THE NOT-SO-HIDDEN BIASES LURKING WITHIN THE CRIMINAL JUSTICE SYSTEM: ISSUES OF RACE AND GENDER IN THE LAW

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ABSTRACT

This Article discusses the history of mass incarceration, race-neutral policies and laws, explicit and implicit biases among criminal justice professionals and the role they play in the disproportionate incarceration rates of Blacks. The impact of each subject is analyzed to review its effect on people of color. Additionally, this article makes recommendations for criminal justice reform with the goal of reducing the racial imbalance within the criminal justice system.

INTRODUCTION

"One nation, indivisible, with liberty and justice for all," are words Americans have recited year after year from elementary to high school. However, "justice for all" may not be accurate. In America, the racial disparity within the criminal justice system contradicts the words "justice for all." Race undeniably plays a salient role in the criminal justice system—its impact can be seen by looking at the racial disparity in incarceration. Although Blacks, per capita, commit crime at a higher rate, whites commit more than twice the number of burglaries, larcenies, rapes, sex offenses,

fraud, embezzlement and aggravated assaults than Blacks.[1] The racial disparity in mass incarceration in the United States is a product of implicit and explicit biases among criminal justice professionals and jurors and race-neutral policies and laws that have had a disparate impact on people of color.

Currently the United States leads the world in the number of incarcerated individuals with 2.3 million people imprisoned. [2] Despite only accounting for 5 percent of the world's population, America fosters 25 percent of the world's prison population. [3] America also has the highest prison population with a rate of 655 individuals incarcerated per 100,000 citizens. [4] However, America was not always the leader in incarceration; it was not until the 1970s that the prison population began to increase dramatically, and the phenomenon of mass incarceration began. Since the 1970s, the United States' prison population has increased by 700 percent. [5] The phrase "mass incarceration" has been used to refer to these extreme rates

[1] *Crime in the United States 2015*, FBI:UCR, (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43.

[2] This number is not inclusive of the 840, 000 individuals on parole and the 3.6 million people on probation. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE, (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html#slideshows/slideshow1/1.

[3] *See generally*, ACLU on mass incarceration. *Mass Incarceration*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/smart-justice/mass-incarceration (last visited, November 4, 2019).

[4] Inst. for Criminal Policy Res., *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last updated 2019).

[5] *See* ACLU on mass incarceration, *supra* note 3.

of imprisonment as well as the disproportionate rates of incarceration among Black men, especially those living in targeted neighborhoods. [6]

Blacks make up only 13 percent of the United States' population yet account for 40 percent of the imprisoned population.[7] Racial disparities can be shown throughout the criminal process. Blacks are 5.9 times more likely than whites to be incarcerated as 1 in every 3 Black men will be imprisoned in his lifetime compared to 1 in every 17 white men. The over policing of people of color also contributes to the racial disparities. The more contact police have with minority communities, the more likely arrests will be made Blacks will be entered into the criminal justice system. Once arrested, Black men are also more likely to be convicted and given harsher sentences. [8] Data confirms the racial imbalance in prisons and jails in America and this Article will address two of the causes of this racial disparity.

One major cause of mass incarceration and the racial imbalance is the policies and practices of police officers due to three eras of policymaking.[9] The first era began with President Nixon's declaration of a war on drugs as a

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[6] *See* Nellis, *supra* note 5; *see also* Sawyer & Wagner, *supra* note 2.

[7] Sawyer & Wagner, *supra* note 2.

[8] THE SENTENCING PROJECT, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* 1 (March 2018), https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf.

[9] Each individually has a disparate impact on Blacks and when added together has been a larger factor in the current racial imbalance of incarcerated individuals. *See* Nellis, *supra* note 5, at 9.

way to be tough on crime.[10] During Nixon's presidency, he caused marijuana to be classified as a Schedule One drug—the most restrictive category of drugs—despite recommendations to decriminalize the possession and distribution of marijuana.[11] Although President Nixon was the first to declare a war on drugs, it was not until the second era of policymaking during President Ronald Reagan's administration that incarceration rates began to skyrocket. In October of 1982, President Reagan declared the war on drugs again during a radio address.[12] Following this declaration, Reagan amplified anti-drug spending, increased federal drug task forces, and launched a

[10] On June 17, 1971 President Nixon declared a war on drugs at a press conference. During the press conference, Nixon stated that drug abuse was America's number one public enemy. Mark J. Perry, *The Shocking Story Behind Richard Nixon's 'War on Drugs' That Targeted Blacks and Anti-War Activists*, AM. ENTERPRISE INST. (June 14, 2018), http://www.aei.org/publication/the-shocking-and-sickening-story-behind-nixons-war-on-drugs-that-targeted-blacks-and-anti-war-activists/.

Although Nixon explained the war on drugs as a way to be tough on crime, it later came out that the reason for the war on drugs was to criminalize being black and being against the Vietnam war. During an interview, President Nixon's domestic policy chief, John Ehrlichman, stated, ""You want to know what this was really all about?" he asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did."" Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAGAZINE, (April 2016), https://harpers.org/archive/2016/04/legalize-it-all/.

[11] *A Brief History of the Drug War*, THE DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/brief-history-drug-war (last updated 2019).

