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## Sentencing Disparities and the Dangerous Perpetuation of Racial Bias

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# Sentencing Disparities and the Dangerous Perpetuation of Racial Bias

Jelani Jefferson Exum\*

## *Abstract*

*This Article addresses the role that racial disparities—specifically sentencing disparities—play in perpetuating the racial bias that increases the daily danger of living as a Black American in the United States. As documented in the news and by sometimes humorous internet memes, White people have called the police many times to report Black people who were simply living as any other American. This trend highlights the manner in which the U.S. criminal justice system’s racial inequities feed into biased beliefs about Black criminality. This Article argues that instead of tackling implicit bias as a means to fight sentencing and other criminal justice bias, we must actively correct and eliminate the disparities head-on.*

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I. Introduction

Racial bias in the criminal justice system has been well documented.<sup>1</sup> From police tactics to rates of arrests and prosecution, Black<sup>2</sup> people suffer the disproportionate weight of

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1. For a compilation of studies, see Radley Balko, *There’s Overwhelming Evidence that the Criminal-Justice System is Racist. Here’s the proof.*, WASH. POST (Apr. 10, 2019), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/> (last visited Feb. 21, 2020) (providing a compilation of studies on racial disparities in criminal justice) [<https://perma.cc/BE8A-VHE2>].

2. I have chosen to capitalize Black when used as an adjective throughout this Article. Using the lowercase “black” treats it like an adjective describing the people, like it is their color. Black people are rarely black, and I believe that using the lowercase “black” as an adjective acknowledges that a descriptor was attached to African people by White colonists in order to justify their dehumanizing treatment. Capitalizing Black elevates it beyond a mere color adjective that was originally meant to demean and embraces it as a descriptor of shared history, culture, and struggle. For a discussion of capitalizing Black, see Merrill Perlman, *Black and White: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), [https://www.cjr.org/analysis/language\\_corner\\_1.php](https://www.cjr.org/analysis/language_corner_1.php) [<https://perma.cc/CG7R-LAAZ>]; Barrett Holmes Pitner, *The Discussion on Capitalizing ‘B’ in ‘Black’ Continues*, HUFFPOST (Nov. 4, 2014), [https://www.huffpost.com/entry/the-discussion-on-capitalizing-the-b-in-black-continues\\_b\\_6194626?guccounter=1](https://www.huffpost.com/entry/the-discussion-on-capitalizing-the-b-in-black-continues_b_6194626?guccounter=1)

criminal law enforcement.<sup>3</sup> This unfair treatment has been blamed on overt racism, implicit bias, and systemic institutional racism, among other social inequities. However, rather than solely exploring the causes of disparities in the criminal justice system, this Article addresses the role that these disparities—specifically sentencing disparities—play in perpetuating the racial bias that increases the daily danger of living as a Black American. While memes of BBQ Becky, Permit Patty, and other instances of White people calling the police to report Black people who are simply living as any other American have inspired internet hilarity, these instances highlight the manner in which our criminal justice system’s racial inequities feed into biased beliefs about Black criminality.<sup>4</sup> These biases hinder sentencing reform efforts, frustrate attempts to hold police accountable for excessive violence, and preserve beliefs that the racial disparities in the criminal justice system are warranted. As this Article argues, rather than simply tackling implicit bias as a means to fight sentencing and other criminal justice bias, we must actively correct and eliminate the disparities head-on. When this is done, perhaps a reduction in bias—and the dangerous consequences of that bias—will follow.

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[<https://perma.cc/VE6J-CRTJ>]; Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html> [<https://perma.cc/V8G7-DUE6>]. The editors of the *Washington and Lee Journal of Civil Rights and Social Justice* have chosen to capitalize White because White is often used to describe common experiences and for consistency’s sake.

3. See generally *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT’G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (last visited Feb. 21, 2020) (documenting the rates of incarceration of different races, identifying contributors to distributors, and providing recommendations for reform) [hereinafter *Color of Justice*] [<https://perma.cc/L68N-RQ83>].

4. See Jessica Guynn, *BBQ Becky, Permit Patty and Why the Internet Is Shaming White People Who Police People ‘Simply for Being Black,’* USA TODAY (July 23, 2018, 12:17 PM), <https://www.usatoday.com/story/tech/2018/07/18/bbq-becky-permit-patty-and-why-internet-shaming-White-people-who-police-Black-people/793574002/> (last visited Feb. 21, 2020) (telling the stories of BBQ Becky and Permit Patty and others) [<https://perma.cc/X8MP-N28Y>].

## II. Living While Black

Before turning to the specifics of racial sentencing disparities, it is important to discuss the realities of living as a Black person in America. Many people are familiar with the term, “Driving While Black” or “DWB.” This expression became popular in the 1990s to describe the phenomenon of Black drivers disproportionately being pulled over by police officers on the unfounded suspicion of criminal activity.<sup>5</sup> By the early 2000s, news accounts of this type of racial profiling began to bring attention to an experience that Black Americans had been having and talking about for generations.<sup>6</sup> Racial profiling refers to “stereotype-based policing” practices by which police make “decisions about criminal suspicion based on prior conceptions about groups and their prevailing characteristics.”<sup>7</sup> In the traffic stop context, profiling Black drivers as more likely to be committing criminal offenses—especially drug offenses—leaves officers stopping Black drivers more frequently than other drivers.<sup>8</sup> An officer will state a traffic infraction as justification for pulling over a driver when the real reason for the focus on that particular driver is a belief that the driver—due to his or her race—is likely to be committing some other crime. Once the stop occurs, the police have an open door to asking for consent to search the car or for claiming that the officer has developed probable cause to search the car without the driver’s consent. Studies show that racial profiling continues

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5. See David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial; New Hersey Files Reveal Drama Behind Profiling*, N.Y. TIMES (Dec. 3, 2000), <https://www.nytimes.com/2000/12/03/nyregion/inside-story-racial-bias-denial-new-jersey-files-reveal-drama-behind-profiling.html> (last visited Feb. 23, 2020) (“By 1989 . . . black and Hispanic drivers . . . complained of a new, unwritten violation in the state’s traffic code: ‘driving while black.’”) [<https://perma.cc/Z374-VZ6T>].

6. See generally *id.* (providing an example of such news coverage).

7. JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING 43 (2015).

8. See generally WILLIAM R. SMITH ET. AL., N.C. STATE UNIV., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/204021.pdf> (providing statistical compilations on racial profiling in traffic stops) [<https://perma.cc/A4WF-WXMJ>].

to be prevalent, even though such traffic stops based on racial profiling do not increase the yield of evidence of a crime.<sup>9</sup> In turn, recognition of this unfair disparate treatment—especially by Black people who have been stopped by police but have not committed any criminal offense—leads Black drivers to claim that they have been harassed for “driving while Black.” The same stereotyping that leads officers to target Black drivers infects greater society as well. Racial profiling is not only done by police officers but also by regular citizens. That reality leads to an even more dangerous situation than “driving while Black,” because it makes “living while Black” an extended experience fraught with baseless suspicions of criminality.

