police Department ("NYPD") between 2004 and 2012.[148] In those years, the NYPD stopped approximately 4.4 million people, a practice known as stop-and-frisk.[149]

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http://www.politifact.com/truth-o-meter/statements/2016/sep/28/donald-trump/debate-donald-trump-says-stop-and-frisk-constituti/.
[145] Id. ("No, you're wrong. It went before a judge who was a very against-police judge. It was taken away from her, and our mayor, our new mayor, refused to go forward with the case. They would have won on appeal.")
[146] 959 F.Supp.2d 540 (S.D.N.Y. 2015).
[147] Interestingly, the lack of jury may be one reason that the defendants declined to pursue a direct appeal, as Judge Scheindlin's 170-page opinion is replete with factual findings that would have been difficult to challenge on appeal, given the deference that appeals courts give to fact finders.
[148] 959 F.Supp.2d at 555.
[149] Id.

Donald Trump, during the September debate with Lester Holt, repeatedly cited stop-and-frisk as a way to keep guns out of the hands of "very bad people." However, Judge Scheindlin found that over half of the stops in New York resulted in the detainee being frisked, and in 98.5% of these frisks, no weapon was found.[150] Eighty-eight percent of all total stops resulted in no further police action.[151] The plaintiffs challenged the policy under the equal protection clause of the Fourteenth Amendment, among other legal theories, alleging that the NYPD was engaged in a practice of targeting black and Hispanic people.[152]

Because pretrial litigation is not publicly available, it is a mystery how the plaintiffs maneuvered around the high discovery bar set by *Armstrong* to the extent that a trial was even possible. Certainly, though, the plaintiffs learned a lesson from *Armstrong* about the need to show the police did not stop similarly situated individuals who were not black or Hispanic. Plaintiffs brought in an expert statistician, Dr. Jeffrey Fagan, who testified that if the police were using non-racial factors in deciding who to stop, the stops should roughly correlate with the crime rates in the area.[153] The City brought its own expert, Dr. Dennis Smith, who argued that the stops would correlate with crime suspect data. Judge Scheindlin, in an

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[150] Id. at 558.
[151] Id.
[152] Id. at 583.
[153] Id. at 583.

impressive display of patience, weighed the validity and the merits of the competing statistical methods over approximately ten pages before concluding that Dr. Fagan was correct.[154]

Judge Scheindlin's deep commitment to the statistical data is immediately distinguishable from either Justice Powell or Justice Rehnquist's approach in *McCleskey* or *Armstrong*, and reflects a pragmatic approach to deciding this case. She carefully and at length examined and weighed the social science data and the logical conclusions therefrom before deciding which expert was correct.[155] Where legalism and formalism are wary of influence form outside of the law, pragmatism seeks guidance from sources outside of the law, including social science data.[156]

One of the most well-known pragmatic jurists, Judge Richard Posner, warns that the danger of pragmatism is intellectual laziness, as pragmatic judges are guided in their decisions by what Justice Oliver Wendell Holmes refered to as the "puke" test.[157] But he answers his own call to caution by warning that intellectual laziness is also a danger of not being pragmatic, as those positivist or formalist judges won't be challenged to question their own

[154] Id. 583-590.
[155] Id. at 583-589.
[156] *See, e.g.* Richard Posner, "Pragmatic Adjudication," 18 Cardozo L. Rev. 1, 6 (1996).
[157] Id. at 2. The "puke test" refers to a judge's gut reaction to a law as a measure of its constitutionality. The law is unconstitutional "if and only if it makes you want to throw up."

premises.[158] It is hard to imagine that anyone who has read the entire 170 pages of Judge Schiendlin's opinion in *Floyd* would accuse her of intellectual laziness. If anything, her fortitude in engaging with the science is impressive, leaving one to wonder if her endeavor is a replicable undertaking in other courts.

Another criticism of pragmatism is that judges are neither trained nor qualified to "stray beyond the boundaries of the orthodox legal materials."[159] This is probably a fair criticism, but it overlooks that straying beyond the bounds of one's expertise is precisely what the legal system asks juries to do every single day (though less frequently in modern times[160]). The jury trial takes a random group of lay people, untrained in the law, and puts them in a courtroom to decide sometimes complex cases. If the legal system has faith that a nurse or auto mechanic or teacher can weigh the evidence and come to the right result, it should have at least the same faith in judges.

Returning to *Floyd*, Judge Scheindlin performed some logical jiu-jitsu of her own in finding a discriminatory intent on part of the NYPD. The City used the same argument that Powell, Rehnquist, and the Court generally have found persuasive for decades, namely that "if particular racial or ethnic groups in New

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[158] Id. at 18.
[159] Id. at 9.
[160] *See generally* Robert P. Burns, THE DEATH OF THE AMERICAN TRIAL, 82-111 (2011).