[12] *See* Ronald Reagan & Nancy Reagan, *Radio Address to the Nation on Federal Drug Policy*, REAGAN LIBRARY (Oct. 2, 1982), https://www.reaganlibrary.gov/research/speeches/100282a; Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs' Was A "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 386 (2002).

campaign to alter the public's perception of drugs and possible consequences of drug use.[13] During this time, zero tolerance drug policies were implemented and anti-drug programs such as Just Say No and D.A.R.E. emerged.[14] At the beginning of Reagan's presidency, the total prison population in America was 329,000; this number nearly doubled to 627,000 at the end of his 8-year term in 1988. [15] The third era began around 1994 when getting convictions and longer sentences were placed in the spotlight.[16] Laws enacted during this era, such as the 1994 Crime Bill, had a heavy influence on incarceration rates by giving States money for stricter criminal laws and policies.[17] The effect that these three eras had on incarceration rates, especially on people of color, is undeniable.

The Article is organized as follows: Part II begins with an introduction to implicit and explicit bias followed by an analysis of how the

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[13] Nunn, *supra*, note 12.

[14] President Reagan's wife, Nancy, publicized the phrase "Just Say No" and attached it to her anti-drug campaign. Additionally, the DARE drug education program, which was founded by the Los Angeles Police Chief, spread throughout the nation and became implemented in schools across the country. *A Brief History of the Drug War*, THE DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/brief-history-drug-war (last updated 2019).

[15] U.S. Department of Justice, *Prisoners in 1980*, BUREAU JUST. STAT. BULL. (May 1981), https://www.bjs.gov/content/pub/pdf/p80.pdf ; U.S. Department of Justice, *Prisoners in 1988*, BUREAU JUST. STAT. BULL. (April 1989), https://www.bjs.gov/content/pub/pdf/p88.pdf.

[16] Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. OF CRIM. L. & CRIMINOLOGY 1225, 1225-41 (2010).

[17] James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

implicit biases of criminal justice professionals and juries disproportionally affect Blacks in different stages of the criminal justice process. Part III provides a discussion of race-neutral policies and laws which create a disparate racial impact. Part IV concludes with a proposal for criminal justice reform which aims to minimize the racial inequality within the criminal justice system.

I. IMPLICIT AND EXPLICIT RACIAL BIAS

The implicit and explicit biases of criminal justice professionals and jurors greatly contribute to the racial disparity in incarceration. In general, bias is a prejudgment of a person based on his or her, perceived or actual, status of being a member of a certain group, instead of judging the person based on his or her actions and behaviors. Explicit bias refers to biases people are aware of and may even embrace as a part of their persona. Explicit bias and overt racism go hand in hand. Although explicit bias is no longer as common as it once was, it has still contributed to the racial disparity in incarceration. [18] As explicit bias declines over time, implicit bias continues to play an important role in the racial disparity. Implicit bias refers to the unintentional and unconscious racial biases that affect one's attitude,

[18] Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 3-2009 CORNELL L. FAC. PUBLICATIONS 1195, 1196 (2009).

decisions and behaviors.[19]These biases are pervasive in society today and equally as problematic among participants within the criminal justice system. From police to jurors to judges, implicit biases augment the racial disparity in the criminal justice system by determining who gets introduced into the system and how long these individuals remain in the system.

A better understanding of implicit biases has been gained since the creation of the Implicit Association Test. The Implicit Association Test measures a person's unconscious association to various objects or concepts such as a black or white, man or woman. [20] Development of the Implicit Association Test has concluded that the majority of Americans tested have held implicit biases towards Blacks by implicitly associating Blacks with negative connotations such as bad, unpleasant, aggressive, and lazy. [21] Legal scholars have recognized the Implicit Association Test as a symbol of implicit bias for two reasons; it shows the prevalence of dissociation when a

[19] Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, THE SENTENCING PROJECT, 16 (2015), https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf. [hereinafter *Black Lives Matter*].

[20] Justin D. Levinson *et al.*, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, 9, 16-17 (2012).

[21] Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10(3) GROUP PROCESS & INTERGROUP REL. 359, 361 (2007); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion,* 35 SEATTLE U. L. REV. 795, 802 (2012).

person's self-reported attitude differs from their tested implicit biases and it can predict the way in which people act. [22]

A. Police Officers

Police officers are granted an exceptional level of discretion when it comes to performing their duties. Racially implicit biases are ingrained in some police officers and affects who gets stopped, searched, and arrested. Society associates young black men with criminality, hostility, and dangerousness and police act in accordance with these implicit biases and stereotypes by racially profiling.[23] Biases an officer holds affect decisions such as whether an officer stops an individual for questioning, the manner in which an officer talks to and interacts with the individual, and whether the officer arrests the individual or releases him or her.

When police officers act based on a person's race or ethnicity instead of one's behavior, the officer is engaging in profiling based on implicit racial biases they harbor. Police profiling is the first step in creating the racial disparity within the criminal justice system as Blacks experience a disproportionate level of contact with the police. Various reports of police

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[22] Smith & Levinson, *supra* note 21 at 803–04; *See* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meanings and Use*, 54 Ann. Rev. Psychol. 297, 303 *(2003); See Siri Carpenter, Buried Prejudice*, SCI. AM. MIND 32-33 (2008), *available at* http://siricarpenter.com/wp-content/uploads/2009/11/Buried-Prejudice.pdf.

[23] Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 298 (2015).

contact, including traffic stops and pedestrian searches, foreshadow the implicit racial biases police officers harbor as people of color are overpoliced. [24] For example, in Greensboro, North Carolina, Blacks are more likely than whites to be pulled over, and twice as likely as whites to be searched when pulled over despite whites being more likely to be caught with contraband during these searches.[25]

B. Prosecutors

Police officers are the first criminal justice professionals to exercise discretion, but not the only participants within the criminal justice system to do so – prosecutors are also given a wide range of discretion. Prosecutors are granted the most unreviewable power and range of discretion in that they have the authority to decide who gets charged, what crimes to charge, whether to oppose bail or negotiate plea bargains, select jurors, and make sentencing recommendations.[26] Like police officers, prosecutors unconsciously use racial implicit bias when making charging decisions which add to the racial imbalance in the criminal justice system. [27]

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[24] Michael Harriot, *Unprotected, Underserved: The (False) Criminalization of Black America*, THE ROOT (Jun. 25, 2018), https://www.theroot.com/unprotected-underserved-the-false-criminalization-o-1827083795.

