

# NOTES

## BLIND INJUSTICE: THE SUPREME COURT, IMPLICIT RACIAL BIAS, AND THE RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

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“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>1</sup> This statement by Chief Justice John Roberts in 2007 is alluring in both its grammatical symmetry and its logical simplicity. Yet it encapsulates the naiveté of the view of racial discrimination currently held by the majority of the justices of the Supreme Court of the United States. Chief Justice Roberts’s assertion contains the implied assumption that the only racial discrimination that exists—or at least the only kind that matters under the Constitution—is explicit and susceptible to conscious control. Decades of psychological research has demonstrated that the most insidious form of racial bias is actually implicit and subconscious, however.<sup>2</sup> Moreover, research has consistently shown that such racial bias—termed “implicit racial bias” by the psychological literature—is capable of affecting conscious behavior and exists independently of individuals’ conscious and explicit beliefs about racial equality.<sup>3</sup> By clinging to an outdated and incomplete definition of racial discrimination, the Court has made a series of decisions that have permitted and exacerbated the damage that implicit racial bias wreaks on racial minorities.

The most dramatic and devastating mark of implicit racial bias on the black American community is the racial disparity that permeates every level of the

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1. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
2. See, e.g., Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, Apr.–May 2008, at 33.
3. See Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 102 (2000) (explaining how individuals can harbor implicit biases distinct from their explicit attitudes); Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 2 (Mark P. Zanna ed., 1990) (explaining how implicit biases influence the formation of conscious thoughts and behavior).

criminal justice system. Failure to acknowledge and account for implicit racial bias has led the Court to expand the discretion of criminal justice actors over the past half century, vastly widening the array of opportunities for implicit racial bias to influence their decisions.<sup>4</sup> At the same time, the Court has rejected one of its most powerful tools for controlling the effects of such bias, spurning disparate impact theory in favor of an intent-based standard that is all but impossible for plaintiffs to meet.<sup>5</sup> To fulfill its constitutional duty and give true meaning to the Equal Protection Clause of the Fourteenth Amendment, the Court must recognize the influence of implicit racial bias on the criminal justice system and change constitutional course accordingly.

This Note begins with an overview of the racial disparity in the American criminal justice system. Part II gives a brief introduction to implicit racial bias, while Part III summarizes the limited research that has been conducted thus far to document its influence on criminal justice actors. Part IV analyzes the key decisions of the Court that have permitted and exacerbated the impact of implicit racial bias on the justice system, culminating in Part V, which shows the cumulative effects of the Court's decisions by analyzing the New York Police Department's "stop-and-frisk" policy and one federal judge's struggle to curtail that policy's racially disparate impact in light of the Supreme Court's precedents. Finally, Part VI argues that the Court should begin to address the reality of implicit racial bias by reigning in criminal justice actors' discretion and by refocusing its equal protection analysis on disparate impact rather than intent.

## I. THE CURRENT RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

Vast racial disparity permeates every level of our criminal justice system. Black Americans constitute roughly twelve percent of the American population,<sup>6</sup> but nearly forty percent of incarcerated Americans are black.<sup>7</sup> Black males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males.<sup>8</sup> In individual terms, the impact of such statistics is staggering: one in three black men born today will be incarcerated in his lifetime, compared to one in six Hispanic men and one in seventeen white men.<sup>9</sup> Racial disparities among incarcerated women are less substantial than among men but remain prevalent.<sup>10</sup> The cumulative effect of such disparity is that today—fifty

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4. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding stop and frisks); *see also infra* Part IV.

5. *See* *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that evidence of a racially disparate impact was insufficient to support an equal protection claim against a state's capital punishment regime); *see also infra* Part IV.

6. U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 & tbl.1 (2011).

7. *See* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 tbl.7 (2012).

8. *See id.* at 8 ("[A]bout 0.5% of all white males, more than 3.0% of all black males, and 1.2% of all Hispanic males were imprisoned in 2011.")

9. Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011).

10. *See id.*

years after the passage of the Civil Rights Act and 150 years after the ratification of the Reconstruction Amendments—more black Americans are under correctional control than were enslaved in 1850.<sup>11</sup>

The perspective encapsulated in Chief Justice Roberts's 2007 statement offers a deceptively simple explanation for these alarming statistics. This perspective assumes that our criminal laws operate with some measure of neutrality and that a disproportionate number of black Americans are incarcerated largely because black Americans commit a disproportionate share of crimes. Those who would seek refuge in that assumption face a serious dilemma, however: it is counterfactual. Research has consistently revealed that black and white Americans abuse and sell illegal drugs at similar rates, for instance.<sup>12</sup> Nevertheless, the black drug arrest rate more than quadrupled in the period from 1980 to 2000, while the white drug arrest rate remained virtually constant.<sup>13</sup> Furthermore, traditionally higher rates of violent and property crimes among black Americans may be better explained by higher rates of low socioeconomic status than race; disadvantaged neighborhoods experience higher rates of crime regardless of racial composition.<sup>14</sup> *To the extent that they exist, higher crime rates among black Americans are insufficient to explain the racial disparity in the criminal justice system.*<sup>15</sup>

Such a conclusion should be deeply troubling. If higher crime rates cannot explain the higher percentage of incarcerated black Americans, the racial disparity in incarceration becomes elevated from a secondary to a primary effect of the criminal justice system. In other words, something about the way the system is administered is contributing to the incarceration of a disproportionate number of black Americans. This is hardly a novel claim. For years, jurists have warned that certain elements of the criminal justice system may function in ways that disproportionately disadvantage minority defendants—from the crisis in indigent defense funding to the enactment of harsh mandatory minimum sentences.<sup>16</sup> Such

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11. *Michelle Alexander: More Black Men Are in Prison Today Than Were Enslaved in 1850*, HUFFINGTON POST (Oct. 12, 2011, 7:53 PM), [http://www.huffingtonpost.com/2011/10/12/michelle-alexander-more-black-men-in-prison-slaves-1850\\_n\\_1007368.html](http://www.huffingtonpost.com/2011/10/12/michelle-alexander-more-black-men-in-prison-slaves-1850_n_1007368.html) [hereinafter *Alexander*].

12. *See, e.g.*, 1 NAT'L INST. ON DRUG ABUSE, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2011, at tbl.4-7 (2012) (listing drug abuse among high school students).

13. The black drug arrest rate rose from 6.5 to 29.1 per 1000 persons; the white drug arrest rate rose from 3.5 to 4.6 per 1000 persons. Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 106 (2006).

14. *See* Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619, 642 (1996) (“[I]t is these differences in disadvantage that explain the overwhelming portion of the difference in crime, especially criminal violence, between white and African American communities.”).

15. *See* Mauer, *supra* note 9, at 90S (reviewing various studies and concluding that “[w]hat we see over time . . . is a steadily declining proportion of the prison population that can be explained by disproportionate arrests”).

16. *See, e.g.*, MARC MAUER, RACE TO INCARCERATE 151–56 (2006) (examining the racial impact of mass incarceration); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (examining the current state of indigent defense).

systemic critiques are valid and warrant the attention of all whose duty it is to ensure that the criminal justice system functions in a racially just manner.

Yet a growing body of research at the nexus between law and psychology has begun to reveal a more fundamental source of the racial disparity in the criminal justice system. Disturbingly, that research suggests that one of the primary sources of the disparity is internal, residing within each key actor in the criminal justice system from police officers and prosecutors to judges and juries.<sup>17</sup> Termed “implicit racial bias” by the bulk of psychological literature,<sup>18</sup> that sinister, surreptitious force taints the criminal justice decision-making of even the best intentioned among us.

## II. INTRODUCTION TO IMPLICIT RACIAL BIAS

In order to understand implicit racial bias and its effects on the criminal justice system, one must first understand the more fundamental concepts that form its psychological foundation. At the heart of that foundation are “implicit associations,” the subconscious relationships our minds draw between nouns and adjectives.<sup>19</sup> Implicit associations are the categories into which humans place the people, places, and things in our lives to help our brains make sense of the world.<sup>20</sup> As our experiences validate those associations over time, they become programmed into our subconscious minds: our brains know that sugar is sweet, a weeping person is sad, and fire is hot without having to exert conscious effort.<sup>21</sup> The ability to form implicit associations is thus a useful tool in our everyday lives because it frees our conscious minds for higher functions by allowing more basic functions to operate automatically.<sup>22</sup>

Implicit associations are distinct from explicit attitudes, which are the consciously controlled views we express on a given subject.<sup>23</sup> Indeed, it is possible for an individual to possess completely different implicit associations and explicit attitudes about a given subject, particularly when socially sensitive subject matter is involved.<sup>24</sup> Because few modern Americans will admit to possessing negative explicit attitudes toward racial minorities, for instance, psychologists have devised a method of bypassing an individual’s conscious attitudes to ascertain her implicit associations: the Implicit Association Test (“IAT”).<sup>25</sup> The IAT purports to measure

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17. See *infra* Part II.

18. See *infra* Part II.

19. See Carpenter, *supra* note 2, at 33.

20. *Id.* at 34.

21. See *id.*

22. *Id.*

23. Wilson et al., *supra* note 3, at 101, 102.

24. See, e.g., John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002).

25. Andrew Karpinski & James L. Hilton, *Attitudes and the Implicit Association Test*, 81 J. PERSONALITY & SOC. PSYCHOL. 774, 774–75 (2001).

implicit associations by comparing the differences in reaction times as individuals sort various words related to a given subject into categories.<sup>26</sup> Shorter reaction times indicate that individuals' brains are performing the categorization more quickly—subconsciously, even—and therefore that the individuals possess a relatively strong implicit association between the word and the category.<sup>27</sup> Since the difference between conscious and subconscious reaction times may be mere milliseconds, there is little opportunity for test subjects to manipulate the results of the IAT, even if they know what is being measured and are motivated to do so.<sup>28</sup> Though the IAT is not totally immune from criticism, it has been almost unanimously embraced by the psychological community and verified in numerous studies since its emergence in 1998.<sup>29</sup>

Because our brains make implicit associations more quickly than we form conscious thoughts and intentions, implicit associations can affect our behavior.<sup>30</sup> One can envision implicit association and conscious behavior in a kind of a race with one another: when implicit association “wins” by happening more quickly, conscious behavior patterns are skewed through its lens.<sup>31</sup> The process whereby implicit associations affect external behavior is analogous to the well-documented “Stroop Effect,” the phenomenon in which an individual mistakenly names the color word in front of her when her instructions were to name the color of the ink.<sup>32</sup> Because the brain reads text more quickly than it identifies color, it is tricked into saying “red” when it sees the word “red,” even if the goal is to say the color of the text, which is blue.<sup>33</sup> Research has demonstrated that racial categorization similarly occurs at speeds that can interrupt conscious behavior patterns.<sup>34</sup>

Implicit associations regarding race become implicit racial bias when a negative implicit association attached to a certain race influences an individual's behavior toward members of that race. Due to our continual exposure to cultural stereotypes and historicized conceptions of blackness,<sup>35</sup> the vast majority of Americans harbor

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26. *Id.*

27. *Id.* at 775.

28. See Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 92 (2003).

29. See Anthony G. Greenwald et al., *Consequential Validity of the Implicit Association Test*, 61 AM. PSYCHOLOGIST 56 (2006) (collecting sources verifying various measures of validity and responding to criticisms). Greenwald, Nosek, and Sriram were the initial designers of the IAT in 1998. *Id.*

30. See Fiske & Neuberg, *supra* note 3, at 2.

31. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325–26 (2002) (citing Jonathan D. Cohen et al., *On the Control of Automatic Processes: A Parallel Distributed Processing Account of the Stroop Effect*, 97 PSYCHOL. REV. 332 (1990)).

32. *Id.*

33. *Id.*

34. *Id.*; Fiske & Neuberg, *supra* note 3, at 11 (“[P]hysically manifested features heavily influence how individuals are categorized.”); see also *infra* Part III.A.

35. The sources of implicit racial bias are beyond the scope of this note. For a discussion of possible sources, see Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79 (2004), and see

negative implicit associations about black Americans.<sup>36</sup> Though researchers have empirically demonstrated implicit associations between blackness and a number of negative adjectives, most relevant for this paper are the links between blackness and criminality, danger, violence, and aggression.<sup>37</sup> Indeed, the implicit association between blackness and criminality is so strong that it is bidirectional—that is, not only does blackness conjure images of criminality, but criminality also conjures images of blackness.<sup>38</sup> Furthermore, research has consistently shown that these implicit racial biases exist within individuals regardless of the explicit racial attitudes they profess to hold; implicit racial bias affects study participants' conscious behavior even when they are instructed to be bias-free.<sup>39</sup> The existing psychological literature therefore strongly suggests that implicit racial bias taints the decisionmaking of criminal justice actors even when those actors possess a general intention to act in race-neutral ways.

### III. IMPACT OF IMPLICIT RACIAL BIAS ON THE CRIMINAL JUSTICE SYSTEM

While the general phenomenon of implicit racial bias is widely documented, social scientists and legal academics are only beginning to untangle its impact on the American criminal justice system.<sup>40</sup> Much of what has been written on the subject is theoretical rather than empirical and rests on the assumption that the decisions that implicit racial bias is most likely to taint—snap judgments with few individuating factors concerning an individual's propensity for danger, violence, and aggression—are rife within the criminal justice context.<sup>41</sup> Nevertheless, the empirical work that has been done thus far is largely consistent with that general hypothesis and is slowly painting a picture of a criminal justice system contaminated by implicit racial bias at every level.

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also Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000).

36. Because the Implicit Association Test is available online at <http://implicit.harvard.edu>, there is an abnormally large sample size for analysis. Between 2000 and 2006, for instance, a combined 761,697 individuals took either the "Race attitude" or "Child-race attitude" IAT on Project Implicit's website. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, tbl.2 (2007). Of those, 68% demonstrated substantially faster response times when *Black/dark-skin* was paired with *Bad* and when *White/light-skin* was paired with *Good*; only 14% of participants demonstrated the reverse. *Id.* at 17.

37. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

38. *Id.* at 889.

39. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15–16 (1989).

40. See Jerrey Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012).

41. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. REV. 2626, 2632–34 (2013) (comparing the triage performed by public defenders to that performed by emergency room personnel and suggesting that documented implicit racial bias in the latter influences the former in similar ways); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 484–86 (2004) (hypothesizing and demonstrating impact of implicit racial bias in police and probation officers' decisions in juvenile cases).

### A. Law Enforcement

By far the most extensive empirical research demonstrating the effects of implicit racial bias on the American criminal justice system concerns the individuals on its front lines: law enforcement officers. Police officers' patrol activities regularly demand the kinds of decisions most affected by implicit racial bias; officers must make lightning-quick, high-stakes judgments about individuals' propensity for criminality and violence with very little individuating information. Effective police officers frequently speak of relying on their "gut instincts" and "hunches"—inarticulable suspicions based on split-second observations of individuals' appearances and behaviors in determining whom to stop for further investigation.<sup>42</sup> Of course, such hunches are highly susceptible to influence from subconscious associations between race—an immediately identifiable characteristic—and criminality.<sup>43</sup> Not surprisingly, therefore, the data consistently demonstrate that police officers stop and search black Americans at disproportionate rates.<sup>44</sup>

Even more disturbingly, a number of empirical studies demonstrate that implicit racial bias influences police decisions about whether to use deadly force against a suspect.<sup>45</sup> Patterning their test on the IAT, researchers designed a simulation that flashed images of both white and black men on a computer screen. The parameters of the test required participants to decide quickly whether the suspect in each image was armed or unarmed and to make the decision to shoot or not shoot him accordingly.<sup>46</sup> By measuring the difference in reaction times between participants' decisions to shoot armed versus unarmed men and white men versus black men, researchers discovered a disturbing trend: in every study, the threshold of the certainty of danger that participants required to shoot a black man was significantly lower than the threshold required to shoot a white man.<sup>47</sup> In other words, participants were significantly more willing to shoot black men than white men. This phenomenon, dubbed "shooter bias" in the psychological literature, has

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42. See Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 408 (2005) (explaining the process of police decision-making that initiates police action).

43. *Id.* at 411 ("Race is perhaps the most important individual-level factor in police-citizen interactions." (citations omitted)).

44. See, e.g., Stewart J. D'Alessio & Lisa Stolzenberg, *Race and the Probability of Arrest*, 81 SOC. FORCES 1381 (2003) (collecting sources).

45. See, e.g., Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCOL. 1102, 1115 (2007) [hereinafter *Decisions to Shoot*]; Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCOL. 1314, 1328 (2002) [hereinafter *Police Officer's Dilemma*]; E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCOL. SCI. 180, 182 (2005).

46. *Police Officer's Dilemma*, *supra* note 45, at 1315–16.

47. *Id.* at 1317; see also Plant & Peruche, *supra* note 45, at 182; *Decisions to Shoot*, *supra* note 45, at 1114–15.

been empirically demonstrated in acting police officers at rates substantially similar to the general public.<sup>48</sup>

### B. Prosecutors

Though prosecutors are widely regarded as the most powerful actors in the criminal justice system,<sup>49</sup> psychologists have not yet conducted empirical research to determine the extent to which implicit racial bias affects the exercise of prosecutorial discretion.<sup>50</sup> In exercising their discretion, however, prosecutors rely upon the same basic consideration that guides police officers in the field: the danger that individual suspects pose to society because of their violence, aggression, and hostility.<sup>51</sup> Prosecutors utilize determinations about a suspect's dangerousness to decide whether to press charges against a suspect and, if so, what charges to bring; whether to oppose bail; whether to offer a plea bargain and, if so, what its terms should be; whether to disclose potentially exculpatory evidence to the defense; and what sentence to recommend.<sup>52</sup> Such a determination may even affect how a prosecutor refers to the defendant at trial.<sup>53</sup>

Furthermore, while prosecutors will usually have more individuating information about a suspect than will police officers in the field, a prosecutor will likely know little more about a suspect than her name, physical description, and the other information in the case file.<sup>54</sup> And while a prosecutor will have more time to make a decision than an officer in the field, the avalanche of arrests over the past three decades strains prosecutorial resources and requires prosecutors to make snap judgments about cases.<sup>55</sup> There is therefore strong reason to believe that such bias taints prosecutorial decisions in much the same way that it affects law enforcement decisions.<sup>56</sup>

A thorough examination of federal sentencing outcomes presents a particularly compelling case for the impact of implicit racial bias in one area of prosecutorial discretion: requests for substantial assistance downward departures from mandatory minimum sentences.<sup>57</sup> Prosecutors request such departures for defendants who are seen as "salvageable" and "sympathetic"—those who are white, female,

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48. See Plant & Peruche, *supra* note 45, at 182.

49. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007).

50. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796 (2012).

51. See *id.* at 798.

52. *Id.* at 805.

53. *Id.* at 819–20.

54. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. (forthcoming 2014) (manuscript at 3), available at <http://ssrn.com/=2261242>.

55. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 726 (1996) (detailing the relative resources spent on corrections versus those spent on legal services).

56. See Smith & Levinson, *supra* note 50, at 797.

57. Per the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Federal Sentencing Guidelines are no longer mandatory, and judges can freely depart from the Guidelines without prosecutors



and have children—at consistently higher rates than for other defendants.<sup>58</sup> An analysis of more than 77,000 federal criminal cases from 1991 to 1994 revealed that prosecutors were significantly less likely to request substantial assistance departures for black and Hispanic male defendants than for white male defendants.<sup>59</sup> The disparity remained even when the data was controlled for the severity of the offense, the individual district court’s sentencing tendencies, and the defendant’s prior criminal history.<sup>60</sup> Even when prosecutors requested departures for nonwhite defendants, such defendants received departures that were on average six months less than those received by white defendants.<sup>61</sup> The data reveal the cumulative impact of the racially skewed exercise of discretion: substantial assistance departures accounted for fifty-six percent of the total racial disparity in sentence lengths between 1991 and 1994.<sup>62</sup>

### C. Public Defenders

It is a testament to the pervasiveness and subtlety of implicit racial bias that it may even affect the decisions made by those who strive to represent the interests of black defendants in the criminal justice system. Implicit bias researchers have studied public defenders the least of all criminal justice actors.<sup>63</sup> Nevertheless, the implicit racial bias of public defenders may play a substantial role in creating and perpetuating racial disparity in the criminal justice system.

Professors L. Song Richardson and Phillip Goff suggest that the current “state of crisis” in indigent defense exposes public defenders’ decisionmaking to particular vulnerability from implicit racial bias.<sup>64</sup> Because many public defenders face unmanageable caseloads with inadequate resources, defenders must determine how to allocate their time and efforts among their clients. Thus, defenders must engage in a decisionmaking process comparable to medical triage<sup>65</sup>—a process empirically shown to be affected by implicit racial bias.<sup>66</sup>

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requesting that they do so. The increase in judicial discretion provides another point at which implicit racial bias can influence the criminal justice system. *See infra* Part III.D.

58. The “salvageable” and “sympathetic” descriptors were coined by Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 533, 535–36 (1992).

59. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 285 (2001).

60. *Id.* at 308–09 & tbl.10.

61. *Id.* at 311.

62. *Id.* at 303.

63. Richardson & Goff, *supra* note 41, at 2628 (“Almost no attention has been paid to the effects that unconscious, i.e., implicit, biases may have on [public defenders’] decisionmaking.”).

64. *See id.* at 2631–32.

65. *Id.* at 2632.

66. *Id.* at 2633 (citing Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007)).

Richardson and Goff identify several ways in which implicit racial bias could affect a public defender's handling of a case. Such bias could make a defender more willing to believe that a black client is guilty based on similar evidence, thereby prompting her to exert less energy on the client's defense or to encourage the client to accept a plea bargain.<sup>67</sup> Such bias could also affect the way she interacts with a black client, tainting the attorney-client relationship from its inception.<sup>68</sup> Finally, implicit racial bias may also make a public defender more accepting of harsher penalties for black clients, skewing the terms on which she is willing to advise her to client to accept a plea bargain and weakening her resolve to fight for the lowest possible sentence for her client.<sup>69</sup>

#### D. Judges

Trial judges have been empirically shown to harbor implicit racial biases at substantially similar rates to the general American population.<sup>70</sup> Furthermore, judges' implicit biases predicted their behavior in determining the appropriate sentences and recidivism potential for hypothetical defendants: judges who exhibited a white preference on the IAT gave a hypothetical shoplifting defendant a harsher sentence when primed with black-associated words rather than neutral words.<sup>71</sup> Significantly, however, racial bias does not seem to affect judges' decisions to *convict* a defendant, at least where the defendant's race is made explicit.<sup>72</sup> This disparity may exist because judges are potentially conscious of the need to monitor their decisions for race neutrality in the conviction context but may be less aware when determining a convicted defendant's sentence or potential for recidivism.<sup>73</sup>

#### E. Juries

Research has demonstrated that jurors drawn from the general population do not shed their implicit racial bias at the doors of the courtroom.<sup>74</sup> Specifically, research has repeatedly shown that jurors treat members of "outgroups," such as those of a different race, more harshly than those jurors perceive to be substantially like

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67. *Id.* at 2636–37.

68. *Id.* at 2638. For more on the need for public defenders to be especially conscious of race bias while interacting with their minority clients, see Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

69. Richardson & Goff, *supra* note 41, at 2641.

70. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009).

71. *Id.* at 1214–15.

72. *Id.* at 1218.

73. *See id.* at 1223.

74. *See* Kang et al., *supra* note 40, at 1144 ("Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors.").

them.<sup>75</sup> Because the majority of juries continue to be all or predominantly white, such outgroup bias disproportionately disadvantages minority defendants.<sup>76</sup> As with judges, such bias appears to diminish—but not vanish entirely—when race is a salient factor of the trial, presumably because the prominence of race prompts jurors to consciously guard against racial bias.<sup>77</sup>

Recent research has revealed an even more explicit link between implicit racial bias and the very decision society calls upon jurors to make. Using a modified version of the IAT, researchers empirically demonstrated a link between blackness and guilty in the same manner that previous studies have demonstrated links between blackness and danger, aggression, and violence.<sup>78</sup> Furthermore, researchers found that the black/guilty implicit association predicted potential jurors' judgments on the probative value of evidence.<sup>79</sup> Finally, as with police officers and the public in general, researchers found that jurors' implicit racial bias functioned independently of their explicit racial attitudes.<sup>80</sup> Such findings cast considerable doubt on the vitality of the presumption of innocence in cases involving black defendants. Jurors may subconsciously presume that such defendants are guilty from the moment they step into the courtroom and filter all evidence through that presumption throughout trial, thereby substantially increasing their likelihood to issue a guilty verdict.<sup>81</sup>

#### IV. MAXIMIZING DISCRETION, MINIMIZING ACCOUNTABILITY

The cumulative influence of implicit racial bias on the various decisions made by criminal justice actors creates a wave of racial disparity that swells from the moment a police officer decides to stop an individual to the final bang of the judge's gavel in her sentencing hearing. At each decision point along the way, the disparity grows: black individuals are more likely to be stopped and searched; they are more likely to be arrested; they are more likely to be charged, and with harsher charges; they are less likely to receive effective defense counsel; they are more likely to be convicted, either at the hands of a trial judge or a jury; and they are more likely to receive harsher sentences. America has been accused of operating two distinct criminal justice systems—one for poor and minority

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75. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005).

76. For instance, in an analysis of juries in death penalty cases, approximately 25% had zero black members and nearly 70% had two or fewer. See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 190–91 & n.99 (2001).

77. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 217 (2001).

78. Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010).

79. *Id.*

80. *Id.*

81. See *id.* at 208.

defendants and one for white and wealthy defendants.<sup>82</sup> Implicit racial bias explains how such accusations can be levied against a system ostensibly rooted in equal justice under law: the types of decisions routinely made by criminal justice actors will almost certainly be tainted by racial bias even when such bias is subconscious.

The Supreme Court's constitutional precedents have played a significant role in tolerating and exacerbating the racial disparity in the criminal justice system. Even as the psychological literature has shifted its focus to implicit and subconscious biases, the Court has hewn to a view of racial bias that encompasses only explicit discrimination.<sup>83</sup> As such, the Court has slowly drifted toward increasing the discretion of criminal justice actors while simultaneously decreasing accountability. Over the past four decades, these two lines of the Court's precedent have created a system in which implicit racial bias flourishes unchecked.

#### A. *Terry v. Ohio and the Reasonable Suspicion Standard*

The Fourth Amendment to the United States Constitution protects citizens against “unreasonable searches or seizures” and requires that “no Warrants shall issue, but upon probable cause.”<sup>84</sup> For the first two centuries of constitutional jurisprudence, these two clauses were read together to stand for the proposition that law enforcement officers could not detain and search an individual without possessing probable cause to believe that the individual was engaging or had engaged in some form of criminal activity.<sup>85</sup> In *Terry v. Ohio*, however, the Court explicitly divorced the prohibition of unreasonable searches and seizures from the probable cause requirement for police officers in the course of their regular patrol duties.<sup>86</sup> Instead, the Court ruled, a police officer may “stop” and briefly “frisk” an individual when the officer possesses “reasonable suspicion” that criminal activity is afoot, “regardless of whether he has probable cause to arrest the individual for a crime.”<sup>87</sup>

Few Supreme Court decisions have influenced law enforcement practices as much as *Terry*. Today, slightly more than forty years after the case was decided in 1968, virtually all law enforcement manuals contain phrases such “*Terry stops*”

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82. See DAVID COLE, NO EQUAL JUSTICE 5 (1999). The following section of this paper draws heavily from Professor Cole's work in fusing his analysis of the Supreme Court's cases increasing discretion while decreasing accountability with the mechanism—implicit racial bias—whereby those combined precedents have tolerated and exacerbated racial disparity in the criminal justice system.

83. See *supra* note 1 and accompanying text.

84. U.S. CONST. amend. IV.

85. See *Terry v. Ohio*, 392 U.S. 1, 36 (1968) (Douglas, J., dissenting) (“We hold today that the police have greater authority to make a ‘seizure’ and conduct a ‘search’ than a judge has to authorize such action. We have said precisely the opposite over and over again.”).

86. See *id.* at 20 (majority opinion).

87. *Id.* at 27 (emphasis added).

and/or “stop-and-frisk” in direct reference to Chief Justice Warren’s opinion.<sup>88</sup> The majority’s motivations in *Terry* were understandable: balancing the Fourth Amendment’s protection of individual liberty against police officers’ sworn duty to protect the public is a Sisyphean task. Indeed, the difficult circumstances of *Terry* itself lend sympathy to law enforcement’s cause; the suspects had “cased” a jewelry store multiple times, and a subsequent search revealed a pistol on one of the suspects.<sup>89</sup> Requiring police officers to show strict probable cause in the face of imminent and potentially violent crime surely seems unreasonable.

The problem with the Court’s retreat from probable cause, as Justice Douglas asserted in his lone dissent, is that “[t]he term ‘probable cause’ rings a bell of certainty that is not sounded by phrases such as ‘reasonable suspicion.’”<sup>90</sup> In the years following *Terry*, federal courts have increasingly deferred to police officers’ definition of what is sufficient to constitute “reasonable suspicion.”<sup>91</sup> As Judge Richard Posner wrote for the Seventh Circuit in 2005, “[w]hether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you.”<sup>92</sup> Furthermore, the advent of the War on Drugs has vastly expanded the realm of criminal activity of which police officers may reasonably suspect individuals on the street.<sup>93</sup> The combined effects of these developments have proved Justice Douglas’s words prophetic: “reasonable suspicion” has come to mean that police may “stop and frisk” virtually anyone for virtually any reason.

*Terry*’s reasonable suspicion standard provides both the earliest and the widest entry point into the criminal justice system for implicit racial bias. The standard allows police officers wide latitude to rely on their “gut instincts” and “hunches” that individuals are dangerous with little oversight or accountability.<sup>94</sup> Yet research on implicit racial bias has confirmed that the mere sight of a black person on the street is sufficient to trigger associations with danger, violence, and criminality in police officers’ minds.<sup>95</sup> A police officer will of course never offer “because he was black” as an explanation for her reasonable suspicion; indeed, she may not even be

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88. See, e.g., SEATTLE POLICE DEP’T, SEATTLE POLICE MANUAL § 6.220 (2014) (“Voluntary Contacts and *Terry* Stops”), available at [http://www.seattle.gov/police/publications/manual/06\\_220\\_Voluntary\\_Contacts\\_Terry\\_Stops.html](http://www.seattle.gov/police/publications/manual/06_220_Voluntary_Contacts_Terry_Stops.html); NEW HAMPSHIRE DEP’T OF JUSTICE, LAW ENFORCEMENT MANUAL § I.D (2008) (“Investigative Or *Terry* Stops”), available at <http://doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>; BOISE POLICE DEP’T, POLICY AND PROCEDURES MANUAL § 2.04.03 (10th ed. 2013) (“Stop and Frisk (*Terry* Stop)”), available at <http://police.cityofboise.org/media/469928/september-2013-bpd-policy-manual-public-copy.pdf>.

89. *Terry*, 392 U.S. at 5–7.

90. *Id.* at 37 (Douglas, J., dissenting).

91. COLE, *supra* note 82, at 44.

92. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005). Ironically, after declaring that “[s]uch subjective, promiscuous appeals to an ineffable intuition should not be credited,” the court went on to affirm the district court’s finding of reasonable suspicion in the case before it. *Id.*

93. See *Alexander*, *supra* note 11.

94. See *supra* notes 90–93 and accompanying text.

95. See *supra* Part II.

consciously aware that race played a role in her decision to stop an individual. By accepting the thinnest of pretexts as reasonable suspicion, however, courts shield such decisions from review and effectively guarantee that officers' true—and likely implicitly racist—motivations are never revealed.

### B. *United States v. Armstrong and Selective Prosecution*

Even as the Court increased law enforcement officers' discretion in *Terry*, it signaled that it would begin moving away from attempting to control the racially disparate impact that can result from such broad discretion in *United States v. Armstrong*.<sup>96</sup> While prior cases emphasized that selective prosecution claims were difficult to prove on the merits,<sup>97</sup> the *Armstrong* Court raised the evidentiary bar for plaintiffs even to reach discovery. To clear that bar, plaintiffs must make a "credible showing" that similarly situated individuals of a different race were not prosecuted despite having committed the same crime.<sup>98</sup> The practical difficulties inherent in the Court's standard are immediately apparent: in essence, plaintiffs must present evidence that selective prosecution occurred in order to gain access to evidence that selective prosecution occurred.

If the Court's articulation of the credible showing standard is troublesome, its application of the standard to the facts of Christopher Armstrong's case is even more disturbing. Armstrong and his co-plaintiffs challenged their federal indictments for selling crack cocaine in Los Angeles as racially selective.<sup>99</sup> In an attempt to meet the credible showing standard, Armstrong's attorneys submitted two affidavits: one from a halfway house coordinator who stated that, in his experience, white and black people dealt and used crack in equal numbers and one from a defense attorney who stated that many white defendants were prosecuted for crack offenses in California state court.<sup>100</sup> The record also contained a list of individuals charged with cocaine offenses in Los Angeles over a three-year period. Of 2400 charged individuals, all but eleven were black and none were white.<sup>101</sup> Yet the majority dispensed with Armstrong's evidence in a single paragraph, noting that he had failed to provide evidence of specific individuals of a different race who could have been but were not prosecuted for crack offenses and dismissing the affidavits as "personal conclusions based on anecdotal evidence."<sup>102</sup>

The Court's disregard of Armstrong's evidence reflects its aversion to disparate impact theory more than its deference to the U.S. Attorney's Office for the Central

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96. 517 U.S. 456 (1996).

97. See *id.* at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.").

98. *Id.* at 470.

99. *Id.* at 459.

100. *Id.* at 460–61.

101. Brief for Respondent Robert Rozelle at 28–29, *Armstrong*, 517 U.S. 456 (No. 95-157).

102. *Armstrong*, 517 U.S. at 470.

District of California. By holding that Armstrong's evidence was insufficient to meet its credible showing standard, the Court indicated that evidence of racial disparity in the enforcement of criminal statutes will rarely if ever be sufficient to advance a plaintiff's selective prosecution claim to discovery, must less to warrant a favorable decision on the merits.<sup>103</sup> In other words, evidence that a facially neutral criminal statute has by the government's own admission been applied in an overwhelmingly racially disparate manner is not a sufficient equal protection problem to warrant judicial intervention. Because the influence of implicit racial bias on prosecutorial decisionmaking can be shown almost exclusively through such evidence, *Armstrong* effectively closes the courthouse doors to attempts to control the impact of that bias through selective prosecution litigation.

### C. *McCleskey v. Kemp and Capital Punishment*

The Court's most emphatic rejection of disparate impact theory in the criminal justice context came in the area in which its influence is most troubling: the imposition of capital punishment. In *McCleskey v. Kemp*, the Court squarely held that statistical evidence of racially disparate impact is inherently insufficient to mount an equal protection challenge to a state's capital punishment regime.<sup>104</sup> Warren McCleskey, a black man, was sentenced to death by the state of Georgia for the 1978 murder of a white police officer during an armed robbery of a jewelry store.<sup>105</sup> After exhausting his postconviction remedies in state court, McCleskey filed a habeas petition in federal district court alleging *inter alia* that Georgia's capital punishment system was administered in a racially discriminatory manner that violated his Fourteenth and Eighth Amendment rights.<sup>106</sup>

As evidence of his claims, McCleskey offered a comprehensive study by Professors David Baldus, Charles Pulaski, and George Woodworth that examined more than 2,000 Georgia capital cases from the 1970s.<sup>107</sup> "The Baldus study," as the Court came to call it, revealed several alarming patterns in Georgia's imposition of the death penalty. The death penalty was imposed in twenty-two percent of capital cases involving black defendants and white victims, for instance, but in only three percent of cases involving white defendants and black victims.<sup>108</sup> Much of that disparity could be traced to prosecutorial discretion: Georgia prosecutors sought the death penalty in seventy percent of black defendant–white victim cases but in only nineteen percent of white defendant–black victim cases.<sup>109</sup> Even when the professors accounted for thirty-nine non-racial variables, such as long criminal

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103. *See id.*

104. 481 U.S. 279, 292 (1987).

105. *Id.* at 283.

106. *Id.* at 286.

107. *Id.*

108. *Id.*

109. *Id.* at 287.

records or strong eyewitness testimony, the data showed that defendants charged with killing white victims were 4.3 times more likely to be sentenced to death as defendants charged with killing black victims.<sup>110</sup>

The district court held an extensive evidentiary hearing at which Professor Baldus himself testified, but it avoided the constitutional question by holding that McCleskey failed to establish the validity of the study by a preponderance of the evidence.<sup>111</sup> Sitting en banc, the sharply fractured Eleventh Circuit took a different approach: it assumed the validity of the Baldus study but affirmed the district court's rejection of McCleskey's claim nonetheless.<sup>112</sup> In 1987, by a one-vote margin, the Supreme Court affirmed the Eleventh Circuit's decision.<sup>113</sup> Even if the central finding of the Baldus study—that black defendants accused of killing white victims were substantially more likely to be sentenced to death in Georgia—were taken to be absolute fact, the Court held, it was insufficient to support McCleskey's constitutional claims.<sup>114</sup> To prevail, McCleskey would be required to show that the prosecutor or the judge or the jury in *his* case acted with *purposeful* racial discrimination.<sup>115</sup>

In a long and scathing dissent, Justice William Brennan characterized the majority's standard as imposing a "crippling burden of proof" on prisoners alleging that racial discrimination tainted their trials.<sup>116</sup> The reasons were articulated in Justice Lewis Powell's majority opinion itself: "[c]ontrolling considerations of public policy" dictate that inmates on death row will virtually never be able to call jurors, judges, and prosecutors "to testify to the motives and influences that led to" their decisions.<sup>117</sup> Yet absent some compelling proof to the contrary, the majority declined to assume that "what is unexplained is invidious."<sup>118</sup> Justice Brennan and the dissenters scoffed at the majority's deliberate naïveté, particularly when applied to a state such as Georgia with a long "legacy of a race-conscious criminal justice system."<sup>119</sup> When coupled with the Baldus study, the dissenters contended, that legacy elevated McCleskey's equal protection claim above "a fanciful product of mere statistical artifice" and showed that Georgia was still operating the same racist system of capital punishment that it had operated "openly and formally" for centuries dating back to the colonial period.<sup>120</sup>

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110. *Id.*

111. *McCleskey v. Zant*, 580 F. Supp. 338, 360 (N.D. Ga. 1984).

112. *McCleskey v. Kemp*, 753 F.2d 877, 899 (11th Cir. 1985) (en banc).

113. *McCleskey*, 481 U.S. at 320.

114. *Id.* at 292.

115. *Id.*

116. *Id.* at 337 (Brennan, J., dissenting) (quoting *Batson v. Kentucky*, 476 U.S. 79, 92 (1986)) (internal quotation marks omitted).

117. *Id.* at 296 (majority opinion).

118. *Id.* at 313.

119. *Id.* at 328–29 (Brennan, J., dissenting).

120. *Id.* at 329.



In response, Justice Powell emphasized that McCleskey's claim, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."<sup>121</sup> McCleskey's challenge contained no limiting principle, he noted; if the Court invalidated Georgia's capital punishment regime based on its racially disparate impact, it would soon be forced to evaluate virtually all criminal statutes based on any number of types of alleged bias.<sup>122</sup> Such an evaluation would challenge "the fundamental role of discretion in our criminal justice system."<sup>123</sup>

The psychological research on implicit racial bias simultaneously validates both Justice Brennan and Justice Powell's concerns. On the one hand, that research further verifies the results of the Baldus study and leaves little doubt that for every black prisoner sentenced to death, "there was a significant chance that race . . . play[ed] a prominent role in determining if he lived or died."<sup>124</sup> On the other, the research demonstrates that racial bias infects the criminal justice system so broadly, so deeply, and so subtly that it throws into serious question the role of discretion itself. Rather than rising to McCleskey's challenge and grappling with that difficult question in 1987, however, the Court adopted a presumption of racial neutrality belied by both history and empirical evidence of current realities. In the absence of any form of meaningful accountability, racial bias has skewed the imposition of capital punishment in America to absurd proportions: since the Court reinstated the death penalty in 1976, the United States has executed thirteen times more black defendants with white victims than white defendants with black victims.<sup>125</sup>

Warren McCleskey was executed by electrocution on September 25, 1991.<sup>126</sup> He was thirty-four years old, having lived on death row for thirteen years.<sup>127</sup> He had his case argued before the Supreme Court of the United States twice.<sup>128</sup> A somber editorial by the *New York Times* published the week following his

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121. *Id.* at 314–15 (majority opinion).

122. *Id.*

123. *Id.* at 311.

124. *Id.* at 321 (Brennan, J., dissenting).

125. See *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#deathrowpop> (last visited Mar. 2, 2014).

126. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, <http://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html>.

127. *Id.*

128. After the Court denied McCleskey's disparate impact claim, his attorneys discovered that Georgia prosecutors had concealed the fact that his "confession" to the murder had been obtained by a police informant with incentives to cooperate with the police. Because *Massiah v. United States* held that this practice violates defendants' Fifth and Sixth Amendment Rights, 377 U.S. 201, 206 (1964), McCleskey filed a successive habeas petition in the Northern District of Georgia. After the district court granted relief and the Eleventh Circuit reversed, the Supreme Court again granted certiorari. The Court never reached the merits of McCleskey's *Massiah* claim, however, holding by a vote of 6-3 that his claims were precluded by his failure to include them in his first habeas petition. *McCleskey v. Zant*, 499 U.S. 467, 497, 503 (1991).

execution called his story “a damning commentary on capital punishment in the United States.”<sup>129</sup> The editorial continued:

Some supporters of the death penalty are outraged that Mr. McCleskey lived so long, surviving through the ingenuity of writ-writing lawyers. But many other Americans are more interested in sure justice than in certain death. They are left to feel outrage for a different reason, and what makes it worse is that they cannot look for relief to the Supreme Court of the United States.<sup>130</sup>

V. A CONSTITUTIONAL PERFECT STORM: NYPD, STOP-AND-FRISK,  
AND *FLOYD V. CITY OF NEW YORK*

The cumulative effects of the Supreme Court’s disregard for implicit racial bias are starkly revealed in the debate over the New York Police Department (“NYPD”)’s stop and frisk policy. While the furor over stop and frisk is largely the product of the last ten years, its roots stretch back more than four decades to the Supreme Court’s decision in *Terry*.<sup>131</sup> The New York legislature passed a statute governing “investigatory stops” that mirrored *Terry*’s relaxed “reasonable suspicion” standard a mere two years after that decision was announced.<sup>132</sup> Six years later, the state’s highest court interpreted the statute to be substantially coextensive with the Fourth Amendment analysis articulated in *Terry*.<sup>133</sup>

Though NYPD officers had the power to conduct *Terry* stops from the 1970s onward, the practice did not receive widespread public attention until the late 1990s and early 2000s, when New York City Mayor Rudy Giuliani announced plans to increase the NYPD’s use of the stop and frisk policy as one component of a larger effort to control crime in the city.<sup>134</sup> Plummeting crime rates inevitably led to declarations of success,<sup>135</sup> and after further expansion of the policy under Giuliani’s successor, Michael Bloomberg, the number of *Terry* stops conducted by

129. Editorial, *Warren McCleskey Is Dead*, N.Y. TIMES, Sept. 29, 1991, <http://www.com/1991/09/29/opinion/warren-mccleskey-is-dead.html>.

130. *Id.*

131. Indeed, as noted above, the very terms “stop” and “frisk” are derived from Chief Justice Warren’s opinion, see *Terry v. Ohio*, 392 U.S. 1, 8 (1968), and such stops are alternatively called “*Terry* stops.”

132. See N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2004 & Supp. 2014).

133. See *People v. De Bour*, 352 N.E.2d 562, 572 (N.Y. 1976) (citing § 140.50 and *Terry*, 392 U.S. 1). While the reasonable suspicion standards under *De Bour* and *Terry* are not perfectly identical, the differences between them are not so substantial that they warrant discussion here.

134. See generally RUDOLPH W. GIULIANI, *THE NEXT PHASE OF QUALITY OF LIFE: CREATING A MORE CIVIL CITY* (1998), available at <http://www.nyc.gov/html/rwg/html/quality.html> (citing James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, March 1982, at 29).

135. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 236 (2005). A number of critics have raised serious doubts regarding the existence or extent of the causal link between increased reliance on stop-and-frisk and decreased crime rates. *Id.* at 262–63 (“[T]he effects of broken windows policing, although significant for some crimes, are not universally significant, nor are they of great magnitude.”). To echo Judge Shira Scheindlin’s opinion in *Floyd*, the purpose of this Note is solely to evaluate “the constitutionality of [stop-and-frisk], not its effectiveness as a law enforcement tool.” *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at \*1 (S.D.N.Y. Aug. 12, 2013).

NYPD officers spiked from 314,000 in 2004 to a high of 686,000 in 2011.<sup>136</sup> Public discontent with the practice grew in direct proportion to the number of stops, however, and in 2008 the Center for Constitutional Rights (“CCR”) filed a federal class action lawsuit challenging NYPD’s implementation of stop and frisk as unconstitutional under the Fourth and Fourteenth Amendments.<sup>137</sup>

The CCR plaintiffs hired Dr. Jeffrey Fagan, a professor of law and public health at Columbia University, to perform complex statistical analyses on the records released by the NYPD in the course of the litigation of *Floyd v. City of New York*.<sup>138</sup> His findings—the overwhelming majority of which were adopted by Judge Shira Scheindlin in her opinion—empirically confirmed what anecdotal evidence had long suggested: stop-and-frisk has a vastly disparate impact on racial minorities in New York City.<sup>139</sup> Between January 2004 and June 2012, the NYPD conducted more than 4.4 million *Terry* stops.<sup>140</sup> Though black Americans constitute twenty-five percent of New York City’s population and Hispanic Americans constitute twenty-nine percent,<sup>141</sup> fifty-two percent of those stopped by the NYPD were black and thirty-one percent were Hispanic.<sup>142</sup> White Americans, who constitute forty-four percent of New York City’s population,<sup>143</sup> made up only ten percent of individuals stopped.<sup>144</sup> Arrest rates were almost identical across races,<sup>145</sup> and searches of blacks and Hispanics were slightly *less* likely than searches of whites to result in weapons or contraband such as drugs.<sup>146</sup>

Dr. Fagan’s analysis of the justifications offered by NYPD officers for their *Terry* stops further revealed how flimsy the “reasonable suspicion” standard has become. Officers’ two most commonly cited justifications were “furtive movements”—in forty-two percent of stops from 2004 to 2009—and “high crime area”—in fifty-five percent of stops from the same period.<sup>147</sup> Judge Scheindlin derided the “furtive movements” justification as too vague and subjective to be meaningful, citing two officers’ testimony at trial that supplied two different lists

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136. *Floyd*, 2013 WL 4046209, at \*3.

137. *See id.* at \*1.

138. *See id.* at \*13 & n.104.

139. *See id.*

140. *Id.* at \*3.

141. *State and County QuickFacts: New York (city), New York*, U.S. CENSUS BUREAU (Jan. 7, 2014, 4:02 PM), <http://quickfacts.census.gov/qfd/states/36/3651000.html> [hereinafter *NYC Census*].

142. *Floyd*, 2013 WL 4046209, at \*4.

143. *NYC Census*, *supra* note 141.

144. *Floyd*, 2013 WL 4046209, at \*4.

145. *See* Second Supplemental Report of Jeffrey Fagan, Ph.D. at 34 tbl.14, *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS) (S.D.N.Y. Nov. 29, 2012) [hereinafter *Fagan Report*]. Arrests as a percentage of stops were 6.73% for whites, 6.19% for blacks, and 6.36% for Hispanics. *Id.*

146. *See id.* at 35 tbl.15. Weapons were seized in 2.37% of white stops, 1.79% of black stops, and 1.73% of Hispanic stops; contraband was seized in 1.94% of white stops, 1.06% of black stops, and 1.25% of Hispanic stops. *Id.*

147. *Floyd*, 2013 WL 4046209, at \*13.

of benign behaviors that could qualify as “furtive.”<sup>148</sup> Further noting that the “furtive movement” justification was consistently cited to justify stops of minorities more than stops of whites, she suggested that unconscious racial bias could be tainting officers’ judgment because “[t]here is no evidence that black people’s movements are objectively more furtive than the movements of white people.”<sup>149</sup> Judge Scheindlin found the “high crime area” justification similarly hollow: Dr. Fagan’s analysis revealed that officers considered every precinct or census tract area in New York City to be a “high crime area” at substantially the same rate, regardless of actual crime data.<sup>150</sup>

In sum, Judge Scheindlin found both “furtive movements” and “high crime areas” to be weak indicators of criminal activity. Indeed, “stops were 22% more likely to result in arrest if ‘High Crime Area’ was *not* checked, and 18% more likely to result in arrest if ‘Furtive Movements’ was not checked.”<sup>151</sup> As a whole, Dr. Fagan identified roughly six percent of the 4.4 million stops as “apparently unjustified” even under the relaxed *Terry* standard.<sup>152</sup> Referring to Dr. Fagan’s definition of “apparently unjustified” as “extremely conservative,”<sup>153</sup> Judge Scheindlin adopted the six percent figure as a minimum and noted that other uncontested evidence suggested that the percentage of unjustified stops was actually much higher.<sup>154</sup> Among the most damning evidence in support of that inference was Dr. Fagan’s revelation that less than two percent of stops resulted in arrest or contraband seizure—a “hit rate” that Dr. Fagan characterized as far lower than one that would be produced by stopping individuals at random.<sup>155</sup>

While Dr. Fagan’s statistical findings clearly troubled Judge Scheindlin, she struggled to anchor her legal criticisms of stop-and-frisk in the Supreme Court’s constitutional precedents. In each of the three cases from which she drew the bulk of her discussion of equal protection challenges, the court ruled that statistical evidence of the racially disparate impact of the policy before it was *insufficient* to make the requisite showing of discriminatory purpose.<sup>156</sup> Judge Scheindlin empha-

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148. *Id.* at \*6; *see also id.* at \*17 (citing *United States v. Broomfield*, 417 U.S. 654, 655 (7th Cir. 2005)).

149. *Id.* at \*18.

150. *Id.*

151. *Id.* at \*14.

152. *Id.* at \*16.

153. *Id.*

154. *Id.* at \*19.

155. Fagan Report, *supra* note 145, at 35 & tbl.15.

156. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1979) (holding that statistical evidence of racially disparate impact of housing policy did not establish discriminatory purpose requisite to equal protection violation); *Hayden v. Paterson*, 594 F.3d 150, 166 (2d Cir. 2010) (affirming district court’s dismissal of plaintiffs’ equal protection challenge of New York’s felon disenfranchisement law because statistical evidence of racially disparate impact, without more, did not satisfy required showing of discriminatory purpose); *Pyke v. Cuomo (Pyke II)*, 567 F.3d 74, 77 (2d Cir. 2009), *cert. denied*, 558 U.S. 1048 (2009) (holding that plaintiffs had failed to show discriminatory purpose in New York’s imposition of roadblocks around a Native American reservation because the policy targeted a geographic area rather than a racial class).

sized that plaintiffs' claim was an as-applied challenge to stop-and-frisk rather than a facial challenge<sup>157</sup> and stressed the impossibility of making individualized findings for all 4.4 million stops.<sup>158</sup> Noting that discriminatory effect may be presumed from a showing of discriminatory purpose,<sup>159</sup> she endeavored to distinguish the Supreme Court's express holding that the converse presumption is not permissible—in other words, discriminatory purpose may *not* be presumed based solely on evidence of discriminatory effect. While plaintiffs' statistical evidence clearly demonstrated the discriminatory effect of stop-and-frisk,<sup>160</sup> they would need to give Judge Scheindlin something more for her to sustain their equal protection challenge to the policy.

In the end, Judge Scheindlin cobbled together a factual basis for holding that NYPD had violated plaintiffs' Fourteenth Amendment rights from testimony about nineteen specific stops and Commissioner Ray Kelly's instruction to officers to target "the right people" for stops.<sup>161</sup> The NYPD admitted that stopping "the right people" included targeting certain racial groups—specifically "male blacks [ages] 14 to 21"—based on crime data, a policy that Judge Scheindlin found constituted express racial classification subject to strict scrutiny.<sup>162</sup> Because the NYPD "[could not] defend . . . the proposition that the targeting of young black males or any other racially defined group for stops is narrowly tailored to achieve a compelling government interest," the department's use of stop-and-frisk violated the Equal Protection Clause.<sup>163</sup>

In sum, Judge Scheindlin's 198-page opinion demonstrates both the stark racial consequences of the Supreme Court's increase of law enforcement discretion and the difficulty that the Court's precedents impose on federal judges who attempt to grant minorities constitutional relief. Stop-and-frisk provides a substantial entry point for implicit racial bias to skew the judgment of police officers in a way that harms black and brown citizens based on nothing more than their "furtive movements" or presence in a "high crime area." Judge Scheindlin ended her opinion by quoting from a *New York Times* column about the Trayvon Martin case:

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

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157. See *Floyd*, 2013 WL 4046209, at \*12. Judge Scheindlin also noted that the Second Circuit has limited *Armstrong's* requirement that plaintiffs identify a similarly situated group of individuals who have been treated better under the challenged policy to the selective prosecution context. *Id.* n.91 (citing *Pyke v. Cuomo (Pyke I)*, 258 F.3d 107, 110 (2d Cir. 2001)).

158. *Id.* at \*16 ("It took weeks of testimony to try nineteen stops. It would take multiple lifetimes of many judges to try each of the 4.4 million stops.")

159. *Id.* at \*72 n.758 (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 635–36 (7th Cir. 2001)).

160. *Id.* at \*72.

161. *Id.* at \*73.

162. *Id.* at \*74.

163. *Id.* at \*73.

watch—regardless of the collateral damage done to the majority of innocents. It's like burning down a house to rid it of mice.<sup>164</sup>

Judge Scheindlin's remedial order—which mandates immediate changes to the NYPD's stop-and-frisk policy, a joint-remedial process that will consider whether further reforms are necessary, and the appointment of a special monitor—has been stayed pending appeal in the Second Circuit.<sup>165</sup> Those measures may ultimately prove unnecessary, however: recent data suggest that the NYPD has voluntarily reduced its *Terry* stops by roughly sixty percent in 2013,<sup>166</sup> and the New York City Council has voted to curtail the department's reliance on stop-and-frisk and provide legislative oversight and accountability.<sup>167</sup> Yet while popular opinion turns against stop-and-frisk, the constitutional precedents that gave birth to it remain viable law.

## VI. TOWARD A CONSTITUTIONAL SOLUTION

The interplay between implicit racial bias and the Court's precedents provides the most compelling reason to date for the Court to revisit its approach to racial discrimination and equal protection jurisprudence. While some authors have suggested structural and minor legal changes to compensate for the effects of implicit racial bias on the criminal justice system,<sup>168</sup> I believe those effects cannot be meaningfully mitigated absent a substantial revision of the Court's constitutional precedents.

The Court's focus on explicitly racist intentions renders the Constitution incapable of meaningfully addressing modern race relations in two key ways. First, the research on implicit racial bias demonstrates that "intent" is not the clear and concrete standard the Court presumes it to be; subconscious racist motivations can and do influence individual behavior regardless of conscious or expressed intentions. The intent-based standard, adopted at least in part due to its judicial administrability,<sup>169</sup> is actually administrable only to the extent that judges accept an antiquated conception of human consciousness and behavior.<sup>170</sup>

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164. *Id.* at \*75 (quoting Charles Blow, Op-Ed, *The Whole System Failed Trayvon Martin*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html>).

165. See *Ligon v. City of New York*, 538 F. App'x 101 (2d Cir. 2013).

166. Pervaiz Shallwani, *NYPD Stop-and-Frisks Decrease By 60% in Single Year*, WALL ST. J. (Jan. 16, 2014, 9:48 AM), <http://blogs.wsj.com/metropolis/2014/01/16/nypd-stop-and-frisks-decrease-by-60-in-single-year/>.

167. Sally Goldenberg, *City Council Overrides Mayor Bloomberg's Vetoes on NYPD Stop-and-Frisk Measures*, N.Y. POST (Aug. 23, 2013, 4:00 AM), <http://nypost.com/2013/08/23/city-council-overrides-mayor-bloombergs-vetoes-on-nypd-stop-and-frisk-measures/>.

168. See, e.g., Kang et al., *supra* note 40, at 1169–84 (suggesting judge training and jury instructions to mitigate the effects of implicit bias in the courtroom).

169. See generally *Washington v. Davis*, 426 U.S. 229 (1976) (holding statistical evidence of a racially disparate of an employment policy insufficient to mount equal protection challenge to the policy).

170. See Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 982 (1993) ("[T]ransparency supports the stronger, affirmative

Second, the intent-based standard focuses the constitutional inquiry in the wrong place. By emphasizing subjective intentions over objective actions and effects, the Court ignores the injuries to racial minorities caused by racial bias and discrimination of any form. By holding to the view that the Equal Protection Clause covers only intentional discrimination, the Court places the real and often devastating harm caused by implicit racial bias beyond the remedial powers of the Constitution. The burden of the harm caused by implicit bias-based discrimination is left to fall on its victims.

In her article *Why Equal Protection No Longer Protects*, Professor Reva Siegel describes how equal protection doctrine evolves over time as the legal system discovers and addresses new forms of social and legal stratification.<sup>171</sup> At the same time, however, the reasoning and laws enforcing stratification adapt to changing equal protection jurisprudence.<sup>172</sup> Thus, “[t]he body of equal protection law that sanctioned segregation was produced as the legal system endeavored to disestablish slavery; the body of equal protection law we inherit today was produced as the legal system endeavored to disestablish segregation.”<sup>173</sup> As evidence, Professor Siegel describes how states tailored their race-relations laws to the civil-political-social rights distinction solidified by the Court in *Plessy v. Ferguson*.<sup>174</sup> Because the Court showed itself willing to strike down racially discriminatory laws governing “civil rights” such as contracting and “political rights” such as jury service,<sup>175</sup> states were forced to enact facially neutral statutes to govern those areas.<sup>176</sup> But because the Court excluded “social rights” from the purview of the Equal Protection Clause in *Plessy*, states were free to enact openly discriminatory laws to enforce racial segregation in marriage, education, public transportation, and accommodation.<sup>177</sup> “The civil-political-social rights distinction thus offered a framework within which white Americans could disestablish slavery . . . and yet continue to justify policies and practices that perpetuated the racial stratification of American society.”<sup>178</sup> The result, of course, was Jim Crow.

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argument that unconscious race-specific decisionmaking is so common that it is in fact the norm for white decisionmakers.”).

171. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1114 (1997).

172. *Id.*

173. *Id.*

174. 163 U.S. 537, 544 (1896); see Siegel, *supra* note 171, at 1125–26.

175. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (striking down a law barring black males from jury service).

176. Siegel, *supra* note 171, at 1127–28. This is not to suggest that such laws were racially neutral in practice, of course: “[S]tates seeking to disenfranchise African-Americans successively experimented with the grandfather clause, residency and literacy requirements, and ‘privatization’ through the white primary, as well as the familiar tactics of racist intimidation and discriminatory administration of facially neutral registration statutes.” *Id.* at 1128.

177. *Id.*

178. *Id.* at 1129.

The Court finally and emphatically rejected the civil-political-social rights distinction in *Brown v. Board of Education*, sweeping laws that regulate the “social right” of education into ambit of the Equal Protection Clause.<sup>179</sup> Yet Professor Siegel invites us to consider the ways in which *Brown* and its progeny have driven the adaptation—and therefore survival—of racial injustice even as the Court dismantled formal segregation just as *Plessy* did following the abolition of slavery.<sup>180</sup> While Professor Siegel offers her own critique of the Court’s rejection of disparate impact analysis and insistence on a showing of discriminatory intent,<sup>181</sup> I posit that the research on implicit racial bias done in the years since her article bolsters her assessment and could provide the impetus for the next stage of evolution in the Court’s racial discrimination and equal protection jurisprudence.

The Court may begin to acknowledge and account for implicit racial bias in two ways. First, the Court should reinvigorate or altogether abandon the “reasonable suspicion” doctrine articulated in *Terry*. “[S]ubjective, promiscuous appeals to an ineffable intuition,” such as citing “furtive movements” and “high crime areas,” should no longer be credited as sufficient justifications for stopping and searching individuals on the street.<sup>182</sup> As Judge Scheindlin noted in *Floyd*, such vague excuses too easily conceal implicitly racist motivations and rarely portend criminal activity.<sup>183</sup> Rather, the Court should authorize lower federal and state court judges to apply more exacting scrutiny to police officers’ motivations and to require that officers justify *Terry* stops by citing to suspects’ specific behaviors that are at least moderately effective indicators of criminal activity. Moreover, the Court should guide lower court judges to be particularly skeptical of weak “reasonable suspicions” offered to justify the *Terry* stops of racial minorities shown to be frequent victims of implicit racial bias.

Second, the Court should limit or overturn *McCleskey* by holding that reliable statistical evidence that a criminal justice policy has a substantial racially disparate impact creates a presumption of discriminatory purpose sufficient to trigger strict scrutiny under the Equal Protection Clause.<sup>184</sup> The government agency defendant would then be required to demonstrate that the challenged policy was narrowly tailored to achieve a compelling government interest.<sup>185</sup> Absent such a showing, the court would require the agency to revise the policy to mitigate or eliminate its racially disparate impact or to abandon the policy altogether.

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179. 347 U.S. 483, 494–95 (1954).

180. Siegel, *supra* note 171, at 1129–30.

181. *Id.* at 1131–46.

182. See *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

183. See No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at \*14 (S.D.N.Y. Aug. 12, 2013).

184. *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”).

185. See *id.*



Revising the Court's constitutional jurisprudence in this manner will not eliminate the racial disparity in the American criminal justice system overnight. The point is rather to move the baseline once more by declaring that criminal justice policies that have a substantial racially disparate impact—like formal segregation—are constitutionally deficient. Doing so would initiate a conversation among the courts, law enforcement agencies, and American society at large that would hopefully lead to the development of criminal justice policies that would be both effective and truly race-neutral. Justice Powell was undoubtedly correct that addressing ongoing racial disparity will require Americans to revisit long-settled balances of power and justice, security and liberty. But acknowledging current racial realities and beginning that difficult conversation is the only way to ensure that “equal justice under law” is a reality and not merely a platitude.

## VII. CONCLUSION

“In order to get beyond racism, we must first take account of race.”<sup>186</sup> This statement by Justice Blackmun in 1978 represents a dramatically different perspective of race relations than the one held by Chief Justice Roberts. Yet the research on implicit racial bias has proven Justice Blackmun's statement prescient by suggesting that it is impossible for American decisionmakers *not* to take account of race. Rather, research demonstrates that implicit racial bias influences many of the decisions of criminal justice actors. The Supreme Court's adoption of the Roberts view has led it to increase the discretion of law enforcement officials—thereby allowing the creation of wide entry points for implicit racial bias to taint the system—while simultaneously reducing accountability for the racially disparate impact of such discretion. Working in concert, these forces have contributed substantially to the racial disparity in the criminal justice system.

Yet even as the research on implicit racial bias paints a bleak picture of the administration of criminal justice in the United States, it also provides an opportunity for the Court to revisit its constitutional precedents regarding racial discrimination and equal protection. By taking account of the influence of implicit racial bias, the Court can move the nation toward a criminal justice system that effectively balances the safety of our citizens with true equal justice under law.

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186. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).