In the policing context, racial profiling is based on stereotyped beliefs about which racial groups commit certain crimes more frequently.<sup>10</sup> The same is true in the policing of Black individuals by greater society, specifically by White Americans. Accounts of Black people being reported by Whites for simply “living while Black” is not new, but they have recently gained traction through the use of social media. For instance, in April 2018, when a White woman, Jennifer Schulte, called the police on a Black family barbequing at a lake in Oakland, California, social media dubbed her BBQ Becky.<sup>11</sup> Humorous memes of BBQ Becky showing up to report Black joy in all sorts

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9. For a discussion on rates of racial profiling in traffic stops and the resulting low yields of evidence, see CAMELIA SIMOIU ET. AL., *THE PROBLEM OF INFRA-MARGINALITY IN OUTCOME TESTS FOR DISCRIMINATION*, 11 *THE ANNALS OF APPLIED STAT.*, no. 3, 1193, 1193 (2017). For a summary of this study, see Edmund Andrews, *A New Statistical Test Shows Racial Profiling in Police Traffic Stops*, *STANFORD ENGINEERING* (June 28, 2016), <https://engineering.stanford.edu/magazine/article/new-statistical-test-shows-racial-profiling-police-traffic-stops> (last visited Feb. 21, 2020) [<https://perma.cc/NCW4-7Y4K>].

10. See GLASER, *supra* note 7, at 44–46 (documenting the origins of racial profiling policing).

11. For an account of the story, see Christina Zhao, “BBQ Becky.” *White Woman Who Called Cops on Black BBQ, 911 Audio Released: “I’m Really Scared, Come Quick,”* *NEWSWEEK* (Sept. 4, 2018, 5:42 AM), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057> (last visited Feb. 21, 2020) [<https://perma.cc/E2V3-KXCR>].

of contexts flooded Facebook, Instagram, and Twitter.<sup>12</sup> Mainstream media followed suit. In December 2018, CNN published a story entitled, “Living While Black” and listed several of the “routine activities for which police were called on African-Americans” that year.<sup>13</sup> The list includes:

- Operating a lemonade store;
- Golfing too slowly;
- Waiting for a friend at Starbucks;
- Barbecuing at a park;
- Working out at a gym;
- Campaigning door to door;
- Moving into an apartment;
- Mowing the wrong lawn;
- Shopping for prom clothes;
- Napping in a university common room;
- Asking for directions;
- Not waving while leaving an Airbnb;
- Redeeming a coupon;
- Selling bottled water on a sidewalk;
- Eating lunch on a college campus;
- Riding in a car with a White grandmother;
- Babysitting two White children;
- Wearing a backpack that brushed against a woman;
- Working as a home inspector;
- Working as a firefighter;
- Helping a homeless man;
- Delivering newspapers;
- Swimming in a pool;
- Shopping while pregnant;
- Driving with leaves on a car; and
- Trying to cash a paycheck.<sup>14</sup>

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12. For examples of these posts, see *Before 2018 Closes, Let’s Revisit the Meme Hilarity Of BBQ Becky*, NEWS ONE (Dec. 31, 2018), <https://newsone.com/playlist/white-woman-called-cops-bbq-meme/> (last visited Feb. 21, 2020) [<https://perma.cc/ACT7-SY4Z>].

13. Brandon Griggs, *Living While Black*, CNN (Dec. 28, 2018, 8:37 AM), <https://www.cnn.com/2018/12/20/us/living-while-Black-police-calls-trnd/index.html> (last visited Feb. 21, 2020) [<https://perma.cc/XE3E-9VJ9>].

14. See *id.* (listing “routine activities for which police were called on African-Americans”).

While all of these activities seem trivial, they were heightened by the fear and tension that comes with having a common (typically White) citizen call the police to the scene simply because that person believed the Black person was doing something suspicious. In none of these situations were the African-American “suspects” found to be doing anything illegal.<sup>15</sup> This is the epitome of the problem of racial profiling—profilers, whether they be police officers or lay citizens, invite the hand (and force) of law enforcement into a situation where there is no need for law enforcement involvement. By doing so, the object of the profiling—in this case African-Americans—are at the mercy of the officer’s judgment. Officers, like the rest of society, are affected by racial stereotypes and biases as well.

In his book, *Suspect Race: Causes and Consequences of Racial Profiling*, social psychologist professor Jack Glaser explains that stereotyping is an “adaptive process” that is a normal part of human mental processes.<sup>16</sup> Stereotyping helps humans make efficient judgments about a situation.<sup>17</sup> However, though the process of stereotyping may be normal, the results are often undesirable and unjust. For example, in the case of policing, studies have found that officers “hold stereotypes linking Blacks with violence.”<sup>18</sup> In turn, these stereotypes result in a higher risk for Black individuals of having the police perceive them as dangerous during an interaction.<sup>19</sup> We see a similar phenomenon when studying perceptions of the general population. Studies “have demonstrated that stereotypes linking Blacks with aggression cause people to judge Blacks’

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15. See *id.* (providing links to the various stories of Blacks having the police called on them with no reports of subsequent conviction).

16. See GLASER, *supra* note 7, at 43 (“[S]tereotyping is a natural and efficient process that probably evolved because it was generally adaptive.”).

17. See *id.* at 43–44 (discussing the psychological basis of stereotyping and its function in human behavior).

18. *Id.* at 43 (citations omitted).

19. See Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT’L MED. ASS’N 106, 108 (2018) (reporting the results of a study about the “relationship between state-level structural racism and Black-White disparities in police shootings of victims not known to be armed”).



ambiguous behavior as more aggressive than identical behavior by Whites.”<sup>20</sup> Stereotypes, including those that taint common interactions with Black people, come from a number of sources. As Professor Glaser explains, in the criminal context, stereotypes can derive from “formal empirical analysis (e.g., DEA actuaries developing drug courier profiles, or national security analysts creating terrorist profiles), or informal, spontaneous learning (e.g. people watching news or fictional characters on TV).”<sup>21</sup> When it comes to bolstering stereotypical views of Blacks as suspicious, sentencing disparities have a hand in informing both formal and informal sources of the resulting bias.

### *III. Sentencing Disparities*

It is well known that there are racial sentencing disparities in the United States criminal justice system. Studies reportedly show that there are persistent differences between the sentences imposed on White versus non-White offenders, with Black male offenders receiving the brunt of sentencing severity.<sup>22</sup> For instance, a comprehensive sentencing study conducted by the Bureau of Justice Statistics found that from 2005 to 2012, “the trends in [federal] sentences for black males were increasingly longer than the sentences for white males.”<sup>23</sup> The same problem plagues the state criminal justice systems as well. In its 2014 written testimony to the Inter-American Commission on Human Rights, the American Civil Liberties Union (ACLU) explained that “Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white offenders and receive longer sentences than their white counterparts in

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20. GLASER, *supra* note 7, at 43 (citations omitted).

21. *Id.* at 44.

22. See, e.g., William Rhodes et al., *Federal Sentencing Disparity: 2005–2012* (Bureau of Justice Statistics, Working Paper No. 2015:01, 2015), <https://www.bjs.gov/content/pub/pdf/fsd0512.pdf> (providing data on federal sentencing disparity) [<https://perma.cc/487A-AZXH>].

23. *Id.* at 41.

some jurisdictions.”<sup>24</sup> As a result of these harsh sentencing practices levied at Black and Brown individuals, we suffer the disturbing plight of racially disproportionate incarceration as well. For instance, in 2011, African-American males were six times more likely to be incarcerated than White males.<sup>25</sup> In a 2016 sentencing study, the Sentencing Project reported that “African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of Whites.”<sup>26</sup> This statistic is reflected in our prison population where, “[t]oday, people of color make up 37% percent of the U.S. population but 67% percent of the prison population.”<sup>27</sup> More specifically, Blacks make up thirteen percent of the U.S. population, yet comprise thirty-eight percent of the U.S. prison population.<sup>28</sup> Distressingly, more than half of the prison population is African American in twelve states.<sup>29</sup> This is especially troubling considering that the United States is the world leader in incarceration.<sup>30</sup> As the oft-touted statistic tells us, “the U.S. has 5% of the world’s

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24. ACLU, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING 1 (2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<https://perma.cc/CUA8-JDGZ>].

25. See U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BULL. NO. 239808, PRISONERS IN 2011 8 (2012), <https://www.bjs.gov/content/pub/pdf/p11.pdf> (providing graphs and data on incarceration statistics) [<https://perma.cc/A3KB-9VW4>]; see also THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (discussing the disproportional incarceration rates between African Americans and White males) [<https://perma.cc/B2H6-8A24>].

26. *Color of Justice*, *supra* note 3, at 4.

27. *Criminal Justice Facts*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Feb. 21, 2020) [<https://perma.cc/XP3T-NV7B>].

28. See *Color of Justice*, *supra* note 3, at 4 (“The Bureau of Justice Statistics reports that 35% of state prisoners are white, 38% are black, and 21% are Hispanic.”).

29. See *id.* at 3 (“Maryland, whose prison population is 72% African American, tops the nation.”).

30. See *Criminal Justice Facts*, *supra* note 27 (showing that for every 100,000 individuals, the United States incarcerates 655).

population, but 25% of the world's prisoners.”<sup>31</sup> Therefore, not only do we over-incarcerate generally, we focus that unnecessarily punitive ammunition on communities of color. While there are many collateral consequences to incarceration that have racial disparities as well,<sup>32</sup> the consequence of perpetuating biased views about black criminality are the most universally damaging because of the danger they cause in everyday life. The sentencing numbers provide a formal source for racial stereotypes—they give official numbers to back up a view that Black Americans are more likely to engage in criminal behavior than Whites. The way those numbers are understood and acted on by the greater society in their interactions with Blacks show that sentencing disparities also play a part in the informal sources of racial stereotypes and bias. A closer look at the role of bias and the popular views about who commits crimes shows that sentencing disparities contribute to bolstering the stereotypical story of Black criminality that has become a popular trope.

#### *IV. The Role of Bias: Implicit Bias and the Typical Causal View*

A popular way of thinking about combating sentencing disparities is to deal with the underlying bias that is said to be a cause of those disparities. In recent years, focusing on in “implicit bias” has been the trend in the discourse on sentencing disparities.<sup>33</sup> Implicit racial bias “describes the cognitive processes whereby, despite even the best intentions, people

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31. See, e.g., *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Feb. 21, 2020) (discussing mass incarceration statistics in the United States) [<https://perma.cc/J2ZE-3E6M>].

32. See, e.g., *Collateral Consequences*, PRISON POL’Y INITIATIVE, [https://www.prisonpolicy.org/visuals/collateral\\_consequences.html](https://www.prisonpolicy.org/visuals/collateral_consequences.html) (last visited Feb. 21, 2020) (listing collateral consequences) [<https://perma.cc/3XJ3-8LDM>].

33. See 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) (“Recent empirical projects have begun the pursuit of assessing how implicit racial bias likely affects police, judicial, and juror decision-making.”).

automatically classify information in racially biased ways.”<sup>34</sup> Researchers using the Implicit Association Test<sup>35</sup> have discovered that the majority of Americans tested carry implicit negative attitudes toward Blacks, and associate Blacks with negative stereotypes.<sup>36</sup> The typical method of connecting these stereotypes to sentencing disparities is to view racial bias as an underlying cause of racial disparity. This sort of association between racial prejudices and criminalization has roots in our nation’s history.

### *A. Race and Perceptions of Criminal Behavior*

In the United States, perceptions of race have been inextricably tied to criminality since the country’s birth. In his book, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Khalil Gibran Muhammad, a professor of History, Race, and Public Policy at Harvard Kennedy School, gives a thorough account of the connection of blackness to criminality in this country.<sup>37</sup> Given that the subject matter of Professor Muhammad’s book is central to understanding the dangerous consequences of sentencing

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34. *Id.* at 797.

35. See *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> (last visited Feb. 21, 2020) (“The Implicit Association Test (IAT) [comes in the form of an online test that] measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).”) [<https://perma.cc/U3GC-VGA3>].

36. See Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 101 (2002) (“[T]he data collected are rich in information regarding the operation of attitudes and stereotypes, most notably the strength of implicit attitudes, the association and dissociation between implicit and explicit attitudes, and the effects of group membership on attitudes and stereotypes.”); see also Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 361 (2007) (discussing studies that show scores on the Implicit Association Test are linked to harmful group behaviors).

37. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

disparities, a brief review of the book's main points is warranted.

Overall, *The Condemnation of Blackness* explains the process by which crime and Blackness became synonymous overtime, though crime among Whites has historically been explained using race-neutral reasons.<sup>38</sup> For instance, the book invokes the 1928 words of Thorsten Sellin, "one of the nation's most respected white sociologists," who attested:

We are prone to judge ourselves by our best traits and strangers by their worst. In the case of the Negro, stranger in our midst, all beliefs by him prejudicial to him aid in intensifying the feeling of racial antipathy engendered by his color and his social status. The colored criminal does not as a rule enjoy the racial anonymity which cloaks the offenses of individuals of the white race.<sup>39</sup>

This association of Blacks with crime in a formalized manner can be seen during this post-Emancipation Era following the Civil War during which time White thinkers began pondering the nature of Black humanity.<sup>40</sup> "What grade of humankind were these Africans in America? What quality of citizenship did they truly deserve? What manner of coexistence should be tolerated?"<sup>41</sup> All eyes were on Blacks to see how they would fare as free people and what their successes and failures as a group meant about who they were as a people. As Professor Muhammad explains, "Statistical data on the absolute and relative growth of the Black prison population in the 1890 census, for example, would now be analyzed and interpreted as definitive proof of blacks' true criminal nature."<sup>42</sup> He makes a further illuminating observation, which sheds light on the racial sentencing disparities that still exist today: "Such empirical evidence could then justify a range of discriminatory laws, first targeting Blacks, then punishing them more harshly than

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38. *See id.* at 1 (discussing how crimes committed by Whites are viewed differently than those by African Americans).

39. *Id.* at 2.

40. *See id.* at 19 (discussing the rise of the racial bias).

41. *Id.*

42. *Id.* at 33–34.

Whites.”<sup>43</sup> It is this explicit view of Blacks as more criminally prone that is reflected in the implicit bias of today.

Critical in this shift from explicit to implicit bias and views of Black criminality is the development of a social definition of Black American culture. This progression is also evident in the history presented in *The Condemnation of Blackness*. Professor Muhammad recognizes two pivotal changes in crime discourse that took place during the Progressive Era. He describes them in this manner:

The first was the appeal for “remedial measures” in solving the Negro Problem, including expanded economic opportunities, education, social work, and crime prevention. The second was the rejection of biological determinism, including redefining racial traits as cultural traits, a paradigmatic shift in the science of race that placed African Americans once and for all within the pale of civilization, at least in the minds of most liberal social scientists.<sup>44</sup>

While initially it may seem that the move away from seeing criminal nature as a biologically determined Black trait would be a positive step, Professor Muhammad explains the danger of exchanging biology as the cause for culture. He quotes sociologist Tukufu Zuberi, who argued that this

was a move from one type of essentialist perspective, the biological evolutionary, to another type of essentialist perspective, the cultural. This shift witnessed the birth of assimilation and a focus on unproductive behavior of the unassimilated as a dominant perspective—in a word, a return to viewing the “Negro as a [peculiar] problem.”<sup>45</sup>

Muhammad explains it further with his own analysis: “The writing of crime into culture, then, became a counter-discourse that was deeply flawed, not because it inherently examined the crimes and immorality of individual Blacks but because it emphasized the cultural distinctiveness of black thieves,

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43. *Id.* at 34.