[25] Karen Jackson *et al.*, *Analysis of Traffic Stop and Search Data*, Greensboro Police Dep't, 2-5, https://www.greensboro-nc.gov/home/showdocument?id=30373.

[26] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

[27] Smith & Levinson, *supra* note 21 at 798.

Implicit racial bias of prosecutors first comes into play when a prosecutor must decide whether to charge an individual, and what offense should be charged. Prosecutors are given the power to use discretion in deciding who to charge, but as noted in *McCleskey v. Kemp,* "the power to be lenient [also] is the power to discriminate."[28] When given this power, studies have proven that prosecutors are more likely to charge black suspects than white suspects. [29] The fact that prosecutors are more likely to charge black suspects with similar backgrounds for the same crime suggests that implicit bias plays a role in the discrepancies in deciding to charge or release suspects. After a prosecutor makes the decision to charge, the next decision is what offense should be charged.

For example, when considering self-defense and justifiable homicides, racial implicit biases come into play. When prosecutors consider self-defense claims, they have to ask themselves whether the suspect reasonably believed the deceased person was reaching for a weapon and whether the suspect was in fear for his or her life. As previously mentioned, Implicit Association Tests confirm that society as a whole associates Blacks

[28] *McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S. Ct. 1756 (1987).

[29] Task Force on Race & the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) ("[E]ven after legally relevant factors ... are taken into account," racial differences affect how cases are processed: whites are less likely to have charges filed against them. (*citing* Robert D. Crutchfield, *Ethnicity, Labor Markets, and Crime, in* ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME AND SPACE (Darnell Hawkins ed., 1995))).

with aggression. Other Implicit Association Tests have proven that people associate Blacks with weapons, especially guns, while whites are associated with harmless objects such as cellphones.[30] These results suggest that prosecutors act in accordance with these implicit biases as they may be more likely to believe that a suspect acted reasonably in discharging a weapon if the victim was black but believe that suspects who shoot white victims acted unreasonably when discharging a weapon on a white victim who was believed to be reaching for a cellphone. [31] The underlying implicit biases at play operate dualistically—because Blacks are seen as aggressive and hostile, if the suspect is white then the suspect will be seen as acting in reasonable fear of the Black victim even if the Black victim was unarmed. In contrast, because of the biases associating Blacks with weapons, the Black suspect will be seen as acting unreasonably.

Aside from homicide cases, underlying implicit racial biases may also come into play when forcible rape is at issue. Research shows that Black suspects are associated with rape, rooting from the hyper-sexualization of Black men. [32] When prosecutors are faced with multiple accounts and must decide whether to charge a person with forcible rape and the suspect is Black, then the underlying bias that Blacks are aggressive and associated with rape

[30] Brian A. Nosek *et al.*, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 55 (2007).
[31] Smith, *supra* note 21 at 808.
[32] *Id.* at 809.

may sway the prosecutor in favor of filing charges, especially if the victim is a white woman.

The decision to charge an individual also relates to the decision to pursue the death penalty, which relies on a highly subjective prediction of whether an individual will be a continuous threat to society. When prosecutors decide to seek the death penalty, they may be influenced by the mere looks of a Black defendant, especially if the defendant has more Afrocentric features. [33] Prosecutors may attribute negative stereotypes to the Black defendant, conclude that he or she is a future danger, and seek capital punishment.

1. Plea Bargains

Prosecutors have the authority to decide who to offer a plea deal to and what the terms of the plea bargain will be. Because there is so much discretion in handing out plea deals, racial disparities are present within plea-bargaining. The racial disparity within plea-bargaining is particularly problematic because the majority—90 to 95 percent—of criminal cases end in plea-deals. [34] Prosecutors are given the authority to decide which charges

[33] Research shows that there is a correlation between death sentences and the stereotypical black appearance of defendants. *See* Jennifer L. Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 PSYCHOL. SCI. 383, 385 (2006). Other research confirms the effect of stereotypical Black appearances in decisions related to criminal matters. *See* Irene V. Blair et al., The Influence of Afrocentric Facial Features in Criminal Sentencing, 15 PSYCHOL. SCI. 674 (2004).

[34] Alan J. Gocha, The Sanitization of Violence: Exposing the Plea Bargain Regime As A Tool for Mass Injustice, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 307,

to file or drop if they wish to reduce charges to lesser offenses which carry lesser or jail or prison time.[35] The discretion and power prosecutors are given to offer and negotiate plea deals is almost unlimited and unchecked as it is exercised in private and minimally overseen by a higher authority. Prosecutors have the upper hand in plea-bargaining in that they hold virtually all the bargaining chips including charging power, details of the crime, and pre-trial incarceration. [36] The power imbalance between a defendant and a prosecutor not only creates an unfair bargaining system but allows for discrimination to come into play as a result of the prosecutor's biases, whether the biases are overt or implicit.

Racial disparities are pervasive in plea-bargaining, especially in cases involving low-level felonies and misdemeanors. [37] For example, Black defendants are more likely than white defendants to be charged for their most serious initial charge, rather than having it dropped or reduced to a lesser offense. [38] This leads white defendants to be 15 percent more likely than black

308 (2016); There is a need for plea-deals because without them the criminal justice system would break as there are not enough resources to give every defendant a full speedy trial.