York City participate in crime at a rate disproportionate to their share of the population" their disproportionate stops would be justified.[161] The City's expert proposed that, if the NYPD were using racially-neutral practices, the racial make-up of those who were stopped-and-frisked would correlate with a combination of crime suspect data and arrest data.[162] The plaintiffs' expert, by contrast, proposed a benchmark that compared the racial make-up of the neighborhood population with crime rate data. Judge Scheindlin chose the plaintiffs' benchmark, explaining that the crime suspect data proposed by the City was flawed because it included those who were stopped and released with no further police action; in other words, it included innocent people.[163] Judge Scheindlin, however, was unconvinced. "[E]ven if all stops by the NYPD were based on reasonable suspicion… the low hit rate would undermine the assumption that the stopped people were in fact engaged in criminal activity, and thus members of the criminal population."[164] The fact that the vast majority of the people who were stopped were found to be innocent undermines the City's use of the crime rate data to justify their discriminatory targeting of people of color for stops.

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[161] *Floyd* at 184.
[162] Id. at 584.
[163] Id. ("there is no basis for assuming that the racial distribution of stopped pedestrians will resemble the racial distribution of the local criminal population *if the people stopped are not criminals*." (emphasis in original)).
[164] Id.

The City's expert also posited that the disproportionate stops of black and Hispanic people could be rationalized by the explanation that black and Hispanic people engage in more suspicious behavior, thereby giving the officers reasonable suspicion more frequently.[165] Again, Judge Scheindlin dismissed this argument, reasoning that "there is no evidence that law-abiding blacks or Hispanics are more likely to behave objectively more suspiciously that law-abiding whites."[166] Judge Scheindlin then made a critical point: that this particular argument "is effectively an admission that there is no explanation for the NYPD's disproportionate stopping of blacks and Hispanics other than the NYPD's stop practices have become infected, somewhere along the chain of command, by racial bias."[167] This "effective admission" functions as the way for plaintiffs to meet the exacting discriminatory intent standard of the equal protection clause.

Scheindlin also recognized the role implicit bias plays in policing. She notes that even President Obama has been subject to racial stereotyping. Her opinion quoted the President's own words:

> There are very few African-American men in this country who haven't had the experience of being followed when they were shopping in a department store. That includes me. There are very few African-American men who haven't had the experience of walking across the street and hearing the

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[165] Id. at 586-87.
[166] Id. at 587.
[167] Id.

> locks click on the doors of cars. That happens to me, at least before I was a senator. There are very few African-Americans who haven't had the experience of getting on an elevator and a woman clutching her purse nervously and holding her breath until she had a chance to get off. That happens often.[168]

Progress isn't always apparent, and it is easy to become discouraged when the institutional hurdles on the way to true equality are set high and legitimized by those in power. Particularly after the election of President Trump, when stories of racial animus run daily,[169] seemingly ignited by President Trump's own racist dog whistling.[170] It is important to remember, though, that once the President of the United States shared a painful and personal story of being stereotyped because of his race.[171] To have that speech quoted in a federal district court opinion that found police practices of the largest police force in the country to be racially biased and unconstitutional, surely must be some marker of progress worth celebrating.

Trump wasn't entirely wrong in his debate comment, though. The City did not appeal Scheindlin's opinion, but the

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[168] Id. at 587, n. 191 (quoting 7/19/13 Remarks by President Barack Obama on Trayvon Martin, White House Press Briefing Room).
[169] *See, e.g.*, Adam Serwer, "The Nationalist's Delusion," THE ATLANTIC (Nov. 20, 2017) https://www.theatlantic.com/politics/archive/2017/11/the-nationalists-delusion/546356/.
[170] *See generally* Christopher N. Lasch, "Sanctuary Cities and Dog-Whistle Politics," 42 New Eng. J. on Crim & Civ. Confinement 159 (2016).
[171] *See also* Tanehisi Coates, "My President Was Black," THE ATLANTIC (Jan./Feb. 2017) https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/.

Second Circuit did grant a stay of her order.[172] And because a reporter wrote an article in which Scheindlin appeared biased toward plaintiffs, the Second Circuit also remanded the case to another judge to oversee a potential settlement.[173] Trump, however, was incorrect to the extent that he disputed the constitutionality of stop-and-frisk.

Regardless of the stay and the remand, Judge Scheindlin's constitutional analysis stands and provides a potential model to practitioners to follow for overcoming the discriminatory intent requirement when challenging racially biased police practices. This case is one of the few cases in modern times when a sweeping police practice was found to be racially discriminatory.[174] Judge Scheindlin found that the NYPD acted with discriminatory intent, in part, because she was able to see that the benchmark offered by the City used the same circular logic that Trump, Justice Powell, Justice

[172] In her Opinion and Order, Scheindlin proscribed broad injunctive and equitable remedies, including the use of body cameras and a change in the supervision, discipline, and management of police forces. Those remedies were stayed, pending appeal. *Ligon v. City of New York*, 538 F.App'x 101 (2d Cir. 2013).

[173] *Lingon v. City of New York*, 736 F.3d 118 (2d Cir. 2013).

[174] Another such case is Melendrez v. Arpaio, 989 F.Supp.2d 822 (D. Ariz. 2013). In that case the Maricopa County Sheriff's Office, headed by notorious racist Joe Arpaio, attempted to justify its practice of racial profiling with the argument that the sheriffs had reasonable suspicion to believe that Latino people had violated immigration laws and were in the country illegally. Arpaio refused to suspend the racist practice—even after being ordered to do so by a federal judge—for which refusal Arpaio was convicted of criminal contempt. *See* United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180 (D. Ariz. July 31, 2017). Arpaio was later pardoned by President Trump for this conviction. *See* United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072 (D. Ariz. Oct. 19, 2017).

Rehnquist, and so many others have used to insulate racially discriminatory police practices, namely that if black people are overrepresented in the criminal justice system it must be because they commit more crimes. With the availability of discovery so limited after *Armstrong*, it is unlikely that future plaintiffs attempting to replicate the results from this case will find a "smoking gun" statement of discriminatory intent. Rather, discriminatory intent is going to have to be inferred. One way to make that inference, as this case has shown, is to challenge who police stop, and why. After *Floyd*, crime suspect data is itself a suspect justification for the disproportionate policing of people of color.

VI. RACIAL REALISM AND LOOKING OUTSIDE THE COURTS

In November 1963, just days before President John F. Kennedy was assassinated, the Anti-Defamation League held a conference on Discrimination and the Law. The presentations were compiled into a book, which begins with a simple truth: "Discrimination is basically a moral problem."[175] A modern version of this idea is found in Freeman's essay.[176] After excoriating the Supreme Court's antidiscrimination jurisprudence, he concludes, "but I cannot regard the court as autonomous and separate from the society that orchestrates it, and I therefore cannot regard that one

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[175] Vern Countryman, Ed., Discrimination and the Law, v., The University of Chicago Press, 1965.
[176] Freeman, supra note 53, at 45.

institution as the villain of the tale."[177] As lawyers, we are indoctrinated to believe in our ability to argue and litigate our way out of problems. But it is likely—probable, even—that racial discrimination in police practices isn't going to be solved in federal courts, especially given that President Trump has the opportunity to fill an astounding number of federal judicial vacancies with candidates to his liking.[178] Perhaps we need to focus some of the energy that we spend fighting within the legal system on transforming the beliefs of the people around us.

Recognizing that the struggle for equality in America is as old as the nation itself, Derrick Bell gave up on the hope of equality and began arguing for "racial realism."[179] Inspired by the profound shift Legal Realism brought to the legal system in the twentieth century, Bell argues for a movement that takes a "hard-eyed view of racism as it is and our subordinate role in it" and lets go of "the romantic love of integration."[180]

In the context of mass incarceration, racial realism may see as a solution releasing the large numbers of people of color locked in prison for nonviolent offenses in favor of home monitoring

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[177] Id.
[178] *See* Rorie Spill Solberg & Eric N. Waltenburg, "Trump's judicial nominees would put a lot of white men on federal courts," THE WASHINGTON POST (November 28, 2017) https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/28/this-is-how-trump-is-changing-the-federal-courts/?utm_term=.823e270b5ede.
[179] Derrick Bell, "Racial Realism," Connecticut Law Review, 363, 364.
[180] Id. at 378.

programs. It's not a fair or equitable solution because a disproportionate number of people of color will still be under state control, only in their own homes; but racial realism doesn't idealize equality. "While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help."[181] The point is not to let the perfect become the enemy of the good. Until more just and equitable systems for arresting people proportional to are won, imperfect remedies like home monitoring may be worth considering if they improve the lives of the people affected.

CONCLUSION

After recognizing imperfect solutions, I'm left wondering what the perfect solution would be. Overturning *Washington v. Davis* and its progeny would be a good start. Getting rid of that precedent would free courts to begin to formally recognize the way that implicit bias and organizational culture interact to create racially biased systems of government oppression—evidenced by the mass incarceration of disproportionate numbers of people of color—without needing to point to a blameworthy actor.

[181] Id.

Overturning *Washington*, though, isn't likely, given the sheer number of cases that rely on it.[182] The most pragmatic solution would be to use any and all available tools: become nimbler and more literate with social science data, increase the number of people of color on the bench, look outside the legal system to change societal beliefs regarding racism, and accept the imperfect but better solutions when they come.

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[182] A simple WestLaw search on December 2, 2016, revealed 3,245 cases that cite to *Washington v. Davis*.