44. *Id.* at 90.

45. *Id.* at 100 (quoting TUKUFU ZUBERI, *THICKER THAN BLOOD: HOW RACIAL STATISTICS LIE* 88 (Minneapolis: University of Minnesota Press 2001)).

rapists, and murderers.”<sup>46</sup> It is this intermingled view of Black culture and criminality that feeds the bias to which Black people are subjected daily.

*B. Bias as the Cause of Sentencing Disparity: The Typical View*

Those studying the disparities in the criminal justice system have now begun assessing how implicit racial biases affect decisions made by police, prosecutors, judges, and jurors.<sup>47</sup> At any discretionary point in the criminal justice process, implicit bias has been suspected to work to the disadvantage of Black subjects.<sup>48</sup> The attention on implicit bias in the criminal justice system is based on the view that racial biases that exist in society seep into the criminal justice system because the players in that system—police officers, prosecutors, judges, etc.—are also members of society.<sup>49</sup> They have been

46. *Id.* at 101.

47. See Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006–09 (2007) (finding evidence of racial bias among both police officers and community members in simulated shooting tests of Black and White targets); see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (conducting an empirical study and finding “that the race of a civil plaintiff or criminal defendant can act implicitly to cause people to misremember a case’s facts in racially biased ways”); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187–89 (2010) (utilizing social cognition methodology to examine “the role of race in criminal law decision-making”); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009) (examining implicit racial biases among judges and finding evidence of similar biases that have been found among White Americans); Smith & Levinson, *supra* note 33, at 797 (arguing that implicit racial biases play a role in skewing prosecutorial decision-making in a manner that reflects those biases).

48. See Smith & Levinson, *supra* note 33, at 797 (providing a discussion of how implicit bias likely plays into prosecutors’ decision-making and arguing that implicit racial biases play a role in skewing prosecutorial decision-making in a manner that reflects those biases).

49. See, e.g., Rachlinski et al., *supra* note 47, at 1195–96 (examining implicit racial biases among judges and finding evidence of similar biases that have been found among White Americans).

infected by the effects of the racism that is at the foundation of our nation's history in the same way as all other members of society. A series of research undertaken by Professor Justin Levinson, a leading expert in implicit bias in the law, supports the existence of implicit bias in the criminal justice system, and at work in society at large.<sup>50</sup> One study conducted by Professor Levinson and Professor Danielle Young, a professor of psychology, found that mock jurors who viewed a series of crime scene photos made decisions based on their perception of the race of the suspect, though every detail in the photographs was the same, other than the skin color on the exposed forearm of the masked gunman.<sup>51</sup> The participants who saw a suspect with dark skin were more likely to render a guilty verdict and to give weight to ambiguous evidence, than those participants who saw a photo of the suspect with lighter skin.<sup>52</sup> As Professor Levinson explains:

First, we found that simply showing participants a photo of a dark-skinned perpetrator introduced racial bias into a crucial jury function—evaluating evidence. Next, we found that these biased evidence judgments mattered; they predicted guilty and not guilty verdicts. Finally, we found that the evidence-based racial cues likely were implicit in nature and may have activated stereotypes even without the participants' awareness.<sup>53</sup>

While that study was framed to mimic trial evidence and juror decision making, its results highlight the implicit prejudices carried by members of the public. In another study, Levinson found that changing the name and race of a suspect

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50. See, e.g., Levinson, *Forgotten Racial Equality*, *supra* note 47, at 345 (using studies and research to provide evidence of implicit racial bias throughout the criminal justice system, in manners such as factual memorization and legal decision-making).

51. See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 338 (2010) (finding that implicit racial biases played a role in how jurors evaluated evidence).

52. See *id.* at 336–37 (using two separate statistical models to conduct the implicit racial bias studies).

53. *Id.* at 338–39.



changed the way participants remembered information relevant to a case that played out in racially biased ways.<sup>54</sup> Specifically, participants who read information about a Black participant in a fight were more likely to remember that person's aggressive actions than those who read about a fight in which the participant was White.<sup>55</sup> In some instances, this biased perception went so far as certain participants even "misremembering" certain facts by recalling aggressive acts that the perpetrator had actually committed.<sup>56</sup> Through this type of research, it is becoming increasingly indisputable that racial biases, even if implicit, play a major role in the racial disparities that we see in our criminal justice system.<sup>57</sup> However, thinking of racial bias only as a cause of the racial disparities does not give a full account of the interplay between bias and the racially unjust outcomes in the criminal justice system.<sup>58</sup> Just as societal racial bias bleeds into the system, the disparities themselves, especially punishment disparities, ooze back out into society and continue to pollute the way people view Black Americans and their involvement in criminal activity.<sup>59</sup> While the implicit bias against Blacks has roots in our country's history of the subjugation of Blacks as slaves and then as unequal citizens, today's racial bias is sustained through the story that statistics on crime and sentencing disparity spin

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54. See Levinson, *Forgotten Racial Equality*, *supra* note 47, at 350 ("For example, study participants who read about Tyrone were more likely to remember aggressive facts from *The Confrontation* than were study participants who read about William.").

55. See *id.* (describing the empirical study's methodology before presenting the results).

56. See *id.* (showing that "susceptibility to misremembering facts based on race" applies to people displaying both overt and "less explicitly racist attitudes").

57. See *id.* at 351 (arguing that the research shows that implicit biases "likely affect[] legal decision-making" from judges and juries).

58. See generally Jelani Jefferson Exum, *Purpose-Focused Sentencing: How Reforming Punishment Can Transform Policing*, 29 J. CIV. RTS. & ECON. DEV. 1 (2016) (explaining the phenomenon of bias-bolstering statistics and how they contribute to racial inequity in the criminal justice system).

59. See *id.* at 8–9 (explaining how racial disparities in the criminal justice system "contribute to a belief in and affirmation of black criminality").

about Blacks and crime.<sup>60</sup> The existence of these disparities often convince people that a racially disparate crime problem is real, and that there is thus a need to concentrate our law enforcement efforts, including the use of force by the police, in those so-called “crime-ridden” communities.<sup>61</sup> That many Americans have this racially skewed view of crime is evident in data on the common perception of equity and fairness in the criminal justice system.<sup>62</sup>

*V. A Different View: Bias as the Dangerous Consequence of Disparities*

*A. Current Perceptions of Fairness in the Criminal Justice System*

As discussed previously, statistics show that African Americans are overrepresented in the criminal justice system.<sup>63</sup> From arrests to incarceration, we see Blacks making up more than their thirteen percent share of the U.S. population.<sup>64</sup> “A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every

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60. See *Color of Justice*, *supra* note 3, at 3 (“African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites.”).

61. See Rudman & Ashmore, *supra* note 36, at 359 (describing the Implicit Association Test and how its statistical findings help identify implicit biases).

62. See John Sides, *White People Believe the Justice System is Color Blind. Black People Really Don't*, WASH. POST (July 22, 2013, 12:20 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/> (last visited Feb. 3, 2020) (finding that “70 percent of blacks, but only 17 percent of whites” consider racial disparities in policing to be a serious issue) [<https://perma.cc/6KJX-H2LY>].

63. See Charles M. Blow, *Crime, Bias and Statistics*, N.Y. TIMES (Sept. 7, 2014), [http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html?\\_r=0](http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html?_r=0) (last visited Feb. 3, 2020) (quoting a Sentencing Project study that found that “implicit racial bias has penetrated all corners of the criminal justice system”) [<https://perma.cc/Q6LP-PWYE>].

64. See U.S. CENSUS BUREAU, QUICKFACTS UNITED STATES (2010) [hereinafter CENSUS QUICKFACTS] (providing data from the most recent census as well as current estimates of population and demographic numbers).

type of crime.”<sup>65</sup> In addition, “[a]t least [seventy] police departments arrested black people at a rate ten times higher than non-black people.”<sup>66</sup> And, as highlighted earlier, African Americans make up thirty-seven percent of the U.S. prison population and almost thirty-six percent of the jail population in the United States.<sup>67</sup> Though many Blacks read into these numbers an unfairness in the criminal justice system, polls show that a majority of Whites see the criminal justice system as principally fair when it comes to race.<sup>68</sup> According to a 2013 Gallup poll, when asked if the American justice system is biased against Black people, sixty-eight percent of Black Americans said yes, the system is biased, while twenty-six percent said it was not biased.<sup>69</sup> Conversely, Whites’ views of the criminal justice system were almost exactly the opposite—with only twenty-five percent of Whites saying the system is biased and sixty-nine percent saying there is no bias against Blacks in the criminal justice system.<sup>70</sup> Keeping in mind that Whites make up seventy-seven percent of the U.S. population,<sup>71</sup> these polls suggest that for the majority, or near majority of Americans who believe that the system is fair, and not biased against Blacks, then the only explanation for the racial disparities seen in arrest

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65. JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 17 (2015), <http://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf> [https://perma.cc/2XVX-NHGQ].

66. *Id.*

67. *See id.* at 12 (displaying pie charts comparing the U.S. jail population with the general population demographics and showing that Blacks are overly represented in the jail population).

68. *See* Frank Newport, *Gulf Grows in Black-White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), <http://www.gallup.com/poll/163610/gulf-grows-Black-White-views-justice-system-bias.aspx> (last visited Feb. 21, 2020) (noting that Whites are “less likely to see bias now than in 1993”) [https://perma.cc/5STX-BZ3L].

69. *See id.* (noting that “Blacks’ attitudes about the justice system have remained virtually constant over the past [twenty] years”).

70. *See id.* (“The Gallup data reveal a continuing divide by race in views of the fairness of the American justice system.”).

71. *See* CENSUS QUICKFACTS, *supra* note 64 (detailing U.S. demographic information).

and incarceration rates is that Blacks in fact commit more than their fair share of crime, and are thus justly punished for it. It is because of this majority perception of fairness that, in my previous work, I have characterized sentencing disparity statistics as “bias-bolstering statistics.”<sup>72</sup> Such statistics contribute to a belief in and affirmation of Black criminality. In this way, stereotypes are formalized in empirical evidence. Studies on American attitudes about race and crime bear out this truth.<sup>73</sup>

Evidence shows that Americans over-attribute criminal activity to Blacks.<sup>74</sup> A 2014 study by The Sentencing Project showed that, when asked about burglaries, illegal drug sales, and juvenile crimes, Whites overestimated the percentage of those crimes committed by African Americans by as much as thirty percent.<sup>75</sup> Across races, people overestimated black participation in violent crime by over ten percent.<sup>76</sup> Of course, implicit bias studies further reveal just how pervasive such negative sentiments about Blacks are in this country.<sup>77</sup> A deeper look at statistics, however, indicates that Americans are basing their views on criminality in the bias-bolstering statistics,

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72. Exum, *supra* note 58, at 8.

73. *See generally* NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> (presenting statistical findings from research on the relationship between racial perceptions of crime and public support for punitive policies) [<https://perma.cc/H6EH-5YE5>].

74. *See id.* at 13 (“These studies consistently show that Americans, and whites in particular, significantly overestimate the proportion of crime committed by blacks and Latinos.”).

75. *See id.* (finding that the White “respondents overestimated actual black participation in these crimes—measured by arrests—by approximately [twenty] to [thirty] percent”).

76. *See id.* (“[A] racially diverse group of participants in a 2002 survey estimated that [forty percent] of people who committed violent crimes were African American, when crime victimization surveys showed this rate to be [twenty-nine percent].”).

77. *See id.* at 14 (“Implicit bias tests have shown that the general public holds negative associations of blacks and Latinos . . .”).

rather than on a full understanding of the structural racism present in the American criminal justice system.<sup>78</sup>

*B. Current Realities of Inequities in the  
Criminal Justice System*

When we zoom out from a narrow focus on arrest and incarceration statistics, to a broader view on actual crime commission, the fact that the criminal justice system is operating with a bias against Blacks comes clearly into focus. Bias-bolstering statistics speak only to crime detection, conviction, and punishment rates. Alternatively, what I have termed as bias-revealing statistics look to the realities of criminal behavior.<sup>79</sup> For instance, bias-bolstering statistics say that African Americans are almost four times more likely to be arrested for selling drugs and almost three times more likely to be arrested for possessing drugs.<sup>80</sup> This could lead to an inference that Blacks must be the main sellers and users of illegal drugs. However, bias-revealing statistics show that Whites are actually more likely to sell drugs and equally likely to consume them.<sup>81</sup> Such bias-revealing statistics unveil underlying injustices in the criminal justice system—Blacks, though not the main criminal culprits, are treated by the system as though they are disproportionately involved in criminal activity. We see the same injustice exposed in the bias-revealing statistics for incarceration. Research from various jurisdictions indicates that African Americans are more likely to receive jail sentences when convicted of low-level offenses. For instance:

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78. See Exum, *supra* note 58, at 8 (presenting bias-bolstering statistics and explaining how they contribute to Americans' perceptions of race and criminality).

79. See *id.* at 10 (“[B]ias-revealing statistics unveil underlying injustices in the criminal justice system . . . the same racially inequities exposed in the bias-revealing statistics for incarceration.”).

80. See EAGLIN & SOLOMON, *supra* note 65, at 7 (signifying the racial and ethnic disparity in regard in the treatment of low-level offenses in the criminal-justice system).

81. See *id.* (emphasizing that having a higher arrest rate for drug-related crimes does not prove that African Americans sell and use drugs more than other racial groups).

A 2014 Vera Institute study of New York County found that 30 percent of African American defendants were sentenced to jail for misdemeanor offenses, compared to 20 percent of Hispanic defendants and 16 percent of white defendants. African Americans were 89 percent more likely to be jailed for misdemeanor “person offenses” (such as assault) and 85 percent more likely to be incarcerated for misdemeanor drug offenses compared to white defendants. Hispanic defendants were 32 percent more likely to be incarcerated for misdemeanor person offenses.<sup>82</sup>

Therefore, when we are comparing people who have been convicted of the same type of crime, we see race as an unduly relevant factor in determining what length of sentence the individuals receive. However, despite these realities, the fact that the racial disparities in the criminal justice system exist make it easy to ignore the role that racial bias plays in those outcomes. But, more dangerously, the existence of these disparities, without the context provided by bias-revealing information—feeds into dangerous assumptions about the character and culture of Black people that we see playing out in everyday life.

### *C. Bias as the Dangerous Consequence of Disparity*

Bias is self-perpetuating. In explaining racial profiling, Professor Jack Glaser says that “[o]ne fundamental problem” with building profiles based on the characteristics of known perpetrators is that “known perpetrators are those who have been reported or caught.”<sup>83</sup> Of course, the problem with this is that “[a]s a consequence, data on known perpetrators for the commonly profiled crimes (drug crimes) are based almost entirely on those already caught.”<sup>84</sup> The scientific term for this truth is “selection bias” and as Professor Glaser describes, if a suspect’s race “has already been a factor in agents’ assessments of suspicion (and . . . there is every reason to believe it has been), then these known drug crime perpetrators are not

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82. *Id.* at 18.

83. GLASER, *supra* note 7, at 46.

84. *Id.*

representative of the larger population of drug crime perpetrators.”<sup>85</sup> We see this same phenomenon in the interplay between racial sentencing disparities and the societal bias that flows from those disparities. So long as there are racial disparities in sentencing, based not on actual criminal desert, but on underlying stereotype-based bias against non-Whites, then data informing sentencing decisions will incorporate that bias as well. Compounding the racial injustice is the fact that those doubly biased sentencing outcomes inform and support further biased sentiments about the behavior of Black individuals, leading to unnecessary actions being taken against them. Professor Glaser describes the psychology behind it this way:

[T]he extent to which we hold predominately negative stereotypes of a group, this will cause us to have relatively negative feelings (prejudice) towards that group. At the same time, if we have negative feelings toward a group, we will be more likely to accept uncritically information indicating that they have negative traits. These negative thoughts and feelings will cause us to be disparaging toward members of that group. Likewise, disparaging behavior (e.g, avoidance, hostility) towards members of the group may cause us to generate negative beliefs and feelings to justify the behavior.<sup>86</sup>

We see this progression play out in the recent “living while Black” news stories. Implicit bias and stereotype research already show that Americans hold predominately negative stereotypes against Blacks.<sup>87</sup> Psychologically, stereotypes are activated through “priming”—“a cognitive phenomenon that reveals how exposing people to photos, symbolic representations, or members of stereotyped groups activates a vast network of stereotypes about that group.”<sup>88</sup> When it comes

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85. *Id.*

86. *Id.* at 52.

87. *See generally* Smith & Levinson, *supra* note 33 (outlining how implicit racial bias has created American society to have a negative impression against Black Americans which can be seen through the actions of prosecutors).

88. *Id.* at 798–99.

to racial bias, racial stereotypes can be triggered simply “by seeing a member of a stereotyped group.”<sup>89</sup> Therefore, when a White student at Yale sees a Black woman sleeping in a common area of a Yale dorm, the White woman’s racial stereotypes can be activated. If we accept Professor Glaser’s proposition, these negative stereotypes cause negative feelings, or prejudice, towards Blacks. So, when a White student at Yale sees a black woman sleeping in a common area of a Yale dorm, that White student thinks, “[T]here’s somebody who appeared they weren’t . . . where they were supposed to be.”<sup>90</sup> This thought indicates the White student’s prejudice or negative feelings toward the Black woman. Following Professor Glaser’s approach, this prejudice indicates that this particular White woman is more likely to “accept uncritically” information indicating that this Black woman is exhibiting a negative trait, namely criminal behavior. That information about criminality comes from sources like the bias-bolstering sentencing disparity statistics discussed previously. It is immaterial whether this particular White woman has actually ever seen sentencing statistics as a formal source of her bias. As a participant in American social life, she has undoubtedly informally absorbed an awareness of the high rates of arrests, prosecutions, convictions, and incarceration of African-Americans. And, it is likely that she has absorbed such information uncritically—which is reflected in the types of studies showing that the majority of White Americans perceive that the criminal justice system deals fairly with Black people. This view, informed by partial information about the criminal justice system (partial, because it is not also clarified by bias-revealing statistics), feed her negative thoughts and feelings and cause her to act disparagingly toward the Black woman whom she unjustly perceives as a threat. In this case, which happened at Yale University in May 2018, the White woman, Sarah Braasch,

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89. *Id.* at 800.

90. Holly Yan, *Yale Student Accused of ‘Napping While Black’ Wants Fellow Student Disciplined*, CNN (May 14, 2018, 1:27 PM), <https://www.cnn.com/2018/05/14/us/yale-Black-grad-student-interview/index.html> (last visited Feb. 21, 2020) [<https://perma.cc/U6B7-GE7L>].



called the police to report the Black woman.<sup>91</sup> Once the police arrived, after questioning the Black woman, Lolade Siyonbola, and requiring her to show her identification, they concluded that she was actually also a Yale student with “every right” to take a nap in the dorm common space.<sup>92</sup> In that particular situation, though certainly stressful for Siyonbola (she told *Good Morning America* that she started filming the interaction “just for my safety”<sup>93</sup>), at least the police encounter did not result in an arrest or use of force.<sup>94</sup> That is not always the case.

Accounts of “living while Black” that involve more heightened tension with the police abound. In April 2018, a White woman called the police on three Black women as they checked out of their Airbnb.<sup>95</sup> As the women were taking their suitcases to their car, seven police officers arrived and officers told the women to put their hands in the air and subsequently detained them for twenty to forty-five minutes before releasing them.<sup>96</sup> Just as Professor Glaser’s explanation of the psychological process predicts, the offending White woman justified her actions by characterizing the women as “strange” and saying, “You know, they just kind of avoided me, or they didn’t wave.”<sup>97</sup> Also in April 2018, a call to police ended in an

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91. See *id.* (showcasing a recent situation in which a White American perceived Black Americans as dangerous because of negative stereotypes and criminal justice system statistics).

92. *Id.*

93. Karma Allen, *Black Student Interrogated After Napping at Yale: I Posted Video “For My Safety”*: EXCLUSIVE, ABC NEWS (May 14, 2018, 6:51 AM), <https://abcnews.go.com/US/black-student-interrogated-napping-yale-posted-video-safety/story?id=55141393> (last visited Feb. 21, 2020) [<https://perma.cc/B6GQ-CF55>].

94. See Yan, *supra* note 90 (“After verifying Siyonbola’s identity, officers scolded the white student who called police . . .”).

95. See Dakin Andone, *Woman Says She Called Police when Black Airbnb Guest Didn’t Wave at Her*, CNN (May 11, 2018, 2:32 AM), <https://www.cnn.com/2018/05/10/us/airbnb-Black-rialto-california-trnd/index.html> (last visited Feb. 21, 2020) (“[A]uthorities said she made the call because the departing guests didn’t wave to her or smile at her . . .”) [<https://perma.cc/SG8Y-RF2H>].

96. See *id.* (exemplifying the interactions between the police and African Americans engaging in routine activities such as leaving an Airbnb).

97. *Id.*

arrest in a well-publicized story of two men who were waiting for a friend in a Philadelphia Starbucks.<sup>98</sup> Starbucks staff reportedly asked the men to leave because they wanted to use the restroom but had not purchased anything.<sup>99</sup> When the men refused to leave, and instead, sat and calmly waited for the friend whom they were meeting there, a staff member called the police.<sup>100</sup> When the police arrived, the two men were arrested “without incident.”<sup>101</sup> Though the Philadelphia Police Commissioner maintained that the officers had acted appropriately, the CEO of Starbucks issued a statement condemning racial profiling and asserting that “[t]he basis for the call to the Philadelphia police department was wrong.”<sup>102</sup> In all of these cases of “living while Black,” there is always the potential of the already unnecessary interaction with police officers to go awry. The same was the case in May 2018, when a neighbor called the police on Daren Martin, a former White House staffer for President Obama, and accused him of being an armed robber.<sup>103</sup> Martin, a Black man, was moving into his own apartment.<sup>104</sup> As he did so, approximately a half dozen New York police officers reported to the scene—each under the impression that Martin was armed and dangerous.<sup>105</sup> As Martin

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98. See Kelly McCleary & Amir Vera, *A Video of Black Men Being Arrested at a Starbucks. Three Very Different Reactions*, CNN (Apr. 15, 2018, 10:45 PM), <https://www.cnn.com/2018/04/14/us/philadelphia-police-starbucks-arrests/index.html> (last visited Feb. 20, 2020) (“A viral video of two black men being arrested at a Philadelphia Starbucks has elicited three very different responses from police, the company and community members.”) [<https://perma.cc/DV7C-2SYC>].

99. See *id.* (outlining the timeline of the confrontation).

100. See *id.* (articulating when the police were called).

101. *Id.*

102. *Id.*

103. See Holly Yan, *This is Why Everyday Racial Profiling is so Dangerous*, CNN (May 11, 2018, 11:54 AM), <https://www.cnn.com/2018/05/11/us/everyday-racial-profiling-consequences-trnd/index.html> (last visited Feb. 20, 2020) (describing Daren Martin’s encounter with the police while moving) [<https://perma.cc/5ASN-4SY3>].

104. See *id.* (“Late last month, he was moving into his own New York apartment when a neighbor called police saying he was an armed burglar.”).

105. See *id.* (“The day Martin moved in, about a half dozen New York police officers showed up under the impression he was armed.”).

aptly observed, “[h]ad he made one wrong move . . . he could have been killed.”<sup>106</sup> These are the dangerous consequences of any aspect of our criminal justice system, like sentencing, that perpetuates racial bias.

Of course, in some instances, Black individuals—though not actually committing a dangerous crime—have been killed by police officers responding to a call.<sup>107</sup> The examples are numerous.<sup>108</sup> One such story is that of John Crawford, a twenty-two-year-old man who was fatally shot on August 5, 2014, by a police officer at a Walmart in Beavercreek, Ohio.<sup>109</sup> Another Walmart shopper, Ronald Ritchie, called 911 and reported that a Black man was carrying around a weapon and pointing it at customers.<sup>110</sup> Emergency dispatchers relayed that a Black man was holding a rifle, and appeared to be loading it and waving it

106. *Id.*

107. *See, e.g.*, Mark Gokavi, *Walmart: 911 Caller “Intentionally Lied to Police” About Man with Toy Gun Fatally Shot in Ohio Store*, WSB-TV2 ATLANTA (June 14, 2019, 10:27 AM), <https://www.wsbtv.com/news/trending-now/walmart-911-caller-intentionally-lied-to-police-about-man-with-toy-gun-fatally-shot-in-ohio-store/958210503/> (last visited Feb. 20, 2020) (reporting the fatal encounter between John Crawford and police officers) [<https://perma.cc/5QGC-UHWF>]; *see also* Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <https://www.gq.com/story/tamir-rice-story> (last visited Feb. 20, 2020) (reporting the fatal encounter between Tamir Rice and the police) [<https://perma.cc/C8KL-LW8H>].

108. *See, e.g.*, Camila Domonoske, *Shots in The Back, Children Tasered: DOJ Details Excessive Force by Chicago Police*, NPR (Jan. 13, 2017, 4:02 PM), <https://www.npr.org/sections/thetwo-way/2017/01/13/509665735/shots-in-the-back-children-tasered-doj-details-excessive-force-by-chicago-police> (last visited Feb. 20, 2020) (“In ‘numerous incidents,’ Chicago police officers chased and shot fleeing people who posed no threat to officers or the public, the DOJ says.”) [<https://perma.cc/9ZSP-PU5W>].

109. *See* Gokavi, *supra* note 107 (reporting that John Crawford was shot after dispatchers were told a Black man was holding a rifle and waving it near people at Walmart).

110. *See* Jon Swaine, *Doubts Cast on Witness’s Account of Black Man Killed by Police in Walmart*, THE GUARDIAN (Sept. 7, 2014 10:37 AM), <https://www.theguardian.com/world/2014/sep/07/ohio-black-man-killed-by-police-walmart-doubts-cast-witness-account> (last visited Feb. 20, 2020) (stating what Ronald Ritchie had told the dispatcher and reporters on the day John Crawford III was killed) [<https://perma.cc/72QR-P4WC>].

near people, including children.<sup>111</sup> Crawford was actually holding a BB/pellet rifle that had been sitting, unpackaged, on the store shelf.<sup>112</sup> Ritchie later admitted that “[a]t no point did [Crawford] shoulder the rifle and point it at somebody.”<sup>113</sup> Despite the fact that Mr. Crawford was simply holding a toy gun that was sold in the store, once officers arrived at the scene, Mr. Crawford was shot and killed by those officers within mere seconds.<sup>114</sup> Mr. Crawford’s girlfriend was with him and, when asked to describe what happened, she said, “I feel like they shot him down like he was not even human.”<sup>115</sup>

A feeling of diminished humanity is also present in the heart-wrenching death of twelve-year-old Tamir Rice in Cleveland, Ohio.<sup>116</sup> Tamir was shot and killed on November 22, 2014, while playing in a park with a toy gun.<sup>117</sup> Police were responding to a call from an individual who reported to the 911 operator: “There’s a guy in here with a pistol . . . and, you know, it’s probably fake, but he’s, like, pointing it at everybody.”<sup>118</sup> At some point during the call, the caller also said, “Probably a juvenile, you know?”<sup>119</sup> As with John Crawford, Tamir Rice was

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111. See Gokavi, *supra* note 107 (“John Crawford, 22, was fatally shot Aug. 5, 2014, by Beavercreek police Officer Sean Williams after dispatchers were told a black man was holding a rifle, appeared to be loading it and waving it near people, including children.”).

112. *Id.*

113. Swaine, *supra* note 110.

114. See *id.* (describing the video surveillance where Crawford was seen standing still, talking on his phone before armed police officer arrived and within seconds shot Crawford twice).

115. Steve Bennish, *Man Police Shot in Walmart Killed over Fake Gun, Family Says*, DAYTON DAILY NEWS (Aug. 6, 2014), <https://www.daytondailynews.com/news/man-police-shot-walmart-killed-over-fake-gun-family-says/IavuXoLYVs7riZJTWPz0IL/> (last visited Feb. 20, 2020) [<https://perma.cc/6TDX-BSAN>].

116. See Flynn, *supra* note 107 (reporting on the Tamir Rice shooting and subsequent grand jury trial).

117. See *id.* (describing the events that led to Tamir Rice’s death).

118. *Id.*

119. *Id.*

killed by police within seconds of their arrival on the scene.<sup>120</sup> Additionally, as is the case with many of these types of killings, the officers involved were never indicted.<sup>121</sup> These types of stories highlight the dangerous consequences of societal racial bias—the type of racial bias that is fueled by sentencing disparities that suggest that Blacks are more often involved in criminal behavior. Those same biases also are also present when grand jurors (who are merely members of the larger society) refuse to see police actions in these cases as unreasonable.<sup>122</sup> Rather, time and again, grand jurors (or petit jurors in the few cases in which officers are actually indicted and go to trial) view the evidence as showing that police officers were reasonable in using deadly force against the Black victim—even in cases in which that victim, in reality, posed no threat to the officers.<sup>123</sup> In this way, we see the implicit biases that support a view of Blacks being more aggressive than Whites play out, not only to support the views of the individuals who call the police to report those black people, but also in the reluctance to punish police officers for holding those same biases.<sup>124</sup>

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120. *See id.* (“When [the cop car] was even with Tamir, before it had stopped, Loehmann [one of the police officers] got out and fired.”).

121. *See id.* (stating that the grand jury declined to indict either officer and the city of Cleveland denied anyone did anything wrong).

122. *See id.* (detailing the officers’ lack of experience and emotional immaturity and little amount of time before the officers shot Tamir, yet the grand jury decided not to indict the officers).

123. *See id.* (explaining that grand jurors, almost always, follow where prosecutors lead them and in this case the prosecutors appeared to be acting more like defense attorneys for the police officers than prosecutors).

124. *See e.g.*, Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 CLEV. ST. L. REV. 491, 491 (2017) (arguing that “so long as the legal standard only allows for the prosecution of police when the officers are ‘unreasonable’ in using their force, . . . there will not be much change in the success of prosecuting police for the use of deadly force”); *see also* Exum, *supra* note 58 (proposing “purpose-focused sentencing’ as a means of remedying the over-incarceration of blacks, thereby combatting attitudes about crime and black criminality, and in turn, affecting how police see and treat blacks”).

*VI. Dealing with the Disparities to Reduce Bias*

Many scholars who research implicit bias identify being aware of our own individual biases and having a desire to change those biases as key factors in reducing implicit bias.<sup>125</sup> This “de-biasing” approach involves extensive interventions and training on alternate decision-making approaches.<sup>126</sup> Without some sort of institutional support, this type of de-biasing is impossible, meaning that it is out of reach as a solution for most Americans who do not work in an environment that is investing in such measures. This means that the everyday dangers faced by African Americans due to implicit racial bias cannot realistically be dealt with in this manner. Therefore, it is paramount to deal with the causes of this bias outright, rather than waiting for racial bias to be reduced through training. As psychological researchers have found:

Another approach that could be effective is to focus on reducing the impact of implicit bias on [behavior] rather than reducing the bias itself. [Organizational] policies and procedures that are designed to increase equity will have an impact on all kinds of bias, including implicit bias. For example, collecting data that monitors equity, such as gender pay gaps, and addressing disparities, or reducing discretion in decision-making.<sup>127</sup>

When it comes to sentencing in particular, this means exploring options that focus specifically on reducing racial sentencing disparities—not simply by reducing the bias of the decision makers—but by guarding the sentencing process

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125. See, e.g., Patricia G. Devine et al., *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012) (describing a multi-faceted prejudice habit-breaking invention that was developed to produce long-term reductions in implicit race bias).

126. See *id.* (explaining the strategies implemented in the study to reduce implicit race bias).

127. Chloë FitzGerald et al., *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 BMC PSYCHOL. 1, 9–10 (2019).

against those biases.<sup>128</sup> While de-bias trainings for prosecutors and judges can certainly be helpful if given long-term investment, it is not the only possible strategy.<sup>129</sup> While all of the possible strategies are beyond the scope of this Article, sentencing reformers can learn from the approach being advocated for in other settings in which inequities persist.<sup>130</sup> For instance, the quote above suggests attacking gender pay disparities by collecting information on those disparities in order to monitor equity.<sup>131</sup> Currently, we collect sentencing data to show racial disparities, but not in order to actually rectify those disparities. If racial sentencing disparities were actually used in the same manner as gender pay data, it would mean using those numbers to tell the sentencing decision makers (judges as the imposers of the sentence, but also prosecutors as the selectors of charges that trigger certain sentencing ranges) that they cannot impose a sentence that contributes to racially disparate outcomes. The obvious pushback against this position is that all cases before a prosecutor and judge are unique, and therefore, by not allowing prosecutors to select charges and recommend sentences that fit the particular offender, and not allowing judges to sentence an individual based on that individual's case alone, we are frustrating justice in punishment. While this position may sound attractive, it allows racial bias in sentencing to continue with the only possible recourse to wait for societal implicit racial biases to someday disappear. If we accept that continued sentencing disparities add fuel to existing racial stereotypes and biases about Black criminality, and we accept that those biases lead to unacceptable and dangerous consequences for the everyday lives of Black Americans, and that they are not based on the actual disparate commission of crime by Black individuals, then it is imperative to push ourselves to eradicate the social sources

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128. See *id.* (advocating that it would be more effective to target reducing the impact of bias on behavior rather than eliminating bias altogether).

129. See *id.* at 1–3 (describing the most effective categories of interventions).

130. See, e.g., *id.* (describing literature in the field about addressing implicit biases).

131. See *id.* (explaining the importance of collecting empirical evidence so that interventions and training sessions do not do more harm than good).

of that dangerous bias. Disparate sentencing feeds those social sources. The Perception Institute says:

It is clear that media and culture makers have a role to play by ceasing to perpetuate stereotypes in news and popular culture. In the meantime, institutions and individuals can identify risk areas where our implicit biases may affect our behaviors and judgments. Instituting specific procedures of decision making and encouraging people to be mindful of the risks of implicit bias can help us avoid acting according to biases that are contrary to our conscious values and beliefs.<sup>132</sup>

For all of the reasons already explained in this Article, the criminal justice system is a “culture maker.” Sentencing is a tool used in the criminal justice system and, consequently, racial disparities in sentencing outcomes become a part of the story we tell about black culture. The Perception Institute suggests that while we wait for that culture to change, we should “in the meantime” encourage people to address their own biases.<sup>133</sup> What this Article promotes instead, is that “in the meantime” we actively work to change culture, and that one way to do that is to institute measures to drastically reduce sentencing disparities. Another obvious question is what entity will be used to institute such measures. This question has several possible answers as well. Legislators and sentencing commissions can play a role by instituting sentencing laws and guidelines that mandate taking racial disparity into account when sentencing offenders. Prosecutors and courts can employ internal policing and accountability measures that track racial disparities in decision making and mandates that reducing those disparities become a priority in making decisions. For instance, chief judges can collect and disseminate racial sentencing disparity numbers for their courts and can set a policy that judges consider the reduction of disparities in selecting punishments. Appellate courts may also have a place in reducing sentencing disparities

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132. *Implicit Bias*, PERCEPTION INST. (Oct. 17, 2019 7:50 AM), <https://perception.org/research/implicit-bias/> (last visited Feb. 20, 2020) [<https://perma.cc/GX89-QWL8>].

133. *See id.* (explaining that social scientists are in the early stages of determining how to “debias”).



by making room in their interpretation of applicable sentencing laws and constitutional provisions for such racial disparities to be legally considered.

Whatever approach is ultimately taken, the important point to take away from this discussion is that we should be talking about and confronting racial disparities in sentencing and racial bias differently than we are. We should characterize racial bias as a consequence and not simply a cause of sentencing disparities. When viewed in this light, if we actually care about Black lives, it becomes crucial to address the disparities in order to begin the task of changing a culture that perpetually suspects the innocence of those lives.