[35] *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals.

[36] Human Rights Watch, An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty (Dec. 2012), https://perma.cc/E2XD-RXNQ."Prosecutors have discretion, largely unreviewable by judges, as to what charges to bring, what promises or threats to make in plea bargaining, and whether to carry out those threats if the defendant does not plead." *Id*. at 8.

[37] *See generally*, Berdejó, Carlos, Criminalizing Race: Racial Disparities in Plea Bargaining, 59 B. C. L. REV. 1187(2018).

[38] *Id.* at 3.

defendants charged with a the same or similar offense, to be charged with a misdemeanor rather than their original felon charge. [39] When a white defendant is initially charged with a misdemeanor, he or she is 75 percent more likely than a black defendant to be charged with a crime resulting in no incarceration or to have the charges dropped. [40]

When similarly situated black and white defendants are charged with the same or substantially similar crimes, yet have different outcomes, then the role of race and biases becomes readily apparent and can be confirmed by the racial disparities. As noted, prosecutors are not immune to hosting implicit biases which can affect their decisions in plea bargains. Implicit biases can affect the prosecutor's evaluation and weight given to the evidence, thus affecting the decision to charge and to what severity. [41] Prosecutors may unconsciously rely on race to decide whether to engage in plea negotiations with black defendants[42] . [43] Even when given factors to consider, such as the seriousness of the crime charged, a prosecutor may allow her in-group favoritism – the tendency to favor the group one belongs

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[39] *Id*.

[40] *Id.* at 4.

[41] John Dunnigan, *Bargaining Towards Equality: The Effects of Implicit Bias Training on Plea-Bargaining*, 21 Rich. Pub. Int. L. Rev. 341, 344 (2018).

[42] *Id*.

[43] *See* Smith, *supra* note 27, 816 (Consider a sampling of four "factors" among those the Department of Justice instructs federal prosecutors to consult in deciding whether to pursue a bargained disposition: (1) "[T]he nature and seriousness of the offense or offenses charged"; (2) "the defendant's remorse or contrition and his willingness to assume responsibility"; (3) "the public interest in having the case tried rather than disposed of by a guilty plea"; and (4) "the expense of trial and appeal.").

to – to affect her assessment of the crime.[44] When a prosecutor can sympathize with a white victim then she is likely to value or overvalue the seriousness of the crime because she can imagine the crime happening to herself or family members. [45]

2. Jury Selection

The right to a trial by a jury of one's peers is a key component of the judicial system. It has been said that a case is won or lost during voir dire. This saying illustrates the importance of jury selection. A prosecutor's biases may assist him in determining which jurors to keep or strike through use of peremptory challenges, even though it is unconstitutional to use race as a reason to strike a juror. [46] Both overt racism and implicit bias have been used to strike jurors. An example of overt racism can be found in *Miller-el v. Cockrell,* where a Dallas prosecutorial trial manual explicitly told prosecutors to make sure that there were no minority jurors on the jury. [47] Although overt racism is less prevalent in prosecutors today, implicit bias still lurks in the

[44] *Id*.

[45] Proof that in-group favoritism plays a role in one's decision making can be found by analyzing Alessio Avenanti's method of transcranial magnetic stimulation (TMS) which measures corticospinal activity level in participants who watched short video clips of a needle entering into the hand of either a light-skinned or dark-skinned person. The results showed that region-specific brain activity levels were higher when Caucasian-Italian participants viewed the clip of a light-skinned participant experiencing pain than when they saw a clip of a dark-skinned person feeling the same pain. *See* Smith, *supra* note 27, at 817.

[46] Batson v. Kentucky, 476 U.S. 79, 84 (1986).

[47] The manual stated, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated." Miller-El v. Cockrell, 537 U.S. 322, 335 (2003).

process of jury selection. When selecting jurors, prosecutors may strike jurors by unconsciously relying on certain stereotypes which paint Blacks as criminals, and disobedient of the law.[48] Even with safeguards such as *Batson*[49] put in place, implicit bias still finds a way to affect jury selection and ultimately the outcome of a case.

C. Public Defenders

The right to counsel, public defenders, if one cannot afford to hire an attorney is an essential part of the criminal justice system as it adds safeguards for the accused.[50] Public defenders have a duty to advocate for their clients, but just as the rest of society, they are not immune from fostering implicit biases. The effects of public defenders' implicit biases may come into play more often as they are overworked and are crunched for time balancing caseloads within minimal resources.[51] On average, public defenders balance

[48] Prosecutors may associate Blacks with lack of respect for the law, opposing prosecution of drugs or harsh punishments and thus strike them from being on the jury. *See* Smith & Levinson, *supra* note 21 at 819.

[49] When a party thinks the other has engaged in a discriminatory preemptory challenge they must raise a Batson Challenge. The Batson challenge includes three steps. First, the party objecting the peremptory strike must make prima facie of discriminatory uses of the peremptory. This can be done either using evidence outside of the record to or by using evidence in voir dire. Next, the opposing party must provide a race-neutral reason for striking the juror. Next, the objecting party has the burden once again to demonstrate the race0neutral reason given was mere pre-text for the challenged strike. *See* Batson, 476 U.S. at 96-98.

[50] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent defendants have a right to appointed counsel in all criminal trials).

[51] Jessica Blakemore, Implicit Racial Bias and Public Defenders, 29 GEO. J. LEGAL ETHICS 833 (2016); *See also* L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013).

