NOTE

THE CORRECTIVE VALUE OF PROSECUTORIAL DISCRETION: REDUCING RACIAL BIAS THROUGH SCREENING, COMPASSION, AND EDUCATION

CHRISTINA MORRIS*

* Christina Morris is an Assistant District Attorney at the Middlesex County District Attorney's Office in Massachusetts. She graduated from Boston University School of Law in 2021 with a Juris Doctorate and from Quinnipiac University in 2018 with a Bachelor of Arts in Criminal Justice and Psychology. The views and opinions expressed in this Note are those of the author and do not represent the views or opinions of any state, agency, employer, or company. She would like to extend her gratitude to Professor Gerald Leonard and the PILJ Editorial Staff for their feedback throughout the writing and editing process. Additionally, she would like to thank her friends and family for their support in all her endeavors, especially Danielle Farrell who pushed her to take that first step toward becoming a lawyer.

INTRODUCTION

The prosecutor is arguably the most powerful actor within the criminal justice system. This power arises from the prosecutor's nearly unfettered discretion to make charging decisions in criminal cases.[1] The discretion of the prosecutor to add, drop, or change the charges against the defendant is presumptively unreviewable.[2] Prosecutors enjoy such wide discretion because the American criminal justice system values individualized justice.[3] Because no two cases are identical, the prosecutor has a duty to exercise common sense to recognize and account for those differences.[4] Allowing prosecutors to exercise their common sense helps avoid inequitable outcomes that would be produced by a rigid application of the criminal code and lets the process be "tempered by mercy."[5] As Justice Powell noted in *McCleskey v. Kemp*, "a [] punishment system that [does] not allow for discretionary acts of leniency '[is] totally alien to our notions of criminal justice.'"[6]

However, that same discretion "makes easy the arbitrary, the discriminatory, and the oppressive" and provides "a fertile bed for corruption."[7] Prosecutorial misconduct is widespread, but it is difficult to determine the scope of such misconduct. The line between legal and illegal behavior is "thin[,]" and there is little oversight or accountability.[8] While a "lack of accountability" opens the door to blatant abuses of discretion, the issue is often more subtle.[9] Prosecutors exist in a culture of "doing [] justice in a fight between the good and the guilty."[10] That mindset combined with the inherent subjectivity of prosecutorial decision-making leaves prosecutors vulnerable to unconscious biases, in particular, racial bias.[11] Although there are constitutional limitations to curb the most overtly racist prosecutorial misconduct, the law has yet to find a way to adequately address the unconscious biases that are perpetuated within the system.[12] Despite the difficulty of the task, prosecutors must be held accountable for their decisions, as their choices affect the rights and liberties of fellow citizens.

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[1] James Babikian, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, and Charging Guidelines*, 42 AM. J. CRIM. L. 139, 141–42 (2015).

[2] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

[3] *See* McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (citations omitted).

[4] *See* Newman v. United States, 382 F.2d 479, 481–82 (D.C. Cir. 1967).

[5] Babikian, *supra* note 1, at 144 (quoting State v. Rice, 279 P.3d 849, 852 (Wash. 2012)).

[6] 481 U.S. at 312 (quoting Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976)).

[7] Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960).

[8] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 125–26, 140–41 (2012).

[9] *See id.* at 125–26.

[10] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007).

[11] *Id.*; Babikian, *supra* note 1, at 149.

[12] *See* Babikian, *supra* note 1, at 140–41.

Thus, any attempts at prosecutorial reform must balance two conflicting goals: accountability and independence. On one hand, prosecutors must be held accountable for their actions because their misconduct can lead to conviction of the innocent or excessive punishment of the guilty.[13] On the other hand, prosecutorial independence promotes efficiency and individualized criminal justice outcomes.[14] At present, the laws governing prosecutorial conduct are weighted heavily in favor of independence rather than accountability.[15]

However, the breadth of prosecutorial independence has coincided with an increase in incarceration. Over the past four decades, the rate of incarceration has increased by 500% and the United States Supreme Court has issued a series of decisions affirming the expansion of prosecutorial power.[16] Of course, there is a wide array of factors contributing to mass incarceration, but largely unreviewable prosecutorial discretion has not helped the situation.[17] In addition, as the rate of incarceration has increased, the disparities within the system have become more exacerbated.[18] Specifically, race and class disparities are deeply entrenched.[19] Black and Latino people make up fifty-seven percent of the United States prison population even though they represent only twenty-nine percent of the population overall.[20] Racial disparities in the American criminal justice system have generated a lot of research aiming to identify its causes and potential solutions.

Part I of this Note examines the scope of racially disparate outcomes in the criminal justice system. The statistics point to a widespread problem, but the reasons for those disparate outcomes and the mechanisms through which they arise are still unclear. Part II discusses the role prosecutors play in shaping those disparate outcomes, and the divide in the literature about the scope of that role.

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[13] DAVIS, *supra* note 8, at 136.

[14] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998).

[15] DAVIS, *supra* note 8, at 136.

[16] *Criminal Justice Facts*, THE SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Apr. 8, 2022); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins Developments*, 6 SETON HALL CIR. REV. 1, 4–7 (2009); *see* Oyler v. Boles, 368 U.S. 448, 456 (1962).

[17] *See* DAVIS, *supra* note 8, at 126.

[18] Assuming that racial bias existed in the same degree fifty years ago as it does today, the rise of mass incarceration would have exacerbated the effects of that bias as the system impacts more and more people. *See generally* RUTH DELANEY ET AL., AMERICAN HISTORY, RACE, AND PRISON (2020), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison.

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

[20] THE SENTENCING PROJECT, XENOPHOBIA AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 6 (2018) [hereinafter XENOPHOBIA AND RELATED INTOLERANCE], https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

This involves the question of whether prosecutors act on their own biases or simply reinforce the results of racist institutions and police decisions. Part III discusses the standards for proving racial bias in prosecution and why those standards do not sufficiently address racial inequities. Finally, Part IV argues that prosecutors should be screened for implicit racial bias before they enter the workforce and that, once on the job, prosecutors should promote racial justice by practicing empathy in a deliberate and systemic manner. In addition, prosecutors have a duty to use their vast discretionary power to mitigate the effects of other racist institutions by considering race rather than ignoring it.

I. IMPLICIT BIAS IN THE CRIMINAL JUSTICE SYSTEM

Empirically, there is little doubt that the American criminal justice system yields discriminatory, race-based outcomes.[21] While Americans would like to believe we live in a "post-racial America," the truth is that racism in the "twenty-first century largely lurks in the shadows of the unconscious mind."[22] The exact causes of the racially stratified criminal justice outcomes are debated, but the statistics point to a widespread race-based problem that affects every part of the system.[23] According to The Sentencing Project, one out of every three Black men born in 2001 could expect to go to prison during their lifetime, while only one in seventeen white men could expect the same.[24] Approximately fifty-seven percent of the 2.2 million people currently incarcerated are people of color, and Black men are six times more likely to be incarcerated than white men. These disparities cannot be attributed solely to a few "bad cops" or "racist prosecutors."[25] The scope of this disparity points to systemic problems that infect police departments, prosecutors' offices, and courtrooms across the country. Implicit racial bias is a part of that system-wide problem because it likely affects many of the decision-makers within the system. Implicit bias is by no means the only cause of the discriminatory outcomes but reducing racially biased decision-making could clarify the much larger structural changes that need to be made.

A. *What is Implicit Bias?*

Implicit bias is a psychological term used to describe the phenomenon in which a person's "actions or judgments are under the control of automatically

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[21] *Id.* at 1.

[22] Babikian, *supra* note 1, at 156.

[23] *See* XENOPHOBIA AND RELATED INTOLERANCE, *supra* note 20, at 2–6.

[24] *Id.* at 1.

[25] *See* Jay Stanley, *We Need to Move Beyond the Frame of the "Bad Apple Cop"*, AM. CIV. LIBERTIES UNION (Mar. 19, 2015, 6:30 AM), https://www.aclu.org/blog/national-security/we-need-move-beyond-frame-bad-apple-cop.

activated evaluation, without the [person's] awareness of that causation."[26] When a person perceives certain stimuli, their mind automatically links those stimuli with a pre-established cognitive framework in order to process that information more efficiently. The process of activating implicit bias is called "priming."[27] Priming occurs when a situation activates a subconscious network of knowledge, which then alters the actor's behavior without their realizing it.[28]

This phenomenon can impact the decisions made by actors within the criminal justice system because priming affects the judgments people make about the behavior of others. For example, when participants were asked to make judgments about a story with ambiguously hostile behavior, those who had been primed with words that evoked negative stereotypes about Black people judged the ambiguous behavior to be more hostile.[29] If this occurs when prosecutors and police make charging or arrest decisions, then racial bias will have tainted the outcome. Implicit bias also contributes to the dehumanization of Black people in the eyes of law enforcement and other groups by forming an implicit connection between Black people and apes.[30] A study by Philip Goff found that this Black-ape association can change the way people perceive police violence against Black people.[31] His study showed participants thought violence against Black people was more justified when they were primed with an image of an ape.[32] When law enforcement and other criminal justice officials start seeing Black people as less human, their judgments about who to charge, release, or police are tainted with racist assumptions and beliefs.[33] Notably, implicit bias can coexist with egalitarian views. While a person may firmly and expressly believe in racial equality, they may still harbor implicit biases that affect their decision-making.[34] Therefore, the role of implicit bias in the criminal justice system must be critically examined because it can negatively impact criminal justice outcomes despite the actor's best intentions.

B. *Measuring Implicit Bias*

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[26] Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

[27] Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10 (Justin D. Levinson & Robert J. Smith eds., 2012).

[28] *Id.*

[29] *Id.* at 12.

[30] Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45, 49–50 (Justin D. Levinson & Robert J. Smith eds., 2012).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 50.

[34] *Id.* at 46.

The Implicit Association Test (IAT) attempts to measure implicit bias in individuals.[35] The IAT asks participants to use two buttons on their keyboards to identify images that appear on their screens.[36] In race-focused IATs, participants are directed to press one key for "good" when a positive word appears and another key for "bad" when a negative word appears.[37] The exercise is then repeated by selecting the appropriate label for the Black or white faces appearing instead of positive or negative words.[38] Next, participants are shown mixes of words and faces, and asked to press one key when a white face or positive word appears, and another key when a Black face or negative word appears.[39] That exercise is repeated with the face and word pairings switched.[40] Participants are encouraged to move through the tasks quickly so the results reflect the participants' automatic associations between race and positive and negative attributes, rather than the participants' conscious decisions.[41] The results of the IAT can potentially even capture the participants' associations between categories, even if the participant would like to hide those associations.[42] Thus, the IAT may be able to provide evidence of implicit bias in participants, even when the participants explicitly disavow biased attitudes.[43]

In the context of criminal justice research, Justin Levinson created a more precise IAT that measures implicit associations between Black people and guilt.[44] His test tailors the results to the criminal context rather than relying on the assumption that a general negative bias toward Black people will affect perceptions of guilt.[45] His study found that implicit associations predicted the participants' judgments on whether evidence tended to indicate a suspect's guilt.[46] Participants who held significant implicit associations between Black people and guilt tended to evaluate evidence as more indicative of guilt.[47]

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[35] Greenwald et al., *supra* note 26.

[36] *About the IAT*, PROJECT IMPLICIT (2011), https://implicit.harvard.edu/implicit/iatdetails.html (last visited Apr. 8, 2022).

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See* Greenwald et al., *supra* note 26, at 1478.

[43] *See id.* at 1464–65.

[44] *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189 (2010). In this study, participants held implicit associations between Black and guilty, and those associations predicted the judgments participants made about the probative value of evidence. *Id.* at 203. However, additional research is needed to confirm that the relationship between the implicit association and the judgments of guilt are moderated by the race of the perpetrator.

[45] *See id.* at 188–90.

[46] *See id.* at 206.

[47] *Id.*

Additionally, the implicit associations of Black/guilt did not correlate with the explicit measures of racial bias, and thus provided useful insight into the ways in which bias can manifest subconsciously.[48] The results of this study also suggest that the guilty/not guilty IAT is not interchangeable with the traditional race-focused positive/negative IAT.[49] Therefore, the IAT shows promise as a tool to examine the unconscious mechanisms that lead to racial disparities within the criminal system.[50]

Although there is empirical support for the IAT's efficacy, many researchers have reservations about the IAT's ability to predict behavior. On one hand, there is enough evidence to suggest that implicit bias plays some role at key decision points in the criminal system to merit further examination.[51] For example, in a study of 133 judges in an experimental setting, judges with strong white preferences on the IAT made harsher judgments when primed with words associated with Black people.[52] On the other hand, even though there is some evidence of a causal link between implicit bias and discriminatory behaviors, there is an ongoing debate about whether implicit bias interventions reduce bias over extended periods of time.[53] Some studies suggest that implicit bias is like a habit and those studies did show some bias reduction over the course of several months.[54] However, there is almost no data on whether long-term reductions in implicit bias would also lead to reductions in biased behavior.[55] If implicit bias measures are not predictive of discriminatory behavior, then interventions designed solely to diminish implicit bias in individuals will not reduce discriminatory behavior or outcomes.[56]

C. *Implicit Bias and the Criminal Justice System*

Racial disparities in the criminal justice system are well-studied and well-documented.[57] One source of those disparities is likely implicit racial bias, but

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[48] *See id.* at 206–07.

[49] *See id.*

[50] *See id.* at 207.

[51] *See* Levinson et al., *supra* note 44, at 188.

[52] Jeffery J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1205, 1213, 1223 (2009). The words used to prime were "graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, roots, afro, Oprah, Islam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, [and] soul." *Id.* at 1213 n.86 (citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 489 n.5 (2004)).

[53] *See* Robert J. Smith, *Reducing Racially Disparate Police Outcomes: Is Implicit Bias Training the Answer?*, U. HAW. L. REV. 295, 305 (2015).

[54] *See id.* at 304–05.

[55] *See id.* at 305.

[56] *See* Babikian, *supra* note 1, at 155.

[57] Smith & Levinson, *supra* note 19.

the ways in which implicit bias impacts behavior to create racial disparities are less clear.[58] Anthony Greenwald and his team attempted to quantify the rate at which bias impacts behavior through a review of recent IAT studies.[59] Greenwald reviewed 122 research reports on implicit bias to examine the predictive validity of the IAT.[60] His meta-analysis showed that implicit bias, measured by the IAT, accounted for approximately six percent of the variation in observed behavior in the studies.[61] Greenwald's review did not focus on the behavior of criminal justice actors. However, the studies that have been conducted on the direct effects of implicit racial bias on criminal justice actors suggest that there are some correlations between implicit racial bias and decision-making.[62] If even six percent of a prosecutor's decisions are tainted by implicit bias, there would be a massive impact on a system that processes millions of cases every year.

The impact of racial bias in judges, juries, and policing is perhaps the most thoroughly investigated area of research.[63] In a study of over 162,000 cases, bail-setting judges were substantially biased against Black defendants and were more likely to overestimate the risk of future misconduct in those cases.[64] This study also accounted for the racial difference in probabilities that Black or white defendants will be arrested for certain crimes and for differences in criminal records.[65] A meta-analysis of thirty-four studies on jury decision-making found a significant correlation between mock jury decisions on guilt, sentencing, and racial bias.[66] Race appears to influence a wide variety of police decisions, from the decision to search a suspect to the use of deadly force.[67] Furthermore, racial bias appears to have an effect on the allocation of police resources, as predominantly Black neighborhoods are over-policed.[68] In the context of drug arrests, Katherine Beckett found that police deployment and arrests in downtown

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[58] *See* Rachlinski et al., *supra* note 52, at 1205.

[59] *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 17 (2009).

[60] *Id.*

[61] Rachlinski et al., *supra* note 52, at 1201 (citing Greenwald et al., *supra* note 59, at 17).

[62] *See* Smith & Levinson, *supra* note 19, at 795–96.

[63] *See id.*

[64] *See* David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1929 (2018).

[65] *See id.* at 1902.

[66] Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 625, 629 (2005).

[67] *See* John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 695 (2014).

[68] *See* Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 128–29 (2006).

Seattle were not a function of crime rates.[69] In fact, Beckett was unable to find a race-neutral explanation for the increased police deployment and subsequently increased arrests for drug distribution.[70] Thus, research across the criminal justice field reveals an insidious undercurrent of racial bias throughout the system.

II. THE ROLE OF THE PROSECUTOR IN PERPETUATING RACIAL INJUSTICE

Although racially disparate criminal justice outcomes are well documented, little attention has been afforded to the role prosecutors play in creating or perpetuating those disparities.[71] Nearly ninety-five percent of all convictions are resolved before trial in a plea bargain, yet many United States Supreme Court cases focus on the impact of racial disparities at trial and sentencing.[72] Worse yet, when a defendant accepts a guilty plea, they give up most of their appellate rights.[73] This severely restricts the defendant's opportunity to enforce the limited protections offered to criminal defendants who go to trial.[74] Thus, prosecutors must carefully examine their role in promoting racial disparities. Prosecutors "make the decisions that control the [criminal justice] system, and they exercise almost boundless discretion in making those decisions."[75]

Prosecutors struggle with racial biases–both their own or that of other systems–partially due to the circumstances in which they work. Prosecutors are frequently inundated with more cases than they are equipped to handle, which makes it difficult to give each case the attention it deserves.[76] This massive caseload depletes the cognitive capacity of prosecutors to attend to each case, which forces them to rely on mental heuristics and allows implicit bias to impact their decision-making.[77] When a prosecutor gets a case, they have very little information about the defendant besides their name, any details in the police report, and the basic demographic information on their criminal record, if

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[69] *See id.* at 127–29.

[70] *See id.* at 129.

[71] Smith & Levinson, *supra* note 19, at 795–96.

[72] *See* Clemons, *supra* note 67, at 700.

[73] *See* Mass. R. Crim. Pro. 12(c)(3) (explaining that "by a plea of guilty . . . , [] the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the privilege against self-incrimination").

[74] DAVIS, *supra* note 8, at 136.

[75] *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832–33 (2013).

[76] L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 877 (2017).

[77] *Id.* at 881.

available.[78] Thus, when faced with cognitive fatigue and a lack of information about an individual case, the prosecutor is more likely to rely on cognitive associations and stereotypes, such as an implicit association between Black men and drugs, to make determinations of guilt.[79] For example, when a prosecutor must decide quickly whether to deny bail based on dangerousness, a defendant with stereotypically Black facial features is disadvantaged by "negative stereotypes of a hostile [B]lack defendant" that can affect the prosecutor's decision.[80]

The literature is divided as to what role the prosecutor plays in perpetuating discrimination and racial bias within the criminal justice system.[81] Some research suggests that the implicit bias of the prosecutor plays a significant role in perpetuating racial disparities.[82] This research shows racial disparity in charging decisions, bail decisions, and charge reduction.[83] Not only is the decision to charge the defendant with a crime important, but the decision of which crime to charge is important too.[84] For example, in federal prosecution, one study showed that white defendants were more likely to have their charges reduced in weapons offenses than Black or Hispanic defendants.[85] In the age of mandatory minimum sentencing, charging decisions significantly impact case outcomes as the statutorily prescribed sentences can vary greatly among similar charges.[86] Mandatory minimums remove judicial discretion at the back end of the decision-making process by forcing judges to impose a minimum committed sentence for specific crimes rather than allowing the judge to make individualized decisions.[87] As a result, the legislative shift toward rigid sentencing structures beginning in the 1970s moved discretion back into the hands of the prosecutors, who can now control sentences through their charging

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[78] In my experience working as an Assistant District Attorney, when a new case comes in the paperwork provided to the prosecutor includes the police report, the complaint, and the defendant's record if they have one. The record often contains demographic info such as the defendant's race.

[79] *See* Clemons, *supra* note 67, at 696.

[80] Smith & Levinson, *supra* note 19, at 813.

[81] *See* BESIKI KUTATELADZE ET AL., VERA INST. JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES 1 (2012).

[82] *See* Davis, *supra* note 75, at 833.

[83] KUTATELADZE ET AL., *supra* note 81, at 7, 11, 13.

[84] Smith & Levinson, *supra* note 19, at 806–07.

[85] KUTATELADZE ET AL., *supra* note 81, at 13–14. However, these results were not consistent across all offenses. *See id.* While there is some empirical support for the proposition that Black people are less likely to receive charge reductions, empirical evidence also supports the contrary proposition. *See id.*

[86] *See* Davis, *supra* note 75.

[87] *See id.* at 833.

decisions.[88] Some researchers believe that prosecutors play a direct role in the biased outcomes of the system by injecting their own unconscious biases into the decision-making process.[89]

However, other researchers believe that prosecutors are making relatively unbiased and race-neutral decisions and that the racial impact is perhaps better explained as a function of other racist institutions.[90] In New York, ninety-two percent of the felony cases the police brought to prosecutors in 2010–2011 were prosecuted, as were ninety-six percent of all misdemeanors.[91] So, even if the prosecutors were making race-neutral decisions throughout, the cases they received may have already been tainted by the biased decision-making of the police.[92] For example, Black people were the subjects of twenty-seven percent of all arrests made nationally in 2016, despite representing half that percentage of the overall population.[93] Distinguishing racially biased policing from racially disparate offending is difficult because potentially biased officers are the ones who create crime rate statistics through their arrests.[94] However, Beckett's research suggests that differential crime rates may only partially explain the racial differences in arrests.[95] At least in the context of drug offenses, implicit bias, rather than community complaints or actual crime rates, appears to drive organizational policing decisions, such as the neighborhoods that officers patrol.[96] Thus, even unbiased prosecutors may perpetuate biased outcomes by failing to use their discretionary authority to remedy the pre-existing bias in their case dockets.

Furthermore, some studies have challenged the idea that prosecutors inject anti-Black racial bias into their decision-making. One study by Spohn and Horney found no difference in dismissal rates by race.[97] Other studies even found areas in which Black defendants received more favorable treatment than

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[88] *See* Alison Siegler, *End Mandatory Minimums: Inflexible, Harsh Sentences Exacerbate Crime and Racial Disparities Alike*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums.

[89] *See id.*; *see also* Davis, *supra* note 75, at 835–36.

[90] *See* Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1602 (2004).

[91] BESIKI KUTATELADZE ET AL., VERA INST. JUST., RACE AND PROSECUTION IN MANHATTAN 4 (2014).

[92] *See* Little, *supra* note 90.

[93] XENOPHOBIA AND RELATED INTOLERANCE, *supra* note 20, at 2.

[94] *See generally* Albert D. Biderman & Albert J. Reiss, Jr., *On Exploring the "Dark Figure" of Crime*, 347 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967) (discussing long-standing debates over what data to rely upon to accurately measure crime).

[95] *See* Beckett et al., *supra* note 68, at 127–29 (detailing a case study of drug arrests in Seattle, in which racial disparity in arrests seemed most strongly related to over-policing of certain areas).

[96] *See id.* at 127–31.

[97] KUTATELADZE ET AL., *supra* note 81, at 12.

white defendants.[98] For example, young Black men received less punitive treatment than middle-aged white men, and prosecutors were more likely to dismiss a rape case involving a Black defendant and a white victim.[99] Different research suggests that even if the prosecutor is unbiased, the facially race-neutral tools they use in decision-making can perpetuate biased outcomes.[100] For example, a suspect's record is often influenced by racial bias due to the disproportionate contact Black people have with police officers, which in turn results in a disproportionately high number of arrests.[101] Thus, prosecutors themselves may or may not be injecting bias into the system, but they are likely at least perpetuating and reinforcing the racial disparities created by other institutions.[102]

Prosecutorial bias or reinforcement of bias is only a small part of a larger problem. The racial disparities in the criminal justice system are the result of a complex overlap of racist institutions and sociological structures.[103] Scholars have attributed the disparities to disparate offending, discriminatory decision-making by criminal justice officials, and criminal justice policies, such as the War on Drugs.[104] For instance, police officers are more likely to subject Black drivers to investigatory stops than white drivers.[105] Once stopped, police officers are three times more likely to search Black drivers than white drivers and are twice as likely to arrest Black drivers.[106] Despite the absence of racial differences in drug use, one in three people arrested for drug crimes is Black.[107] Even public defenders can contribute to the problem when they are faced with crushing caseloads and left to make unguided decisions about how to allocate their limited resources.[108] Implicit bias can impact the way defense counsel

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[98] *Id.* at 9–10. This also may be due to the fact that prosecutors are bringing more wrongful charges against Black people than white people. *See* Aleksander Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissal of Felony Charges*, 10 AM. L. & ECON. REV. 110, 127 (2008) (finding that prosecutors bring "a higher proportion of weak or erroneous charges" against Black defendants versus white defendants).

[99] *See* KUTATELADZE ET AL., *supra* note 81, at 9–10.

[100] *See* NAZGOL GHANDOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM 3 (2015).

[101] XENOPHOBIA AND RELATED INTOLERANCE, *supra* note 20, at 3 (finding that more than one in four people arrested for drug offenses were Black, despite relatively equal usage rates across white and Black Americans).

[102] *See* Smith & Levinson, *supra* note 19, at 813 (discussing opportunities for the introduction or prosecutorial bias); Little, *supra* note 90, at 1602, 1613–14 (suggesting that bias likely occurs before the prosecutorial charging stage).

[103] *See* Ogletree et al., *supra* note 30, at 45–60.

[104] Davis, *supra* note 75, at 824.

[105] *See* GHANDNOOSH, *supra* note 100, at 6, 10.

[106] *Id.* at 11.

[107] *Id.* at 14–15.

[108] *See* L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631, 2635–36 (2013).

interprets the evidence in a defendant's case, which in turn affects the amount of time and energy the defense attorney allocates to fighting the charges or discouraging a plea.[109] Furthermore, sociological factors that disproportionally affect Black Americans also contribute to racialized criminal outcomes and offending, such as high rates of poverty, joblessness, and low levels of education.[110] Prosecutors are only a small part of a bigger issue, but they possess tremendous power and capacity to look at the bigger picture to effect positive change for the communities they serve.

Regardless of whether prosecutorial decision-making is influenced by discrimination, the decisions prosecutors make, including the race-neutral ones, appear to perpetuate or exacerbate racial disparities. Thus, any efforts to reduce the disparities perpetuated by prosecutors should account for both the implicit bias prosecutors inject into the system and the bias perpetuated by race neutral decision-making.

III. CURRENT SOLUTIONS ARE INADEQUATE

The United States Supreme Court has addressed the issue of racial bias within the criminal justice system on many occasions, but the standards it has set forth screen out only very serious cases of explicit racial bias.[111] The Court has established protections against race-based prosecutions under the Fifth and Fourteenth Amendments, finding that the decision to prosecute cannot be based on "unjustifiable standard[s] such as race, religion, or other arbitrary classification[s]."[112] However, to invoke these constitutional protections, the defendant must show intentional discrimination or animus.[113] The Supreme Court views prosecutorial decision-making as presumptively unbiased, requiring the defendant to show "clear evidence to the contrary" to overcome that presumption and make a claim against the prosecutor.[114]

Under *United States v. Armstrong*, to successfully claim a prosecutor has engaged in selective, race-based prosecution, a defendant must show that the prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose."[115] The Court set this high standard due to the ramifications of reviewing a "decision [about] whether to prosecute."[116] "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-

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[109] *See id.*

[110] *See* Ogletree et al., *supra* note 30, at 46.

[111] *See* Babikian, *supra* note 1, at 149–50.

[112] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369, 373–74 (1886).

[113] Davis, *supra* note 75, at 835.

[114] United States v. Armstrong, 517 U.S. 456, 465 (1996).

[115] *Id.* (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

[116] *See id.* (quoting *Wayte*, 470 U.S. at 608).

making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the [g]overnment's enforcement policy."[117] In *Armstrong*, the Court emphasized its hesitancy to exercise judicial review over decisions of executive officers.[118] In addition to expressing concern about unnecessarily infringing on "a core executive constitutional function," the Court also doubted the judiciary's ability to objectively assess prosecutorial performance.[119] Thus, to overcome the presumption of regularity, a defendant must present clear and convincing evidence that the prosecutor violated their right to equal protection.[120] Further, they need to show that a similarly situated person of a different race was not prosecuted.[121] If a defendant cannot credibly satisfy these two elements, they will not receive an evidentiary hearing on the matter.[122]

Furthermore, a claim of general implicit bias in a prosecution became nearly impossible to make after *McCleskey v. Kemp*.[123] In *McCleskey*, a defendant on death row attempted to establish that his prosecution was tainted by prosecutor and juror bias by introducing an empirical study on the effect of race on death penalty decisions.[124] The study showed that when Black defendants killed white victims, prosecutors were more likely to pursue the death penalty than when Black defendants killed Black victims, when white defendants killed white victims or when white defendants killed Black victims.[125] The study accounted for 230 variables other than race that could have caused the discrepancy, and yet the data still showed that Black defendants who killed white victims had the greatest likelihood of receiving the death penalty.[126] The Supreme Court did not challenge the accuracy of the scientific evidence, but rather dismissed the defendant's claim because he failed to show any evidence of discrimination in his particular case.[127] This dismissal of generalized evidence of racial bias essentially closed the door to any claims of prosecutorial implicit bias, because implicit bias is usually examined through trends rather than individual decisions or cases.[128] A prosecutor can justify their prosecution however they like, given

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[117] *Id.* (quoting *Wayte*, 470 U.S. at 607).

[118] *See id.*

[119] *See id.*; *see also* Babikian, *supra* note 1, at 167–68.

[120] *See Armstrong*, 517 U.S. at 465.

[121] *Id.* at 465–67.

[122] *See* Babikian, *supra* note 1, at 150.

[123] *See* 481 U.S. 279 (1987).

[124] *Id.*

[125] *Id.* at 286–87.

[126] *Id.*

[127] *Id.* at 291–99.

[128] *See id.* Although *McCleskey* technically left the door open to statistical claims of racially bias prosecutions, such claims have since been met with great hostility by the lower courts. *See* John H. Blume et al., *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1808 (1998).

the lack of clear guidelines for their decision-making process.[129] As a result, case decisions motivated in part by implicit bias are difficult to detect and even more difficult to prove.

The doctrinal hostility toward reviewing prosecutorial discretion makes it virtually impossible for a defendant to successfully bring a claim for prosecutorial implicit bias. The evidentiary burdens placed on defendants by *McCleskey* and *Armstrong* are nearly insurmountable and only permit courts to act when they can be nearly certain that racial bias is at play.[130] By ignoring more subtle ways in which racial bias permeates the criminal justice system, courts essentially accept that some bias will always influence the system.[131] In his dissent in *Powers v. Ohio*, Justice Scalia endorsed this view, claiming that in-group favoritism is an "undeniable reality."[132] Although the majority recognized that there is a cognizable harm when a defendant is tried by a tribunal in which members of their race have been excluded, Justice Scalia's assertion appears to hold true.[133] Defendants who bring selective prosecution and equal protection claims are rarely successful, and the majority's tests in *McCleskey* and *Armstrong* have done nothing to change the "undeniable reality" of implicit racial bias.[134]

Finally, there is little incentive outside of the courtroom for a prosecutor to work hard to ensure that they act in an unbiased manner.[135] First, prosecutorial misconduct is difficult to address, even in cases where the rules governing prosecutors are explicitly broken.[136] In cases of implicit bias, the prosecutor is not likely to break any specific rule, and as discussed above, their actions are unlikely to rise to the level of selective prosecution. Second, prosecutors are not evaluated by the collective impact of their decision-making and are, thus, generally unaware that their implicit bias is negatively impacting the cases they

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[129] Babikan, *supra* note 1, at 158.

[130] *See McCleskey*, 481 U.S. at 337 (Brennan, J., dissenting) (arguing that in light of the "uniquely high" standards for imposing the death penalty and the history of discrimination against Black Americans, a defendant should not be required to prove actual discrimination); Chapman v. California, 386 U.S. 18, 24 (1967) (requiring courts to apply the harmless error standard to claims of Fourteenth Amendment violations).

[131] *See* Clemons, *supra* note 67, at 696.

[132] Powers v. Ohio, 499 U.S. 400, 411 (1991); *id.* at 424 (Scalia, J., dissenting) (claiming that "all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members").

[133] *See id.* at 411; *see id.* at 424 (Scalia, J., dissenting).

[134] *See id.* at 424 (Scalia, J., dissenting); *see generally* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605 (1998) (criticizing *Armstrong* as a means to combat selective prosecution based in part on the fact that prosecutors will be as biased as any other part of the population).

[135] DAVIS, *supra* note 8, at 126.

[136] *Id.*

handle.[137] After surveying over 300 prosecutors, Florida International University (FIU) found that approximately 60–70% of the prosecutors thought crime reduction was a "very important" measure of their success whereas only 40–50% thought reducing racial disparities was a "very important" measure.[138] Third, the guidelines provided by the American Bar Association (ABA) set forth only the bare minimum of requirements for a prosecutor to move forward with a case.[139] The code of professional conduct requires only that a prosecutor refrain from moving forward with a charge that is not supported by probable cause.[140] Rule 3-1.6 of the ABA's Standards for Criminal Justice requires prosecutors to "strive to eliminate implicit biases," but that command does not provide clear standards.[141] In 2019, the Office of Professional Responsibility received over 700 complaints, but only opened forty-nine inquiries, six of which included allegations of prosecutorial abuse of discretion.[142] Even if prosecutors are referred to disciplinary boards for concerns related to implicit bias, there may still be very little accountability.[143]

Doctrinally, there is almost no remedy for defendants impacted by the implicit racial bias of the prosecutor. The rules governing prosecutorial discretion only protect against explicit racial bias. At the same time, prosecutors are not encouraged to look at the collective impact of their decision-making, where any implicit biases would be the most noticeable.[144] Given the lack of oversight by legal doctrine and office policy, prosecutors must hold themselves individually accountable in rooting out the effects of implicit racial bias until systemic changes are made.

IV. MOVING FORWARD: ADDRESSING THE UNCONSCIOUS

"In order to get beyond racism, we must first take account of race."[145] These words by Justice Blackmun illuminate the path forward. Prosecutors must account for and consider race rather than ignore it in favor of supposedly race-neutral alternatives. Prosecutors are often unaware of the role they play in perpetuating disparities and do not see a way to address systemic issues of racial disparity in their individual cases. Additionally, the FIU study that surveyed

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[137] *See* FLA. INT'L UNIV. & LOYOLA UNIV. CHI., PROSECUTORIAL ATTITUDES, PERSPECTIVES AND PRIORITIES: INSIGHTS FROM THE INSIDE 6 (2018).

[138] *Id.* at 7, 15, 19, 27, 31, 39, 43, 51.

[139] DAVIS, *supra* note 8, at 147.

[140] MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2019).

[141] *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, 3-1.6 (AM. BAR ASS'N 2019).

[142] OFF. PRO. RESP., FISCAL YEAR 2019 REPORT 5 (2019).

[143] Bruce A. Green, *Prosecutor's Professional Independence – Reflections on* Garcetti v. Ceballos, 22 CRIM. JUST. 4, 8 (2007).

[144] *See* FLA. INT'L UNIV. & LOYOLA UNIV. CHI., *supra* note 137.

[145] Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part).

more than 300 prosecutors found that prosecutors often feel they are using race-neutral decision criteria and therefore are not responsible for addressing the disparities created by other systems.[146] Even if prosecutors are not directly responsible for the biased results of the system, they should recognize that they are in a position either to alleviate or to perpetuate some of the disparities, given their wide discretionary authority.[147]

Bias in prosecutorial decision-making can be addressed in three ways: implicit bias screening in hiring, a compassionate approach, and decision-making informed by the social sciences. First, prosecutors' offices can work toward reducing racial bias within their ranks by not hiring individuals with higher levels of implicit racial bias in the first place. Relatedly, these offices can foster an office culture that is willing to address implicit bias by screening out candidates who are unwilling to engage in critical self-examination.[148] Second, prosecutors should be encouraged to engage with their sense of empathy for defendants to counteract any effect their own implicit bias may have on their use of discretion.[149] If the prosecutor makes an effort to connect with and understand the defendant then they are less likely to unconsciously rely on stereotypes and assumptions. Third, prosecutors should be educated on the impact of implicit racial bias on the criminal justice system and trained to recognize circumstances where bias is likely influencing outcomes. By recognizing instances where bias is likely to have an effect, prosecutors can counteract its effect by reducing, changing, or dismissing charges that are likely tainted by bias. Prosecutors must understand the role they play in perpetuating racial injustice and work toward effecting positive change through the recognition and mitigation of their own bias, as well as the bias of other actors within the system.

A. *Finding the Right Prosecutors*

One of the unsurprising prerequisites to reducing one's implicit bias is a willingness to admit that one can be biased. A person's disposition can not only affect their motivation to reduce their biases, but it can also affect the level of control implicit biases may have over their behavior.[150] While external pressure from district attorneys can motivate behavioral changes, those who are internally motivated to act in an unbiased manner are more likely to do so.[151] Therefore, changing the role of the prosecutor to address racial injustice starts with placing the right people in prosecutors' offices. Hiring managers should screen

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[146] FLA. INT'L UNIV. & LOYOLA UNIV. CHI., *supra* note 137, at 56.

[147] *See id.* at 8.

[148] L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 298 (2012).

[149] Asa Wettergren & Stina Bergman Blix, *Empathy and Objectivity in Legal Procedure: The Case of Swedish Prosecutors*, 17 J. STUD. SCANDINAVIAN CRIMINOLOGY & CRIME PREVENTION 19, 20 (2015).

[150] Richardson, *supra* note 148, at 296–98.

[151] *Id.* at 297.

applicants for their level of pre-existing bias and their willingness to reflect critically on their own beliefs and assumptions. Prosecutors' offices should work toward creating a culture that promotes, rather than resists, these types of evaluations.

First, hiring managers within prosecutors' offices should look to the social sciences for screening devices that will help them select candidates who will create an office culture willing and able to address racial bias. Psychological testing is common practice in police departments, and future prosecutors should undergo similar, rigorous testing that is adapted to their particular work environment.[152] For example, the IAT should be employed to screen candidates for implicit racial bias. In fact, the more specific Guilty/Not Guilty IAT developed by Levinson would provide a more accurate insight into the ways general race-related bias could affect the potential prosecutor's decision-making process.[153] In Levinson's Guilty/Not Guilty version of the IAT participants made associations between guilt and race rather than race and positive/negative traits.[154] This IAT predicts the way that participants evaluate evidence against Black and white suspects.[155] Participants who had stronger implicit associations between Black people and guilt tended to interpret ambiguous evidence as indicative of guilt when primed with a Black suspect.[156] However, Levinson's study also found correlations between the traditional IAT and interpretation of ambiguous evidence.[157] Thus, hiring managers could still use the standard race-based IAT, the validity of which has undergone more rigorous testing.[158] Testing for implicit bias is especially valuable because implicit bias can coexist with overtly egalitarian views.[159] Interviewees usually feel pressure to explicitly adopt the desired, unbiased, attitudes of the office, obscuring any underlying bias.[160] Therefore, hiring managers must look beyond an interviewee's overt expressions of egalitarian views and use the IAT to obtain an accurate picture of the applicant's bias.

Anytime a test or screening device is employed to help select applicants, the test must comply with federal anti-discrimination laws.[161] The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII by prohibiting any screening process that disparately treats or has a disparate impact

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[152] *Id.*

[153] Levinson et al., *supra* note 44, at 207.

[154] *Id.* at 189.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 206.

[158] Levinson et al., *supra* note 27, at 19.

[159] Ogletree et al., *supra* note 30, at 46.

[160] *Id.*

[161] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYMENT TESTS AND SELECTION PROCEDURES (2010), https://www.eeoc.gov/policy/docs/factemployment_procedures.html.

on applicants based on race, sex, or national origin.[162] Administering the IAT may have a disparate impact on white applicants, as they may be disproportionately screened out by the test.[163] However, studies have shown that Black participants can also harbor implicit racial bias against Black people.[164] Additionally, even if there is a disparate impact, the procedure is job-related and consistent with business necessity in accordance with EEOC guidelines.[165] Reducing racial bias in prosecutorial decision-making is necessary to ensure the constitutional execution of the prosecutor's job under the Equal Protection mandate of the Fourteenth Amendment.[166] Moreover, there are no less discriminatory alternatives to using the IAT to screen out applicants with high levels of implicit bias.[167] Presently, many prosecutors' offices are trying to hire more diverse applicants, an effort perhaps based in part on the assumption that people of color will be less biased.[168] However, the IAT removes race as a proxy for bias and instead measures bias directly. Thus, while it is possible using the IAT will have a disparate impact on applicants based on race, the test is necessary to promote unbiased prosecution.

The IAT has the potential to be an effective screening device for prosecutors but its importance should not be overstated. As previously discussed, levels of implicit racial bias can potentially be changed over time and with practice.[169] Therefore, an applicant's performance on the IAT should not be determinative in the hiring decision. Additionally, the results of the IAT should not be made public or turned over to defense counsel if the applicant is hired.[170] The purpose of using such a test is only to provide hiring managers with additional information and promote self-awareness among the applicants. Feedback from IATs can reduce the expression of implicit bias by simply making the participant aware of their own bias.[171] Allowing the results of the IAT to be used against prosecutors would discourage prosecutors from retaking the IAT and continually

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[162] *Id.*

[163] Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter: Law, Politics, & Racial Inequality*, 58 EMORY L.J. 1053, 1062 n.17 (2009).

[164] *Id.*

[165] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 161.

[166] United States v. Armstrong, 517 U.S. 456, 464 (1996).

[167] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 161.

[168] *See* SUFFOLK CNTY. DIST. ATT'Y'S OFF., *Employment with the Suffolk DA's Office*, https://www.suffolkdistrictattorney.com/jobs-and-internships/open-positions (last visited Apr. 8, 2022); PHILA. DIST. ATT'Y'S OFF., PHILADELPHIA CITY COUNCIL BUDGET TESTIMONY, (2019), http://phlcouncil.com/wp-content/uploads/2019/04/Budget-Remarks-FY20-FINAL.042319a.pdf.

[169] *See* discussion *infra* Section IV.B.

[170] *See* Richardson, *supra* note 148.

[171] *See id.*; Gaelle C. Pierre, Confronting Implicit Bias Through Awareness: The Role of IAT Performance Feedback 43–44 (2010) (Ph.D. dissertation, New York University) (ProQuest).

reflecting on their bias. If a prosecutor's scores are released to defense attorneys, they may avoid taking the test altogether. Of course, prosecutors operating with high levels of bias should be held accountable but publicizing their IAT scores may discourage the honest self-reflection required to make long term improvements. Therefore, the IAT can be a very helpful administrative tool, but should not be used to the detriment of the prosecutor later on.

Second, human resources should work to create an office culture that is willing and able to address the issue of implicit bias. Developing this office culture starts by screening for an applicant's general disposition at the hiring stage because that can impact the applicant's willingness to address their unconscious biases. For example, measuring an applicant's worldview through a test, such as Kahan's cultural worldview scale, can reveal whether an applicant has an egalitarian mindset.[172] While egalitarian views can coexist with implicit bias, one experiment shows that strongly held egalitarian beliefs can help reduce and control implicit bias.[173]

Although getting the right people in the office is an important first step in creating an office culture that is willing to address implicit racial bias, the office environment itself affects a prosecutor's willingness to engage in efforts to reduce bias as well.[174] Mid-level managers within the office play a key role in translating an elected official's vision for a less biased, more race-conscious office into a reality on the ground.[175] If a new attorney's supervisor continues to primarily reward trial experience and conviction rates, the new prosecutor will shape their behavior to fall in line with the structural incentives, even if the elected official and young prosecutor are both reform-minded.

Thus, attorneys applying to become prosecutors should undergo psychological testing before they enter the workforce in order to reduce the effects of implicit racial bias. This testing ensures not only that less biased individuals are placed into the most powerful position within the criminal justice system, but also that these individuals will be willing to work toward combating racial injustice throughout their career.

B. *Bringing Empathy to Decision-Making*

Although prosecutors strive to be rational actors who make decisions based solely on the facts of each case, they are not, nor should they be. Western legal systems emphasize the importance of having detached and unemotional actors

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[172] Richardson, *supra* note 148, at 298–99. Kahan's cultural worldview scale is a series of agree-disagree statements that align with egalitarian or communitarian worldviews. *Id.* The scale would likely need to be adapted to better suit screening for prosecutors and adjusted so that applicant would not be able to guess the answer the recruiter was looking for. *Id.* at 299 n.191.

[173] *Id.* at 296–97.

[174] *Id.* at 293.

[175] FLA. INT'L UNIV. & LOYOLA UNIV. CHI., *supra* note 137, at 54.

working in the system, valuing rational decision-making above all else.[176] Empathy is often viewed as dangerous in the legal system—the antithesis of reason and the inappropriate insertion of personal beliefs.[177] But empathy is different than sympathy. Empathy is the practice of "tak[ing] the perspective of another," while sympathy is "feeling *for* or *with* the object of the emotion."[178] Sympathy leads to "the desire to take action" whereas empathy "does not necessarily."[179] Empathy is already an integral part of the criminal justice system. Judges, police officers, and prosecutors often need to use empathy to understand the perspective of those interacting with the system, to predict behavior, to understand the consequences of their actions, and to apply legal standards.[180] For example, police officers often rely on empathy to discern whether someone has a motive to lie, and prosecutors need to understand the defendant's mental state at the time of the offense to determine what mens rea they can prove.[181] Decisions that are perceived as "empathy-free" usually exhibit empathy that is so comfortable to the decision-maker that they are unlikely to realize they are exercising empathy at all.[182] When the decision-maker shares the same beliefs and background as the parties, taking the perspective of that party is not considered empathetic, whereas taking the view of someone with a very different background is.[183] Thus, empathy is employed in the criminal justice system every day, but prosecutors need to make a more concerted effort to apply empathy to their decision-making in a methodical way.

Specifically, empathy can be enhanced and sustained as a way of counteracting the effects of implicit racial bias.[184] A study by Denise Whitford and Andrea Emerson examined the effect of an empathy-based intervention on teachers' levels of implicit bias when disciplining their students.[185] While the study focused on teachers rather than prosecutors, public school systems also

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[176] Wettergren & Blix, *supra* note 149.

[177] Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE NOVO 133, 139 (2009).

[178] *Id.* at 136 (citing CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 44–45 (1997)).

[179] *Id.*

[180] *Id.* at 138–39. In *Safford v. Redding*, the Court was asked to weigh the intrusiveness of a strip search of a middle school student against the interest of the school in protecting its students from drugs. 557 U.S. 364, 364 (2009). Several of the justices considered the perspective of the young girl when interpreting the word "intrusive," while others took the perspective of the school administrators when considering the weight of the government's interest. *Id.* at 375, 378, 382, 385.

[181] Bandes, *supra* note 177.

[182] *Id.* at 139, 141.

[183] *Id.*

[184] Denise K. Whitford & Andrea M. Emerson, *Empathy Intervention to Reduce Implicit Bias in Pre-Service Teachers*, 122 PSYCH. REPS. 670, 679 (2019).

[185] *Id.* at 670.

struggle with discriminatory discipline practices based on race and socioeconomic status.[186] Black children tend to receive harsher punishments and lose the presumption of innocence long before they interact with the criminal justice system.[187] White student teachers in the experimental group were given a perspective-taking task that involved reading short stories from another student's perspective describing a time when they experienced racism.[188] The student teachers were then asked to reflect on the impact that type of experience would have on a person.[189] The student teachers took the IAT before and after completing the empathy-soliciting intervention, and the intervention significantly reduced negative bias toward Black individuals.[190] Although this study focused on a single intervention that temporarily reduced implicit bias, other research has shown that repeated empathy interventions can cause a sustained change in empathy levels over time.[191] In a study of medical students, researchers found that students who were repeatedly engaged in discussions and lectures on empathy sustained higher levels of empathy ten weeks later.[192] Thus, the systematic use of a prosecutor's capacity for empathy could potentially counteract the prosecutor's own implicit bias and guide their decision-making in a race-neutral manner, but more research focused in the criminal law context is needed.

Furthermore, prosecutors are actually better at their job when using empathy. Indeed, the purely "objective" prosecutor Western legal systems exalt may not exist. Prosecutors who frequently engage their sense of empathy are better able to prepare for trial by predicting how the jury might interpret the evidence and by managing the emotions of witnesses throughout the prosecution.[193] Therefore, striving for a standard of objectivity, completely devoid of emotion, actually makes the prosecutor's job more difficult and prevents them from reflecting on times when their emotions inappropriately interfere with decision-making. For example, a prosecutor may be more likely to empathize with a white defendant, which can lead to a more lenient prosecution.[194] If a prosecutor denies that empathy has entered the equation at all, then they are unable to recognize and adjust their behavior when emotions negatively influence their decision-making.[195] Prosecutors who refuse to actively engage with their sense

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[186] *Id.*

[187] *Id.* at 671.

[188] *Id.* at 677–78.

[189] *Id.* at 678.

[190] *Id.* at 677–79.

[191] Mohammadreza Hojat et al., *Enhancing and Sustaining Empathy in Medical Students*, 35 MED. TCHR. 996, 999 (2013).

[192] *Id.*

[193] Wettergren & Blix, *supra* note 149, at 31.

[194] Davis, *supra* note 75, at 833.

[195] Wettergren & Blix, *supra* note 149, at 32.

of empathy ignore the ways they are already using empathy and shut down opportunities to meaningfully reflect on its impact.

However, while prosecutors need empathy to perform their job successfully, empathy can also arguably exacerbate racial disparities if the prosecutor is not mindful. A prosecutor often uses empathy to decide who to prosecute and for what charges by taking the perspective of those involved in the crime and then fitting their behavior into a legal framework, especially to determine the defendant's intent and potential motive.[196] However, this process can be affected by implicit racial bias.[197] Empathy for the pain of someone within a subject's racial group is actually processed faster and more automatically at the neurological level than the pain of out-group members.[198] Increased levels of implicit racial bias can make those automatic differences even greater. This differential processing toward outgroups is especially concerning given that ninety-five percent of elected prosecutors are white.[199] While empathy can be affected by cognitive processes outside a person's control, the consistent practice of perspective-taking can modulate empathy and close the gap between empathy for out-groups and in-groups.[200]

Prosecutors should be aware of their unconscious tendency to empathize with defendants or victims who are similar to themselves and focus on taking the perspective of all the stakeholders in their cases from the defendant, to the victim, to the police, and the witnesses. The practice of perspective-taking is also a low-cost step toward reducing racial bias in terms of both a prosecutor's time and the office's financial resources. This practice will allow them to operate in a race neutral way and will likely help them better fulfill the prosecutor's mandate of achieving a "just" outcome in every case.

C. *Recognizing and Reacting to Bias*

Implicit bias may operate at the outer edges of a person's consciousness, but that does not mean it cannot be recognized by an educated observer. In *McCleskey v. Kemp*, the Supreme Court acknowledged the validity of the Baldus study, which found that there were certain death penalty cases where the race of the defendant rendered a death sentence much more likely.[201] Despite the study's validity, the Court found the Baldus study to be insufficient evidence of race-based prosecution because the study only spoke to general circumstances where racial bias could occur.[202] The defendant was unable to point to any

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[196] *Id.* at 26.

[197] Alessio Avenanti et al., *Racial Bias Reduces Empathetic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1018 (2010).

[198] *Id.* at 1020.

[199] Reflective Democracy Campaign, *Justice for All*?*, WOMEN DONORS NETWORK (2015), https://wholeads.us/justice/.

[200] Whitford & Emerson, *supra* note 184, at 670.

[201] McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

[202] *Id.*

specific evidence of racism in his case. Although non-specific proof of racial bias is not enough to trigger the high standards for doctrinal protection against racism in the criminal justice system, a prosecutor's decision does not need to meet such a burden.[203] A prosecutor, armed with the knowledge of the Baldus study, could recognize the cases that Baldus found to be most susceptible to racially biased outcomes and choose not to pursue the death penalty in those cases.[204]

Beyond the context of death penalty cases, social scientists have identified places in which implicit racial bias is more likely to play an active role in decision-making. Implicit bias is likely to come into play anytime a decision is made quickly and with limited information.[205] Unfortunately, these conditions are the exact ones in which prosecutors make decisions in dozens of misdemeanor cases every day.[206] Additionally, cases with ambiguous evidence are also particularly susceptible to implicit bias.[207] Furthermore, race can influence the so-called "objective indicators" of criminality that prosecutors often rely on.[208] For example, in making charging and bail decisions, prosecutors will look to a defendant's arrest record, but a lengthy record can be the result of biased policing.[209] These are just a few of the ways that implicit bias can manifest in a prosecutor's caseload, and thus should be carefully examined to reduce the role implicit bias plays.

One example in which the actions of a police officer were identifiably tainted by cognitive, though not racial, bias is *Commonwealth v. A Juvenile*.[210] This case provides useful insight into the way in which priming and stereotypes can potentially change perceptions. This phenomenon is difficult to demonstrate with race because race is an immutable characteristic. Thus, its impact on perception can only really be recorded in a lab setting where race is a controlled variable in otherwise factually identical scenarios. However, the stereotypic thinking that I argue changed the officer's perception here is the same mechanism that underlies implicit racial bias.

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[203] *See* United States v. Armstrong, 517 U.S. 456, 467 (1996); *McCleskey*, 481 U.S. at 286–87.

[204] *See generally* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[205] Richardson, *supra* note 148.

[206] *See* Burke, *supra* note 10, at 187–88.

[207] Levinson et al., *supra* note 44, at 206.

[208] KUTATELADZE ET AL., *supra* note 81, at 7, 11, 13.

[209] FLA. INT'L UNIV. & LOYOLA UNIV. CHI., *supra* note 137, at 57.

[210] Commonwealth v. A Juvenile, 19-P-0266 (Mass. App. Ct. Dec. 12, 2019), https://128archive.com/Disposition/DownloadDisposition/14201?dispositionId=14214 (using "juvenile" as a pseudonym).

On the night of Juvenile's arrest, Juvenile was driving a rental car with tinted windows when police pulled her over.[211] When the officer walked up to the vehicle to ask for Juvenile's license and registration, he noticed a purse that was partially opened at Juvenile's feet.[212] The officer pointed his flashlight at the purse.[213] The first time the officer looked inside the purse from outside the vehicle, he saw what appeared to be a hairbrush and possibly something metal.[214] At that point, the officer did not order Juvenile out of the vehicle and he and his partner walked back to the police cruiser to run the registration.[215] While standing by the cruiser, the officer's partner informed him that he recognized Juvenile as a member of a local gang.[216] The two officers then returned to Juvenile's vehicle and the officer took a second look inside the purse he had seen on the floor.[217] This time, a gun was clearly visible to the officer and the officer made the arrest.[218]

The officer's actions in this case demonstrate how cognitive bias can alter perceptions and decision-making, although the biased cognition here is not necessarily race-related. Officially, the Massachusetts Appeals Court found that the purse had been moved, which is why the gun was suddenly visible.[219] However, it is quite unlikely that Juvenile, who appeared nervous when pulled over by the police, moved her bag in such a way that her hidden firearm was more visible to the officer who had shined a light in her purse moments before.[220] More likely, the change in perception was related to the cognitive heuristics that were activated when the officer's partner informed him that the driver was a member of a gang.[221] At that point, an object that was previously ambiguous was viewed through the lens that the driver was in a gang and likely dangerous. If the officer had never been informed of Juvenile's gang affiliations, the officer would not have been primed with the imagery of dangerous gang members and he may have never seen the gun for what it was. However, because stereotypic images of gang members were at the forefront of the officer's mind when he looked at the purse the second time, a juvenile was arrested and convicted for possession.

This case demonstrates the complexity of finding and addressing cases where cognitive bias shapes the outcome. The Appeals Court did not act unreasonably when it held that the purse had been shifted to make the gun more visible, and

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[211] *Id.* at 2.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 2–3.

[215] *Id.* at 3.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *See id.*

[221] *See id.*

ultimately their decision to uphold the search was based on grounds unrelated to the possibility that bias had affected police decision-making.[222] However, this case demonstrates different points where the prosecutor could have chosen not to move forward if the officer's decision had been affected by implicit racial bias. First, the prosecutor could have dropped the possession charge entirely as the gun may not have been discovered if not for the bias. However, office policies and information about the individual offender would affect whether that would be an appropriate decision. If the gun charge had been one of many charges arising from the arrest, then perhaps the decision to drop the gun charge would be more prudent, or the prosecutor could drop other lesser charges to lessen the total impact the suspected bias had on the defendant. In this case, the prosecution made an interlocutory appeal to reverse the trial court's order on the motion to suppress.[223] If the gun's discovery had been tainted by implicit racial bias, the prosecutor likely should not have pursued the appeal.

Prosecutors are generally not going to be certain that implicit bias is affecting their cases. Yet the possibility of that bias should be a factor that is considered in their decision-making. Prosecutors are constantly making decisions based on abstract possibilities, such as the likelihood they would win a motion or the possibility that a defendant will act violently in the future. In the same way, prosecutors should first consider whether implicit bias affected the arrest or investigation and then consider the extent of its effects. The likelihood that implicit bias affected some part of the case in front of them should be an important factor in the prosecutorial decision-making process.

By recognizing cases that may have been tainted by implicit bias or could be tainted by their own bias, prosecutors can then use their considerable discretion to take corrective steps such as reducing or dismissing charges, changing bail or sentencing recommendations, or pursuing diversion programs. As prosecutors face massive caseloads with limited time to devote to each case, their awareness of the increased risk of implicit racial bias can be used to challenge their own assumptions about whether the case is winnable, the strength of ambiguous evidence, and the chances the offender will recidivate.[224] Unfortunately, prosecutors likely will not have the resources to do the additional investigation that would better remedy the implicit bias.[225] However, by challenging their own assumptions, prosecutors counteract the prejudicial heuristics that would

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[222] *Id.* at 6.

[223] *See id.*

[224] *See* Burke, *supra* note 10, at 197.

[225] In my experience interning and working as a prosecutor in both Suffolk and Middlesex County, Massachusetts, the Assistant District Attorneys working at the district court level rarely have the time or resources to conduct further investigations into their cases. Only the most serious cases have additional time and energy devoted towards them, while the thousands of other cases that pass through court are never investigated beyond the single police report that gave rise to the charges.

have guided the decision otherwise.[226] Additionally, prosecutors should not treat all arrest records the same and should give serious consideration to the race of the defendant and the location of the arrest when using that record to make predictions about future criminality.[227] Such records may be more reflective of the deployment of police resources than the criminality of an individual.[228] Identifying these influences on their own decision-making and the decision-making of others within the system allows the prosecutor to adjust their course of action to ameliorate the racial injustice within the system.

In *McCleskey* and *Armstrong*, the Supreme Court rejected the idea that generalized claims of bias could be sufficient to reverse a sentence or dismiss a charge if there was no additional proof of bias in that specific case.[229] However, this approach ignores the problem of general and widespread implicit bias. If the effect of implicit bias is not accounted for doctrinally, prosecutors should account for such general effects of bias despite a lack of proof in individual cases. When a statute or sentencing scheme is ambiguous, the rule of lenity suggests that courts should resolve the ambiguity in favor of the defendant, and prosecutors should adopt the same mentality in their decision-making process.[230] Whenever there is a probability that race is influencing the outcome or decision on a case, the prosecutor should take corrective action in favor of the defendant.

Despite these recommendations, implicit racial bias is admittedly difficult to see at the individual level. Often, another variable or circumstance can explain the possibility of implicit racial bias. For example, the purse in *A Juvenile* could have been moved so that the gun was more visible, but cognitive bias is more likely the reason the officer saw the gun on his second look. Biased decision-making becomes much clearer when viewed through trends and statistics, which is why I, like many others, also strongly encourage prosecutors' offices across the country to keep detailed records on their caseloads.[231] The mechanisms through which racial injustice is perpetuated throughout the criminal justice system are still obscure, and the data that has been collected and analyzed is often contradictory.[232] But reducing implicit bias from decision-making throughout the system will likely bring the underlying structural issues within the system into sharper focus.[233] Prosecutors are in a position to start immediately working toward racial justice rather than wait for massive structural change to make a difference.

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[226] *See* Burke, *supra* note 10, at 197–98.

[227] XENOPHOBIA AND RELATED INTOLERANCE, *supra* note 20, at 2–3.

[228] *Id.* at 3 ("Crime is often significantly higher in minority neighborhoods than elsewhere. And that is where we allocate our resources.").

[229] *See generally* United States v. Armstrong, 517 U.S. 456 (1996); McCleskey v. Kemp, 481 U.S. 279 (1987).

[230] Bell v. United States, 349 U.S. 81, 83 (1955).

[231] Davis, *supra* note 75, at 845.

[232] KUTATELADZE ET AL., *supra* note 81, at 11.

[233] Ogletree et al., *supra* note 30, at 60.

CONCLUSION

Through their vast power of discretion, prosecutors are in a position to exacerbate or alleviate racial injustice in the criminal justice system. Implicit racial bias currently permeates the criminal justice system and exacerbates structural inequalities that lead to racially disparate outcomes in the system. To reduce the amount of bias within the system, prosecutors should focus on filling their ranks with individuals who already have low levels of implicit bias and those who are willing to engage in critical self-reflection to reduce their bias. Once prosecutors enter the workforce, they should tap into their sense of empathy in a methodical manner to recognize and counteract the ways implicit bias can affect decision-making. Finally, prosecutors should be educated by social scientists to recognize cases in which implicit bias is likely to have an effect so that prosecutors can account for and counteract the results. Reducing implicit bias in prosecutorial decision-making is only a small part of a much larger picture, but by tapping into the corrective value of prosecutorial discretion, prosecutors can work toward racial justice until larger structural changes can be achieved.