371 cases per year. [52] Handling more cases than there are days in a year, public defenders are overwhelmingly susceptible to acting based on implicit biases as they prioritize cases and determine how to efficiently allocate their resources.[53]

Implicit biases play a role in public defender's decision-making throughout their entire representation of a client, starting with the moment they are assigned a case and begin to evaluate it. Public defenders' initial evaluations affect how the case gets prioritized and allocated resources. The problem with initial case evaluations is that implicit biases may affect how the case is assessed. When reviewing the case file and looking at the evidence, a public defender decides how to apportion resources. For example, if a public defender believes that the State has a strong case then they will be less likely to spend resources fighting the case; conversely, if the public defender thinks the State's case is weak then they will be more likely to spend resources to fight the case and engage in plea negotiations. [54] The issue with initial evaluations is that they are often based on, or influenced by, implicit biases.

Implicit biases about Blacks can affect how ambiguous the evidence

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[52] THE SENTENCING PROJECT, *Report of The Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal Justice System* 7 (2013) https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf [hereinafter *Regarding Racial Disparities*].

[53]Richardson, *supra* note 51, at 2631.

[54] Richardson, *supra* note 51, at 2635.

is viewed or if the public defender actually believes the client is innocent thus affecting the decision to prioritize or not. Implicit biases affect how the public defender not only makes judgments about the accused, but how they interpret the accused's actions and facial expressions. [55] These biases also affect how an attorney interacts with their clients, such as maintaining a greater physical distance, losing eye contact, and making more speaking errors.[56] Additionally, because Blacks are stereotyped to be more aggressive and hostile, public defenders may react to the accused client with more hostility than usual and cause the client to reciprocate the behavior and energy given to them. Since implicit biases are held unconsciously, a public defender may not be aware they were the initial hostile person and may end up accrediting the hostile behavior to Blacks; this is known as the "behavioral confirmation effect." [57]

[55] Facial expressions made by Blacks are more likely to be viewed as hostile than if the same exact expression was made by a White individual. Additionally, behavior of white individuals is less likely to be viewed as aggressive than the same conduct and behavior of a Black individual. Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 PSYCHOL. SCI. 640 (2003).

[56] Carl O. Word et al., The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction, 10 J. Experimental SOC. PSYCHOL. 109 (1974); *see also* Richardson, *supra* note 51,at 2637.

[57] Richardson, *supra* note 51, at 2637–38; *See* Mark Chen & John A. Bargh, Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 542 (1997) (defining behavioral confirmation effect).

D. Judges

Judges play such a critical role in the criminal justice system, such as setting bail, deciding motions, determining the evidence that can be admitted or excluded, making rulings throughout the trial, issuing verdicts in some cases, and setting sentencing. Judges are human too, which makes them no less vulnerable to harboring implicit biases; this may be problematic as judges are supposed to be one of, if not the, most impartial participants in the criminal justice system. One study based on testing the implicit biases of trial judges found that judges have implicit biases which can affect their judgments; however, if the judges are aware of such biases then they can suppress the biases in a way so as not to affect their final judgments. [58] Two stages in the criminal process in which a judge's implicit biases can have monumental consequences are bail hearings and sentencing.

1. Bail

One of the first determinations a judge makes is whether to require bail, what kind, and how much. Bail sentencing is a vital stage in the criminal justice process due to its proven consequences. It has been shown that a defendant held in pretrial detention has increased odds of accepting a less favorable plea deal, likelihood of getting convicted, incarcerated and

[58] Rachlinski, *supra* note 18, at 1221(Finding that White judges implicitly favored White over Blacks while Black judges did not display a clear preference for Whites nor Blacks).

receiving a longer sentence. [59] Judges are most likely, at a rate of 70 percent, to issue a cash bond – which predominately affect low-income defendants who are disproportionately Black.[60] Judges are also more likely to deny bail, set a higher bond, and detain low-income defendants for being unable to pay such bond. [61] A judges' implicit biases come into play as Black defendants are more likely to be seen as flight risks based on the systems put into place against them.[62]

2. Sentencing

When a defendant is convicted, the judge typically decides the type and length of the sentence. As noted earlier, the "tough on crime" policies caused a dramatic increase in incarceration rates as well as the length of sentences. Part of the reason for an increase in length of sentencing results from the establishment of mandatory minimums.[63] Mandatory minimum sentencing laws eliminate judicial discretion as judges are forced to sentence the convicted defendant to a sentence predetermined by statute. Though there

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[59] *Regarding Racial Disparities*, *supra* note 52, at 6, n.9.

[60] *Id.*

[61] Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 942 (2013).

[62] There are many different stereotypes which actively work against Blacks when it comes to bail determinations. Blacks are seen as hostile and prone to criminality which a judge equates to being more of a danger to society. Furthermore, one's ties to the community are a huge factor in bail determinations as it reduces one's likelihood to flee. However, Blacks are seen as higher flight risks because they are more likely than White to be socioeconomically disadvantaged and possibly have criminal records, which judges use to justify denial of bail. *See Regarding Racial Disparities*, *supra* note 52; Smith, *supra* note 27, at 814.

[63] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 117-20 (2018).

are mandatory minimum sentencing laws for various crimes, they are primarily used for drug offenses. There are two main glitches found in mandatory minimum laws: first, they transfer the discretion and power of judges to prosecutors and second, implicit biases affect how such laws were drafted.[64] As to the first glitch, prosecutors possess implicit biases and are more likely to charge Blacks than Whites with crimes that have lengthier sentences under mandatory minimum laws. [65] Mandatory minimums on their face seem to reduce racial disparity, but these laws merely transfer the discretion in sentencing from judges to prosecutors, who harbor their own implicit biases. With regard to the second glitch, mandatory minimums increase the racial disparities due to the implicit biases of policy makers. For example, the mandatory minimum sentencing for crack cocaine differ greatly in length despite being "pharmacologically identical".[66]

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[64] Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 414 (2017) ("Systemic implicit bias can influence how policymakers choose between punitive and preventative frameworks for addressing social problems…. The relative devaluing of Black lives and the disproportionate desire to punish Black people will sway decision-makers toward supporting mandatory minimum jail time instead of programs aimed at treatment and prevention.").

[65] *See generally* Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* at 25, THE SENTENCING PROJECT (2014), http://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf.

[66] *Regarding Racial Disparities*, *supra* note 52, at 15 (Noting that Blacks make up 80 percent of individuals sentenced for offenses related to crack cocaine, resulting in harsher consequences than those related to powder cocaine. To receive the same sentence, the ratio for the amount of power cocaine compared to crack cocaine was 100:1 and later reduced to 18:1.).

E. Jurors

The Sixth Amendment, allows the accused to have an impartial jury in criminal cases; however, the jury is made up of people who, just as every other character within the criminal justice system, are vulnerable to fostering implicit biases and making decisions based upon these biases.[67] Within a pool of jurors, there are two common forms of implicit bias shown; in-group preference and out-group degradation. [68] In-group preference results when a juror is more likely to find against a defendant who has allegedly committed a crime against someone of the juror's own race. Out-group degradation refers to a juror being more likely to find against a defendant who is not of the same race as the juror. [69] These different preferences and implicit biases of jury members, lurk throughout trialven after voir dire is done by prosecutors.

II. DISPARATE RACIAL IMPACT OF RACE-NEUTRAL POLICIES AND LAWS

Race-neutral policies and laws that create a disparate racial impact also contribute to the racial disparity in incarceration. Race-neutral laws and policies are those which appear to be race-neutral and nondiscriminatory. Even when laws and policies appear to be race-neutral, they may disparately

[67] U.S. CONST. amend. VI. Additionally, the Due Process Clause of the 14th Amendment has extended the 6th Amendment right to a jury to apply in state criminal cases. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

[68] Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 154–55 (2010).

[69] *Id*.

impact certain groups. Race-neutral policies and laws have their biggest impact when it comes to policing policies and sentencing laws. [70] As noted before, police officers are allotted discretion when deciding who to stop and who to arrest. Police policies may determine which crimes are enforced and which areas are patrolled. These policies end up disproportionally affecting people of color.

A. Drug Free School Zones

Currently, all 50 States have some form of a drug-free school zone law, such as 21 U.S.C. § 860.[71] These laws were popularized by Reagan's War on Drugs. Drug-free school zone laws were enacted to protect children by increasing penalties for drug offenses, such as selling or using certain drugs, committed near schools.[72] These laws are problematic and result in a disparate impact on people of color due to the breadth and vagueness of the statutes. Like 21 U.S.C. 860, many States have rules prohibiting drug-related activity within 1000 feet of a school, even when schools are out of session and children are not present. [73]These laws remain active even after school

[70] *Black Lives Matter, supra* note 19, at 13.

[71] The statute 21 U.S.C. § 860 governs the distribution or manufacturing in or near schools and colleges. Subsection (a) and (c) of the statute discusses penalties and how being in or near schools harshens punishments of distribution, typically doubling the punishment of the crime if it had been done outside a school zone.

[72] Nicole D. Porter & Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies*, THE SENTENCING PROJECT (Dec. 20, 2013), https://www.sentencingproject.org/publications/drug-free-zone-laws-an-overview-of-state-policies/ [hereinafter *Drug-Free Zone Laws*].

[73] The statute's parameters for where the laws are active read, "… within one thousand feet of, the real property comprising a public or private elementary, vocational, or

hours and even extend to other areas such as public housing facilities, youth centers, public swimming pools, and parks. [74] Because the protected drug-free zones are typically clustered in inner-cities and urban areas, people of color are disproportionately affected by the harsh punishments of these laws, adding to the racial disparity.[75] Penalties for violation of drug-free zone laws include mandatory minimums, enhancement of drug offense penalties, and in some States, a lower age at which a juvenile defendant can be charged as an adult. [76] Drug-free zone laws are especially challenging when they carry mandatory minimums which allow the implicit bias of the police and prosecutor to come into play when deciding whether to arrest and charge an individual with violating the drug-free zone law.

B. Stop and Frisk

Because of increasing rates of violent crimes, police departments across the United States began implementing "stop and frisk" policies. [77]

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secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility…" 21 U.S.C. § 860; The restricted zones vary by state and range from 300 feet up to 3 miles. *See generally* Judith Greene Kevin Pranis & Jason Ziedenberg, *Disparity by Design: How Drug-Free Zone Lows Impact Racial Disparity– and Fail to Protect Youth. Justice Policy Institute* (Mar. 1, 2006), JUSTICE POLICY INST., http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_disparitybydesign_dp-jj-rd.pdf.

[74] *Id*.

[75] *Drug-Free Zone Laws*, *supra* note 72, at 10.

[76] *Id.* at 7.

[77] In New York, the policy was to "stop, question and frisk." Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

These stop and frisks typically happened in predominately minority neighborhoods which undoubtedly contributed to the racial disparities in incarceration. The rationale behind "stop and frisk" policies was to fight crime and remove guns from being on the streets by allowing police officers to stop, question, and frisk "suspicious" individuals. These policies allow the implicit biases of police officers to drive their decisions regarding who to stop and question. The Supreme Court has held that a police officer can conduct a reasonable search for weapons for his own protection, when he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.[78] Allowing police officers to frisk when they feel they are dealing with a dangerous individual welcomes subjectivity and implicit biases of an officer, to drive who gets frisked and ultimately arrested. As discussed in Part II, this subjectivity has contributed to the racial disparity.

Police engage in "stop, question, and frisk" practices primarily in minority communities, which leads to more minorities being arrested than whites. For example, in New York City, at the peak of "stop and frisk" policies in 2011, 574, 483 of the 685,724 individuals stopped by police officers, were Black or Latino.[79] Due to the nature of "stop and frisks," these

[78] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[79] Rose Lenehan, *What "Stop-and-Frisk" Really Means: Discrimination & Use of Force*, PRISON POLICY INITIATIVE (Aug. 17, 2017), https://www.prisonpolicy.org/reports/stopandfrisk.html.

policies have been constitutionally challenged. In 2013, a federal judge ruled that New York City's "Stop, Question and Frisk" policy violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[80] The Court ruled that the policy was actually acting as a way for police officers to racially profile people of color.[81] New York City's policy was found unconstitutional because it resulted in more stops of Blacks and Latinos. Additionally, even when all relevant variables were similar, the Court found that police officers used more force against Blacks and Latinos compared to Whites in similar situations, and police officers were more likely to unjustifiably stop Blacks and Latinos.[82] Judge Scheindlin ended her decision with a powerful quote[83] which the Court concluded its decision by emphasizing the danger of police officers' subjective views influencing stops and arrests, resulting in a staggering racial imbalance within the criminal justice system.

[80] Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013)

[81] *Id.* at 663.

[82] *Id.*

[83] Judge Scheindlin wrote, " I conclude with a particularly apt quote: "The idea of universal suspicion without individual evidence is what Americans find abhorrent and what black men in America must constantly fight. It is pervasive in policing policies—like stop-and-frisk, and ... neighborhood watch—regardless of the collateral damage done to the majority of innocents. It's like burning down a house to rid it of mice."" Charles M. Blow, *The Whole System Failed Trayvon Martin*, N.Y. TIMES (July 15, 2013), https://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html; Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

CONCLUSION

The racial imbalance within the criminal justice system is alarmingly apparent. This imbalance is the result of implicit and explicit bias, race-neutral policies, and laws that have a disparate impact among other factors. The staggering prevalence of racial inequality calls for criminal justice reform. This section concludes the Article by providing suggestions for criminal justice reform with a focus on changes that will reduce the racial imbalances.

Recognizing the staggering racial disparity within the criminal justice system, some States have begun to pass legislation and policies in hopes of criminal justice reform. [84] The most common changes made were to sentencing laws, reducing or eliminating disfranchisement, raising the age which juvenile delinquents are charged as adults, abolishing involuntary slavery and servitude, and addressing racial disparity and collateral consequences of imprisonment.[85]

A. Implicit Bias Training

Although implicit bias training alone will not fix the racial disparity in imprisonment, or racism in the criminal justice system, it is a start. Due to

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[84] *See generally* Nicole Porter, *Top Trends in State Criminal Justice Reform, 2018*, 2019 THE SENTENCING PROJECT (Jan. 16, 2019), https://www.sentencingproject.org/publications/top-trends-state-criminal-justice-reform-2018/.

[85] *Id*.

the fundamental role which police officers, prosecutors, public defenders, judges, and jurors play in the criminal justice system, implicit bias training can help reduce the racial imbalance by making people aware of bias which they may carry, and altering how they act. Research has shown that implicit biases are not permanent and can be unlearned through debiasing, much like breaking a bad habit.[86] The Kirwan Institute for the Study of Race and Ethnicity researched and compiled numerous debiasing strategies shown to reduce implicit racial bias. Some of the strategies mentioned are: counter-stereotyping training, exposure to counter-stereotypic individuals, intergroup contact, education about implicit bias, and accountability.[87]

These debiasing strategies, particularly education about implicit bias and intergroup contact, could be very useful in reducing the role of implicit bias in the criminal justice system if implemented. Education about implicit bias comes in many different forms. The United States Department of Justice has begun to mandate training for all of its law enforcement agents and prosecutors, noting that training is an "important step in our ongoing efforts to promote fairness, eliminate bias and build the stronger, safer, more just society that all Americans deserve."[88] In order to promote fairness and

[86] Cheryl Staats, Kirwan Inst. For the Study of Race and Ethnicity, State of the Science: Implicit Bias Review 2013, at 53, *available at* http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

[87] *Id*. at 53-60

[88] *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, U.S. DEPT. OF JUSTICE (Jun. 27, 2016)

eliminate bias, these trainings should not only be mandated for federal actors within the criminal justice system but should be mandated for those at the local and state level as well.

Although jurors are not employed by the government, they too should be required to complete implicit bias training as part of jury duty. Not only will implicit bias training help ensure a fair outcome of the case, it would help build a more just society. The easiest, and perhaps most efficient way, to train jurors on implicit bias is to do so during jury selection. For example, U.S. istrict Judge Mark W. Bennett takes 25 minutes to educate potential jurors about implicit bias to make jurors aware of their own biases, then asks them to pledge to go against any biases they may harbor. The same pledge potential jurors are asked to give is then displayed in the jury deliberation room to serve as a reminder for jurors to be aware of any unconscious biases which may affect their decisions.[89] A similar training for jurors should be implemented nationwide to reduce the role of implicit bias on a guilty or not guilty verdict.

Throughout the nation, implicit bias trainings should be given to every actor throughout the criminal justice system: police officers,

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https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel.

[89] 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 the Proposed Solutions*, 4 HAR. L. & POL'Y REV. 149, 149-71 (2010).

prosecutors, public defenders, judges, and jurors. For a nationwide training to be implemented, the Department of Justice should collaborate with scholars on implicit bias to create an effective training program that will help diminish the role of implicit bias in the criminal justice system.

B. Legislation Reform

The racial inequity within the criminal justice system is evident and calls for a change. Two major policies that contribute to the racial disparity are bail and mandatory minimums. As discussed, bail hearings and decisions affect the entire case and ultimately can affect the verdict of cases. Because bail hearings areso essential to a fair trial and 62 percent of those incarcerated being legally innocent, bail reformation is needed. The current bail system is unconstitutional as it violates due process rights and equal protection under the Fourteenth Amendment, the Eight Amendment's prohibition on excessive payments, as well as the Sixth Amendment right to a speedy trial.

Across the nation, bail systems should be reformed at every level. Some states such as California, New Jersey, and Massachusetts have enacted bail reform laws. California has completely dismantled the use of cash bail.[90] While New Jersey enacted new bail reform statutes that do not explicitly

[90] While the law does not go into effect until October 1, 2019, California Governor Jerry Brown acknowledged the effect that money bail has on socioeconomically disadvantaged people and stated, "Today, California reforms its bail system so that rich and poor alike are treated fairly."; Pretrial Release or Detention: Pretrial Services, S., 10th Cong. § 244 (2017).

eliminate cash bond, it proposes that defendants are given the presumption of release, unless they are facing life imprisonment, meaning defendants can only be detained if they pose unacceptable flight risks or a danger to the community. Under New Jersey's law, for a defendant to be detained, a prosecutor must convince a judge at the bail hearing that no conditions would ensure the defendant would return to court or ensure that the community is safe with the defendant on the streets.[91] Massachusetts has passed statutes requiring judges to take a defendant's capability of paying bail into account before setting it; Massachusetts also enacted a statute which provides judges with more pretrial alternatives to detention.[92]

Each of these States has a different approach to bail reform but all hinge on the idea that the use of cash bail should be drastically reduced, if not eliminated completely. Defendants should only be detained if they are a danger to society or a flight risk. [93] In order to ensure defendants'

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[91] *Pretrial Justice Reform*, ACLU NEW JERSEY, https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last visited Nov. 10, 2019).

[92] CSG Justice Center Staff, *Massachusetts Governor Signs Comprehensive Criminal Justice Reform Legislation*, CSG JUSTICE CENTER (Apr. 13, 2018), https://csgjusticecenter.org/jr/massachusetts/posts/massachusetts-governor-signs-comprehensive-criminal-justice-reform-legislation/.

[93] A common statement is that there are two criminal justice systems—one for the poor and people of color and one for the wealthy. Being economically disadvantaged is not a crime. To punish defendants by detaining them pretrial for failure to pay bail may be unconstitutional as people accused of crimes are effectively forced to buy their freedom or be detained before being convicted. Though it was expressly held that being impoverished is not a protected class in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), it is apparent that one's race and socioeconomic status intertwine and at some point become inseparable. This allows there to be a class justification for laws that have disparate impacts on people of lower socioeconomic status would turn to be pretext for discriminating against people of color. The law must change to acknowledge that the

constitutional rights are not violated, the use of bail money should be completely eliminated. California's approach to bail has not yet gone into effect but seems promising and will help reduce the racial disparity within the criminal justice system. As previously stated, the effects of being incarcerated pretrial are devastating and linger throughout the entire trial, including sentencing. By giving defendants a fair opportunity to be judged by a jury or judge, regardless of their race or socioeconomic status, then just maybe the racial imbalance within the criminal justice system will decrease and eventually be eradicated.

The United States has a revolting history of racism and inequality. Some may think that because slavery and segregation are illegal and the first Black President was elected that America is now in a post-racial era; this is a flawed conclusion. Racism in America is alive and well. What was once explicit racism has turned into implicit racism. however with the newest administration in office, explicit racism is resurfacing. Current policies do not overtly discriminate against people of color, but instead provide pretextual justifications regarding why such policies are not discriminatory—even when resulting in a disparate impact on people of color.[94] To combat

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intersectionality between race and socioeconomic status sometimes cannot be separated. Because the two are so closely related, to have a disparate impact on one is to be discriminatory towards the other group as well.

[94] The decision in *Washington v. Davis,* 426 U.S. 229, (1976)*,* which requires proof of a racially discriminatory motive when challenging the constitutionality of a facially neutral law, has made it difficult—if not impossible—to dismantle "facially

this, the United States ought to adopt policies that recognize that some laws and policies disproportionately affect people of color due to the institutional racism embedded within every stage of the criminal justice system. Policies that require Racial Equity Impact Assessments could ensure that a facially-neutral policy does not disproportionately affect certain groups, such as people of color.[95] Racial Equity Impact Assessments are a progressive tool that could prevent the furtherance of institutional racism and eventually aid in finding remedies for the past institutional racism that were once and still remain in place. Preventing laws and policies from having disparate impacts before they are enacted may not reduce the current racial disparity but can ensure that the racial imbalance does not increase moving forward.

neutral" laws that disproportionately affect people of color because it is easy to justify these laws with a non-discriminatory motive.; See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

[95] Terry Keleher, *Race Forward: The Center for Racial Justice Innovation, Racial Equity Impact Assessment,* Applied Research Center, 2009, https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf.