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## **Racial Bias Still Exists in Criminal Justice System? A Review of Recent Empirical Research**

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**RACIAL BIAS STILL EXISTS IN CRIMINAL JUSTICE SYSTEM?  
A REVIEW OF RECENT EMPIRICAL RESEARCH**

*Yu Du*<sup>1</sup>

***ABSTRACT:***

The debate on whether racial bias is still embedded in the criminal justice (CJ) system today has reached its plateau. One recent article in the Washington Post has claimed an overwhelming evidence of racial bias in the CJ system. Whereas some scholars argue that racial disparity is an epitome of real crime rates, others indicate that implicit and/or explicit racial bias against Blacks held by law enforcement agents persists in the system. This review considers both supporting arguments and relevant counterarguments. After evaluating empirical and rigorous research during the past five years, the review maintains that racial bias still exists in the system. Implicit and/or explicit racial bias indeed influence law enforcement agents' legal decisions and practice. Implicit bias has more detrimental consequences than the explicit one, mainly because it operates unconsciously within almost everyone, including police, prosecutors, judges, prison staff, and parole officers. Even well-intentioned law enforcement agents are not immune from the impact of implicit bias on their decision making. Implicit racial bias may further exacerbate the Black-White racial disparity in the system, as well as in the society.

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**TABLE OF CONTENTS**

<b>I. INTRODUCTION.....</b>	<b>81</b>
<b>II. GENERAL COUNTERARGUMENT AND DISCUSSION.....</b>	<b>83</b>
<b>III. RACIAL BIAS IN POLICING.....</b>	<b>85</b>
<b>A. Police Searching Practices.....</b>	<b>85</b>
<b>B. Police Decision to Arrest.....</b>	<b>88</b>
<b>C. Police Use of Force.....</b>	<b>90</b>
<b>IV. RACIAL BIAS IN SENTENCING.....</b>	<b>91</b>
<b>A. Prosecutor’s Discretion and Practice.....</b>	<b>92</b>
<b>B. Judge’s Sentencing Decision.....</b>	<b>94</b>
1. Decision to Incarcerate and Sentence Length.....	95
2. Death Penalty Decision.....	97
<b>V. RACIAL BIAS IN INCARCERATION AND REENTRY.....</b>	<b>98</b>
<b>A. Use of Solitary Confinement.....</b>	<b>99</b>
<b>B. Decision for Parole Release.....</b>	<b>101</b>
<b>VI. CONCLUSION.....</b>	<b>102</b>

## I. INTRODUCTION

One recent article in the *Washington Post* indicated that racial bias overwhelmingly exists in criminal justice (CJ) system after reviewing more than 150 studies.<sup>2</sup> Although it is hard to partial out the racial effect from other confounding effects related to politics, education, and socioeconomic status in the legal system, the above argument is still valid. Racial bias and racism can be concluded when the disparity presented is attributed to actions and/or decisions, either explicit or implicit, taken by a dominant group (Whites) that are harmful to a minority group (Blacks).<sup>3</sup> The overrepresentation of Blacks in the CJ system—where they consist of 40% of the overall two million incarcerated Americans, but only constitute 13% of the entire population—exactly mirrors this argument.<sup>4</sup> In other words, the percentage of incarcerated Blacks far more exceeds their proportion in the general population.<sup>5</sup> The Black-White racial disparity has been found to be pronounced and enduring across multiple CJ processing stages.<sup>6</sup> In fact, the mere existence of the supporting empirical research on race and the CJ system may be self-evidenced for its racial bias.<sup>7</sup>

Two key questions are why is the CJ system disproportionately represented by Blacks and why the *Washington Post*'s conclusion receives tremendous support? Some would think the overrepresentation is an epitome of real crime rates, whereas others would say that it is because racial bias against Blacks persists in the system. This review shows evidence aligning with the latter statement, arguing that law enforcement agents, such as police officers, prosecutors, and judges, hold either explicit or implicit racial bias through their legal

<sup>2</sup> Radley Balko, *There's Overwhelming Evidence that the Criminal-Justice System is Racist: Here's the Proof*, WASH. POST (June 10, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/>.

<sup>3</sup> See generally FLAVIO FRANCISCO MARSIGLIA & STEPHEN KULIS, DIVERSITY, OPPRESSION, & CHANGE: CULTURALLY GROUNDED SOCIAL WORK (2d ed. 2016).

<sup>4</sup> KEITH O. LAWRENCE, RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 4 (2011).

<sup>5</sup> ANN E. CARSON & ELIZABETH E. ANDERSON, U.S. DEP'T JUST., PRISONERS IN 2015 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

<sup>6</sup> Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 57 (2015).

<sup>7</sup> See generally BRIAN MACLEAN & DRAGAN MILOVANOVIC, RACISM, EMPIRICISM AND CRIMINAL JUSTICE (1990).

decisions, which leads to and exacerbates the Black-White racial gap. Explicit racial bias manifests as an overt racial discrimination; whereas implicit racial bias refers to an automatic and unconscious association between negative stereotypes and certain racial groups, commonly measured by the Implicit Association Test (IAT).<sup>8</sup> A growing number of studies have revealed how implicit racial bias influences legal decision making and how it manifests in each legal processing stage.<sup>9</sup>

In general, people are more likely to associate Blacks or Afrocentric features with dangerousness, negativity, and criminality.<sup>10</sup> Due to the universality of such implicit racial bias, legal officials and practitioners are nearly impossible to be immune from it.<sup>11</sup> In the 26th Presidential debate, Hillary Clinton also acknowledged the substantial and even fatal consequences of implicit racial bias in the CJ system for Blacks.<sup>12</sup> A better understanding of the impact of racial bias in the CJ system, by providing empirical research and evidence, is necessary. A proactive discussion about implicit racial bias can facilitate current efforts of narrowing the racial gap and benefitting future policies.

This review addresses the racial disparity in the CJ system in the following ways. Section II discusses and refutes a counterargument which concerns the nonexistence of racial bias and Black-White racial disparity in the CJ system. Section III reviews research about implicit racial bias rested in police discretion and practice, specifically in their stop-and-frisk decisions, decisions to arrest, and use of force. Section IV discusses the racial disparity in the sentencing stage, including prosecutors' discretion and judges' sentencing decisions. Section V presents evidence of racial bias existing in the use of solitary confinement during incarceration, as well as parole officers' decision to revoke release for reentry. Finally, section VI draws the conclusion. Each subsection starts with a potential counterargu-

<sup>8</sup> Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 286 (2010).

<sup>9</sup> *Id.* at 287-88. See also Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871 (2015).

<sup>10</sup> Smith et al., *supra* note 9, at 881.

<sup>11</sup> *Id.* at 916-23.

<sup>12</sup> Julia Jacobo, *Presidential Debate: How Donald Trump and Hillary Clinton Plan to Deal with Race*, ABC NEWS (Sept. 26, 2016), <https://abcnews.go.com/Politics/presidential-debate-donald-trump-hillary-clinton-plan-deal/story?id=42378733>.

ment briefly and then moves on to recent empirical studies to support that implicit racial bias exists in the CJ system.

## II. GENERAL COUNTERARGUMENT AND DISCUSSION

Two broad perspectives explain the Black-White racial gap in the CJ system. One is differential involvement indicating that Blacks commit more and serious crimes over a long time because of neighborhood disadvantages, “biological flaws,” or other factors.<sup>13</sup> The other is differential selection suggesting that Blacks are treated differently and harsher than their similar social-situated Whites.<sup>14</sup> This review concurs with the differential selection argument, disagreeing that the Black-White racial gap in the system is because Blacks commit more drug, violent, and property crimes.

Differential involvement hypothesis has one apparent limitation: its supporting data is drawn from official and aggregated crime records, such as Uniform Crime Report (UCR) and Prison records, documenting with many methodological issues that limit their validity.<sup>15</sup> The official crime counting system may be inherently biased; the data itself can be contaminated by racial bias due to the involvement of multiple legal decision points and legal agents. Therefore, the official data that is often used to offer statistical support for labeling blacks as criminals may also be biased.<sup>16</sup>

National Survey on Drug Use and Health shows that Blacks only constitute 12.5% of illegal drug users in 2015—even lower than the proportion of Blacks in the general population (13.4%).<sup>17</sup> But, they represent 29% of those arrested for drug offenses and 33% of

<sup>13</sup> Lauren Nichol Gase et al., *Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics*, 8 RACE & SOC. PROBS. 296, 297 (2016).

<sup>14</sup> Tonry, *supra* note 8, at 274.

<sup>15</sup> Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 324 (1997).

<sup>16</sup> KATHERINE J. ROSICH, AM. SOC. ASS’N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM (2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf>.

<sup>17</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL (2007), <https://files.eric.ed.gov/fulltext/ED498206.pdf>.

drug offenders in prison.<sup>18</sup> The racial gap is more striking for crack cocaine use and arrest. Despite Blacks consisting 24% of crack cocaine users compared to 72% of Whites, they represent more than 80% of those arrested and sentenced.<sup>19</sup> Further, Blacks are three times more likely than Whites to be arrested for marijuana possession, even though both racial groups use marijuana at a comparable rate.<sup>20</sup> Apparently, the claim that Blacks simply commit more drug offenses does not hold.

Despite the fact that official crime reports underestimate the real number of crimes committed, the violent felony crime rate tends to be more accurate and follows a similar pattern as the conviction rate.<sup>21</sup> According to official FBI statistics in 2015, Blacks are disproportionately arrested and incarcerated for violent crimes, although the majority of Blacks have never committed any crimes.<sup>22</sup> In addition, the 2006 National Judicial Reporting Program (NJRP) shows that 39% of those convicted of violent crimes are Black, whereas 58% are White.<sup>23</sup> Compared to 74% of Whites, 78% of Blacks are sentenced to prison or jail.<sup>24</sup> A similar trend also exists for property crimes. Blacks have a higher incarceration rate (69%) than Whites (65%), even though they only represent 33% of overall property crimes, relative to 65% of Whites.<sup>25</sup> After analyzing four “face-to-face” crimes between 2000 and 2007, the general Blacks-Commit-More-Violent-Crime pattern drawn from official aggregated data does not emerge.<sup>26</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *ACLU Report: Racial Disparities Persist in Marijuana Possession Arrests*, NORML (Apr. 23, 2020), <https://norml.org/news/2020/04/23/aclu-report-racial-disparities-persist-in-marijuana-possession-arrests>.

<sup>21</sup> Terence P. Thornberry & Marvin D. Krohn, *Comparison of Self-Report and Official Data for Measuring Crime*, in MEASUREMENT PROBLEMS IN CRIMINAL JUSTICE RESEARCH: WORKSHOP SUMMARY 43, 59-60 (2003).

<sup>22</sup> *2015 Crime in the United States*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43/#overview> (last visited Mar. 5, 2021).

<sup>23</sup> BUREAU OF JUST. STATS, FELONY SENTENCES IN STATE COURTS, 2006-STATISTICAL TABLES (Nov. 22, 2010), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Gregory DeAngelo et al., *Interracial Face-to-Face Crimes and the Socioeconomics of Neighborhoods: Evidence from Policing Records*, 56 INT’L REV. L. & ECON. 1, 5-6 (2018) (the four crimes include homicide, robbery, assault, and use of weapons, and controls for neighborhood socioeconomic conditions, overall crime

Instead, Whites are more likely to assault and use weapons than Blacks.<sup>27</sup> Even when Whites commit more crimes, Blacks are more likely to be convicted and incarcerated.

While efforts have been made to reduce overt racism in the system over years, history still has its lingering effect on people's perceptions of Blacks, and the Black-White racial disparity persists.<sup>28</sup> Even under the assumption of the neutrality of legal policies, legal decisions, and practice, they may still continue to hold explicit or implicit racial bias. The potential impacts of implicit and explicit racial bias have been studied among various legal actors across multiple CJ processing stages.<sup>29</sup> Overwhelming evidence has indicated that implicit/explicit racial bias manifests in virtually any discretionary decision-making point and exists within many law enforcement agents.<sup>30</sup>

### III. RACIAL BIAS IN POLICING

Explicit and/or implicit racial biases against Blacks can shape whether police officers decide to stop people for questioning, interrogate briefly or at length, frisk or not frisk, use force or not use force, and make verbal warnings rather than arrests.<sup>31</sup> This section covers empirical research on three consecutive stages in policing: (a) police's searching practice, (b) brutality or use of force after stops, and (c) decisions to arrest.

#### A. Police Searching Practices

One counterargument is that police's practice and discretion are not racially biased because officers simply follow the crime control policy and focus on places where more crimes occur. Take police's "stop-frisk-search" tactics as an example. People who hold this

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rates, and demographic turnover, as well as time-varying effects, such as different policing strategies).

<sup>27</sup> *Id.* at 1.

<sup>28</sup> SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* (6th ed. 2018).

<sup>29</sup> See, e.g., Bailey Maryfield, *Implicit Racial Bias*, JUST. RES. & STAT. ASS'N (Dec. 2018), <https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf>.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 (2012).

idea would contend that pedestrians, motorists, and drivers are stopped at random, engaged in conversations or questionings, and searched by officers due to their furtive movements or other probable causes.<sup>32</sup> Police officers on average do not make more stops and searches of Blacks than Whites.<sup>33</sup> The logic is that while stopping Whites could be a “less productive stop” for police, they still do it.<sup>34</sup>

However, such conclusion does not consider two facts. First, officers have to make decisions fast with no time to make a cost-benefit analysis for their practice. This can be officers’ overreactions to the implicit racial bias problem because they are more aware of it or simply concerned their practices appear to be racist. Second, we must consider that each police officer has flexible yet subjective interpretations of so-called “probable cause” or furtive movement. An implicit racial bias can operate through their decision making and discretion. The bias can easily translate into discriminatory behaviors under the condition that people have large discretion in need of making immediate decisions—just like the working condition for police.<sup>35</sup>

Using a threshold test instead of traditional benchmark and outcome analysis for stop-and-search, research has found that the search threshold for Black drivers (6%) is significantly lower than that of Whites (9%) in nearly 100 police departments, indicating an existence of implicit racial bias in police’s decisions and discretions.<sup>36</sup> Consistently, there is a lower stopping threshold for black drivers (16%) than Whites (20.9%), based on sixty million municipal and state patrol traffic stops across twenty states.<sup>37</sup> After being stopped, the odds of being searched for Blacks is two times higher than for Whites.<sup>38</sup> While the legalization of recreational marijuana

<sup>32</sup> See generally Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014).

<sup>33</sup> Decio Coviello & Nicola Persico, *An Economic Analysis of Black-White Disparities in the New York Police Department’s Stop-and-Frisk Program*, 44 J. LEGAL STUD. 315, 343 (2015) (analyzing ten years of data from the NYPD’s “stop and frisk program” and applying time and precinct-level fixed effects).

<sup>34</sup> *Id.* at 15.

<sup>35</sup> Kang et al., *supra* note 31, at 1142.

<sup>36</sup> Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1207 (2017).

<sup>37</sup> Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 739 (2020), <https://www.nature.com/articles/s41562-020-0858-1.pdf>.

<sup>38</sup> *Id.* at 738.

use reduces the absolute difference in stop and search rates between white and black drivers, the relative racial disparity still maintains.<sup>39</sup>

Those who agree on the statement that “Blacks generally offend more” may particularly focus on the police’s hit rate in order to evaluate whether explicit and implicit racial bias exists.<sup>40</sup> A gap in hit rates between Blacks and Whites can be suggestive of a racial bias.<sup>41</sup> One classic study, using the disaggregated NYPD data, has revealed that one in every 9.5 Blacks stopped results in an arrest, compared to one in 7.9 for Whites, after controlling for location variability and previous race-specific arrest rates.<sup>42</sup> This difference suggests a racial bias against Blacks embedded in police officer’s discretionary behaviors. Despite comprising of only half of the population in NYC, Blacks and Hispanics are accountable for more than 80% of police stops.<sup>43</sup> The overall hit rate for Blacks is 2.5%, whereas it is 11% for Whites.<sup>44</sup> Blacks are also significantly involved in lower hit rate stops for criminal possession of a weapon (CPW), compared to Whites, with time- and location-fixed effect.<sup>45</sup> Blacks may continue to face racial biases, either explicit or implicit, in police officers’ practices.

Another line of research is to consider residential mobility to test racial bias in officer’s practice and discretion. Both classic and contemporary theories consistently claim that Blacks are more likely to experience racial discrimination by the police in predominantly white neighborhoods because officers tend to be more aggressive and more likely to engage in unjustifiable stop-and-frisk practice in poor racial minority neighborhoods.<sup>46</sup> Empirical research has lent support

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<sup>39</sup> *Id.* at 736.

<sup>40</sup> John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 205, 204-06 (2001).

<sup>41</sup> Coviello & Persico, *supra* note 33, at 338.

<sup>42</sup> Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 820 (2007).

<sup>43</sup> Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 366 (2016).

<sup>44</sup> *Id.* at 375.

<sup>45</sup> *Id.* at 382.

<sup>46</sup> See generally Ronald Weitzer, *Police Race Relations*, in THE OXFORD HANDBOOK ON POLICE AND POLICING 339 (Michael D. Reisig & Robert J. Kane eds., 2014); see also Donald P. Green et al., *Defended Neighborhoods, Integration, and Racially Motivated Crime*, 104 AM. J. SOCIO. 372, 397, n.11 (1998).

for the theory.<sup>47</sup> When black residents travel outside of their neighborhoods, they are more likely to be stopped and experience negative treatments by police.<sup>48</sup> The probability of experiencing racially biased treatment by police is significantly higher for Blacks than for Hispanics, even within a residentially stable neighborhood.<sup>49</sup> Altogether, these empirical studies have suggested the existence of explicit and/or implicit racial bias in policing which exacerbates the racial disparity in the CJ system.

### B. Police Decision to Arrest

Police's decision to arrest is the first and one of the most consequential stages where offenders enter the CJ system, but it involves a large degree of subjectivity and discretion.<sup>50</sup> In 2016, Black Americans comprised 27% of all individuals arrested in the United States, although they only make up 12% to 14% of the total U.S. population—double their share of the total population.<sup>51</sup> Blacks are arrested at a rate that is 2.3 times higher than Whites.<sup>52</sup> Specifically, compared to Whites, Blacks are nine times more likely to be arrested in Jersey City, six times more likely in Millville, three times more likely in Elizabeth, and 2.6 times more likely in New Brunswick.<sup>53</sup> Likewise, a meta-analysis based on twenty-seven independent microlevel data has revealed a strong and statistically significant consistency that black suspects are more likely to be arrested than their white counterparts.<sup>54</sup> Across these selected studies, the average probability of

<sup>47</sup> See generally Eric A. Stewart et al., *Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth*, 47 CRIMINOLOGY 847 (2009).

<sup>48</sup> *Id.* at 854.

<sup>49</sup> Eileen E.S. Bjornstrom, *Race-Ethnicity, Nativity, Neighborhood Context and Reports of Unfair Treatment by Police*, 38 ETHNIC & RACIAL STUD. 2019, 2030 (2015).

<sup>50</sup> Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 474 (2011).

<sup>51</sup> THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2 (2018).

<sup>52</sup> Daniel P. Mears et al., *Offending and Racial and Ethnic Disparities in Criminal Justice: A Conceptual Framework for Guiding Theory and Research and Informing Policy*, 32 J. CONTEMP. CRIM. JUST. 78, 80 (2016).

<sup>53</sup> LYNDIA GARCIA, ACLU OF N.J., SELECTIVE POLICING: RACIALLY DISPARATE ENFORCEMENT OF LOW-LEVEL OFFENSES IN NEW JERSEY 18-62 (2015), [https://www.aclu-nj.org/files/7214/5070/6701/2015\\_12\\_21\\_aclunj\\_select\\_enf.pdf](https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf).

<sup>54</sup> Kochel et al., *supra* note 50, at 473.

Whites being arrested is 20%, while the average probability for Blacks is 26%.<sup>55</sup> That is, the probability of black suspects being arrested is 30% higher than their white counterparts.<sup>56</sup>

Moreover, Schleiden and colleagues concurrently test social disorganization theory, differential involvement hypothesis, and differential selection hypothesis by analyzing a national longitudinal data.<sup>57</sup> After controlling for neighborhood disadvantages, exposure to violence, behavioral differences, and demographic factors, black young adults are on average seven times more likely to be arrested and experience an increased probability of being arrested in their young adulthood.<sup>58</sup> By the age of eighteen, the risk of being arrested for Black males is 30%, compared to 22% for Whites; by the age of twenty-three, the arrest risk increases to 49% for Blacks, relative to 38% for Whites.<sup>59</sup> A quasi-experimental analysis of co-offending behaviors with a counterfactual approach has further demonstrated that black offenders are 2.8 times more likely to be arrested for the same offense than white co-offenders.<sup>60</sup> In particular, although Blacks are less likely to engage in drug distribution and drug use offenses, they are 247% more likely to be arrested by police.<sup>61</sup> Notably, the higher probability of Blacks being arrested can neither be explained by differences in offending nor neighborhood features, further illustrating an explicit and/or implicit racial bias in policing discretions and practice.<sup>62</sup> Hence, race does significantly influence the police's decision to arrest.

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<sup>55</sup> *Id.* at 490.

<sup>56</sup> *Id.* at 498.

<sup>57</sup> Cydney Schleiden et al., *Racial Disparities in Arrests: A Race Specific Model Explaining Arrest Rates Across Black and White Young Adults*, 37 CHILD & ADOLESCENT SOC. WORK J. 1, 1 (2019).

<sup>58</sup> *Id.* at 10.

<sup>59</sup> Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 475 (2014).

<sup>60</sup> Brendan Lantz & Marin R. Wenger, *The Co-offender as Counterfactual: A Quasi-Experimental Within-Partnership Approach to the Examination of the Relationship Between Race and Arrest*, 16 J. EXPERIMENTAL CRIMINOLOGY 1, 17 (2019).

<sup>61</sup> Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 309 (2015).

<sup>62</sup> *Id.* at 307.

### C. Police Use of Force

A decision by the police to shoot a potentially armed suspect only takes milliseconds.<sup>63</sup> Unconscious and automatic responses matter. It is hard to argue that police use of force is racially neutral because of the dramatic media exposure of the Ferguson event in 2014 and the subsequent “Black Lives Matter” movement.<sup>64</sup> Accounting for county-specific predictors and local crime rates, a significant racial bias in police decisions to shoot unarmed Blacks has emerged.<sup>65</sup> The probability of being shot by police for an unarmed Black is about 3.5 times more than that for their white counterparts, indicating a racial bias in police decisions to shoot.<sup>66</sup>

Implicit bias against Blacks is more evidenced in police use of non-lethal force, rather than lethal force, and in less threatening yet more ambiguous circumstances.<sup>67</sup> Fridell and Lim have directly tested the implicit racial bias argument using 1,846 incident reports from the Texas police department.<sup>68</sup> Holding the level of resistance, officer’s race, officer’s education level, and incident type constant, police are more likely to use intermediate (i.e. electronic control devices) instead of a lower-level force on black suspects.<sup>69</sup> Further breaking down the definition of “force” used by police into more details, black suspects are 18% more likely to experience police use of non-lethal force in an interaction, even after controlling for age, gender, various encounter characteristics, citizen’s behaviors, precinct- and year-fixed effects, and eventual outcomes.<sup>70</sup>

<sup>63</sup> Benedict Carey, *Study Finds Police Training Plays Key Role in Shootings*, N.Y. TIMES (June 2, 2007), <https://www.nytimes.com/2007/06/02/us/02police.html>.

<sup>64</sup> Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13 2018, 3:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight>.

<sup>65</sup> Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, 10 PLOS ONE 1, 14 (2015).

<sup>66</sup> *Id.* at 6.

<sup>67</sup> Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1320 (2002).

<sup>68</sup> Lorie Fridell & Hyeyoung Lim, *Assessing the Racial Aspects of Police Force Using the Implicit- and Counter-Bias Perspectives*, 44 J. CRIM. JUST. 36, 41 (2016).

<sup>69</sup> *Id.* at 42.

<sup>70</sup> Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1231 (2019).

Some argue that a citizen's racial bias towards police should be included because the interpretation of the same incident may differ between officers and citizens/suspects.<sup>71</sup> A citizen's biased or hostile reaction may independently and jointly create the misinterpretation of an encounter, subsequently influencing a police officer's reaction and increasing the probability of police use of force.<sup>72</sup> Evidence from analyzing a sample of 139 incidents where police use non-lethal forces has discovered that Blacks are indeed subjected to more police use of force, particularly at an early stage of an interaction.<sup>73</sup> This finding supports that police may explicitly or implicitly link Blacks with criminality and dangerousness since in an early stage of an interaction police have less information available and their decisions are more likely based on implicit associations.<sup>74</sup> In sum, both early field studies and current empirical research have reached a consensus that Blacks are overrepresented in police use of force, being a strong indicator of racial bias in the CJ system.<sup>75</sup>

#### IV. RACIAL BIAS IN SENTENCING

If the policing stage is the starting point to assess whether the CJ system is racially biased, the sentencing stage is the true entering point. This section primarily focuses on prosecutors and judges because they engage in multiple legal but subjective decision-making processes.<sup>76</sup> Because the decision-making processes by prosecutors and judges are less visible and clear to the public and sometimes based on less well-defined standards, the implicit or explicit racial bi-

<sup>71</sup> Jeff Rojek et al., *Examining Officer and Citizen Accounts of Police Use-of-Force Incidents*, 58 CRIME & DELINQ. 301, 323-24 (2012).

<sup>72</sup> Stephen D. Mastrofski et al., *Police Disrespect Toward the Public: An Encounter-Based Analysis*, 40 CRIMINOLOGY 519, 522 (2002).

<sup>73</sup> Kimberly Barsamian Kahn et al., *How Suspect Race Affects Police Use of Force in an Interaction Over Time*, 41 LAW & HUM. BEHAV. 117, 121 (2017).

<sup>74</sup> *Id.* (echoing Correll et al., *supra* note 67, at 1315).

<sup>75</sup> For field studies, see generally Gerald D. Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 225 (1963). For empirical research, see generally Daniel P. Mears et al., *Thinking Fast, Not Slow: How Cognitive Biases May Contribute to Racial Disparities in the Use of Force in Police-Citizen Encounters*, 53 J. CRIM. JUST. 12 (2017).

<sup>76</sup> Spohn, *supra* note 6, at 91.

ases rooted in their decisions may have profound “spillover” effects in the system.<sup>77</sup>

### A. Prosecutor’s Discretion and Practice

One counterargument is that prosecutors generally make charging decisions based on the strength of evidence under the Equal Protection Clause.<sup>78</sup> A systematic review of sixty-eight studies on prosecutorial decisions, regarding bail and pretrial release, charge or dismiss, and recommendations for the death penalty, seems to support the proposition that race was neither the only nor strong predictor of prosecutorial decisions.<sup>79</sup> However, the limitations of the review are clear: (a) most studies included are not rigorous enough based on current evidence-based standards, (b) they do not have information on the victim’s race, and (c) they do not consider the influence of offending types, the seriousness of offenses, and other confounders.

It should be unsurprising that a prosecutor’s wide range of discretions carries immense weight for a defendant’s final outcome.<sup>80</sup> Plus, prosecutorial discretion is often less transparent to the public, and external regulations are limited and ineffective.<sup>81</sup> There is strong reason to believe that such implicit racial bias can taint prosecutor’s decisions in the same way as it does in police officers’ decisions.<sup>82</sup> And the only way to draw a confident conclusion on the impact of implicit racial bias on a prosecutor’s decisions and practice is to control for all the possible confounders but race.<sup>83</sup>

Unlike research on policing, fewer empirical studies examine prosecutors’ racial bias in their discretionary practice. Nevertheless, several recent studies using rigorous methodologies have shown that

<sup>77</sup> See generally WALKER ET AL., *supra* note 28.

<sup>78</sup> Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1237-39 (2018).

<sup>79</sup> Marvin D. Free, Jr., *Race and Presentencing Decisions in the United States: A Summary and Critique of the Research*, 27 CRIM. JUST. REV. 203, 226 (2002).

<sup>80</sup> Besiki Kutateladze et al., *Race and Prosecution in Manhattan*, VERA INST. JUST. (July 2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan>.

<sup>81</sup> Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO J. LEGAL ETHICS 873, 904 (2012).

<sup>82</sup> Robert R. Smith & Justin J. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 826 (2012).

<sup>83</sup> Kang et al., *supra* note 31, at 1140.

racial bias does exist in prosecutorial decisions.<sup>84</sup> Partnering with the New York District Attorney and controlling for demographics, the seriousness of charges, prior criminal histories, and types of defending counsel (i.e. public vs. private), race clearly has an independent effect on prosecutors' decisions.<sup>85</sup> Specifically, Blacks are 20% more likely than Whites to be detained for misdemeanor offenses, and 19% more likely to be offered plea deals, including custodial time for misdemeanor marijuana offenses.<sup>86</sup> Prosecutors are also twice as likely to file mandatory minimum sentences against Blacks than their comparable Whites.<sup>87</sup>

Similarly, by analyzing more than 45,000 Wisconsin Circuit Court cases over a seven-year period, and controlling for demographics, the number of previous convictions, initial charge, final adjudication, characteristics of the district attorney, and offense seriousness, the Black-White racial disparity in prosecutorial decisions is consistently significant.<sup>88</sup> For instance, Blacks are 15% less likely to have their cases dismissed or reduced to a lesser crime than Whites.<sup>89</sup> Undoubtedly, criminal history matters, but Blacks with no prior convictions are still 9.9% less likely to get reduced charges than Whites.<sup>90</sup> One possible reason is that prosecutors may explicitly or implicitly use race as a proxy for criminality and culpability.<sup>91</sup> Prosecutors' charging decisions can account for at least 50% of the CJ system's unexplained racial disparity.<sup>92</sup>

From the qualitative aspect, one powerful yet overlooked prosecutorial practice is summation. Summation can not only manifest prosecutors' implicit racial bias more intuitively through languages, but also can trigger jurors' implicit bias.<sup>93</sup> When prosecutors have the final opportunity to give a narrative summary of the trial to

<sup>84</sup> Spohn, *supra* note 6, at 73-74.

<sup>85</sup> Kutateladze et al., *supra* note 80.

<sup>86</sup> *Id.*

<sup>87</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of United States v. Booker* 3 (Univ. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 12-021, 2012), <http://ssrn.com/abstract=2170148>.

<sup>88</sup> Berdejó, *supra* note 78, at 1214-1238.

<sup>89</sup> *Id.* at 1219.

<sup>90</sup> *Id.* at 1237.

<sup>91</sup> *Id.* at 1237-38.

<sup>92</sup> *Id.* at 1239-40.

<sup>93</sup> Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *FORDHAM L. REV.* 3091, 3126 (2018).

help jurors evaluate and weigh the evidence, implicit racial bias is more likely to occur.<sup>94</sup> For example, in *Long v. Butler*,<sup>95</sup> the prosecutor explicitly cited a line made by a slave in *Gone with the Wind* to show that the black witnesses lied to protect the black defendant. In *Bennett v. Stirling*,<sup>96</sup> the prosecutor referred to the movie *King Kong* when making a closing argument about black defendants.

Also, prosecutorial summations sometimes include certain words in a discriminatory manner to imply perceived criminality and culpability of black defendants.<sup>97</sup> In *State v. Kirk*,<sup>98</sup> the prosecutor sang three lines from *Dixie* during his closing argument. Although prosecutorial summations are rarely studied, several court cases have already evidenced the prosecutor's summation practice's racial bias.<sup>99</sup> Language through the priming mechanism can easily trigger implicit racial bias.<sup>100</sup> In prosecutorial trial summations, using racial themes or words can lead to jurors' implicit biases against Blacks, leading to racial injustice and disparate outcomes in the CJ system.<sup>101</sup>

### B. Judge's Sentencing Decision

Dissenters may claim that judges do not hold racial bias because they simply follow sentencing guidelines and legal rules to determine conviction, incarceration, sentencing length, and the death penalty.<sup>102</sup> Under determinate sentencing laws, a judge's discretionary power is assumed to be restricted.<sup>103</sup> However, results from both computer tasks and questionnaires among 133 judges across three different jurisdictions have shown that judges are also susceptible to

<sup>94</sup> Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 366 (2006).

<sup>95</sup> 809 F.3d 299 (7th Cir. 2015).

<sup>96</sup> 842 F.3d 319 (4th Cir. 2016).

<sup>97</sup> Prasad, *supra* note 93, at 3109.

<sup>98</sup> 339 P.3d 1213 (Idaho Ct. App. 2014).

<sup>99</sup> See generally Alford, *supra* note 94.

<sup>100</sup> Smith & Levinson, *supra* note 82, at 798-801.

<sup>101</sup> Prasad, *supra* note 93, at 3103-04.

<sup>102</sup> See generally David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012).

<sup>103</sup> Shawn D. Bushway et al., *Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors*, 9 J. EMPIRICAL LEGAL STUD. 291, 292 (2012).

implicit racial bias which subsequently affects their judgments.<sup>104</sup> A significant pro-White bias among white judges exists, while Black judges show similar, yet unclear preference overall.<sup>105</sup>

The real impact of the sentencing guidelines on judges' decisions is hard to determine. Bushway and colleagues have calculated the inconsistency between the final sentence recommendations from the upstream agents (judges) and the preferences of downstream agents (officers) to determine judges' deviations from sentencing guidelines.<sup>106</sup> Judges appear to be eager to go along with an erroneous lesser sentence for violent offenses, but not for property and drug offenses.<sup>107</sup> Apparently, if the recommended sentences are too high, judges are willing to give a reduced sentence.<sup>108</sup> However, whether and to what extent an offender may receive a reduced sentence is still up to judges.

*i. Decision to Incarcerate and Sentence Length*

Recent research with more sophisticated analysis methods have reached a consensus about the relation between race and judges' practices.<sup>109</sup> When interviewing fifty-nine judges about racial disparity regarding the processes of arraignment, plea bargaining, jury selection, and sentencing decisions, most judges consider the problem as a combination of officials' implicit and explicit racial bias and societal factors.<sup>110</sup> Judges acknowledge their implicit racial bias, although few of them are willing to address it formally.<sup>111</sup>

To solve earlier studies' unobserved variable effect, a rigorous study used random control trials to examine the racial bias in judges' decisions on incarceration and sentence length.<sup>112</sup> Research-

<sup>104</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

<sup>105</sup> *Id.* at 1210-1211 (results obtained after controlling for judges' demographics, political affiliation, and years of experience on the bench).

<sup>106</sup> Bushway et al., *supra* note 103, at 311.

<sup>107</sup> *Id.* at 315.

<sup>108</sup> *Id.*

<sup>109</sup> See Starr & Rehavi, *supra* note 87, at 78-81; Abrams et al., *supra* note 102, at 376-77; Rachlinski et al., *supra* note 104, at 1232.

<sup>110</sup> See generally Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in The Criminal Justice System*, 54 CRIMINOLOGY 332 (2016).

<sup>111</sup> *Id.*

<sup>112</sup> Abrams et al., *supra* note 102 at 353-56.

ers applied statistical simulations to make sure that all observable case characteristics and judges' sentencing propensity are not statistically different, and they also controlled for potential confounding factors, such as judges' demographics, previous experience as public defenders, average sentencing harshness, and racial-stereotyped crime types.<sup>113</sup> Hypothetically, if judges do not harbor implicit racial bias, the observed racial gap in judicial decisions should be the same among individuals. However, the result shows the opposite, with a significant variation in judges' decisions to incarcerate.<sup>114</sup> Researchers found that at least some judges treated defendants differently based on their race.<sup>115</sup> There was a significant inter-judge difference regarding the racial gap in incarceration rates compared with a mean incarceration rate of 51% for Blacks and 38% for Whites.<sup>116</sup> Specifically, the racial disparity in incarceration rate increases by 18% and the estimated sentence length increases by ten months if a defendant is randomly assigned to a judge who ranked higher in the racial gap distribution.<sup>117</sup>

Similarly, after random assignment of federal cases between 1999 and 2015 to 1,400 judges within the same district court, researchers showed that judges with different political ideologies tend to give differential treatments to defendants based on their race, thereby suggesting a significant role of implicit racial bias on judges' decisions on sentence length.<sup>118</sup> Republican-affiliated judges give black defendants three month longer prison sentences than Whites, compared to Democratic judges in the same district court.<sup>119</sup> The Black-White racial disparity in sentence length is larger among judges who have served in courts from the South due to higher racial bias

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<sup>113</sup> *Id.* at 349-50.

<sup>114</sup> *Id.* at 367-68.

<sup>115</sup> *Id.* at 370; *see also* Starr & Rehav, *supra* note 87, at 59-62 (using regression discontinuity analysis to show that sentence outcomes for Blacks also differ significantly from Whites).

<sup>116</sup> Abrams et al., *supra* note 102, at 370.

<sup>117</sup> *Id.* at 377.

<sup>118</sup> Alma Cohen & Crystal Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J. 169 (2019) (taking into account the defendant, case, and judge characteristics, as well as sentencing-year fixed effects, primary-offense-type fixed effects, prosecutorial discretion, and average racial bias within the district court).

<sup>119</sup> *Id.*

on the macro level.<sup>120</sup> These studies suggest that judges have implicit racial bias that can impact how they determine sentence length.<sup>121</sup>

ii. *Decision for Death Penalty*

Research on capital punishment provided more compelling evidence for the existence of implicit racial bias in the CJ system. Numerous studies and exhaustive reviews have consistently reached a conclusion that Blacks are far more likely to receive death penalties than Whites, especially when the victim is White, or the offender shows more Afro-centric facial features.<sup>122</sup> Here, I briefly use two recent studies to illustrate that implicit racial biases disfavoring Blacks in the courtroom have not disappeared.

Beckett and Evans analyzed 298 aggravated first-degree murder cases involving death-eligible adult defendants in Washington State encompassing fourteen counties.<sup>123</sup> After controlling for case characteristics, race of the defendant and victim, previous convictions, number of aggravators, and county characteristics, “black defendants are 4.5 times more likely to” receive death penalty decisions from juries and judges than their white counterparts.<sup>124</sup> Race matters both directly and indirectly in the administration of capital punishment.<sup>125</sup> Undeniably, implicit and explicit racial bias has continued to impact judges’ perceptions and shaped their legal decisions, even in the twenty-first century.

In Louisiana, the administration of capital punishment and reversal are highly dysfunctional.<sup>126</sup> Racial bias in death penalty decisions has consistently emerged after 1976.<sup>127</sup> Among 155 resolved

<sup>120</sup> *Id.* at 162.

<sup>121</sup> Tonry, *supra* note 8, at 287; Kang et al., *supra* note 31, at 1147; Cohen & Yang, *supra* note 118, at 185.

<sup>122</sup> Spohn, *supra* note 6, at 56-57; see Frank R Baumgartner & Tim Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, 7 S. U. L. CTR. J. RACE, GENDER & POVERTY 58, 69-70 (2016); see also Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 COLUM. J. RACE & L. 77, 103-04 (2016); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383-85 (2006).

<sup>123</sup> Beckett & Evans, *supra* note 122, at 90.

<sup>124</sup> *Id.* at 100.

<sup>125</sup> *Id.* at 104.

<sup>126</sup> Baumgartner & Lyman, *supra* note 122, at 58.

<sup>127</sup> *Id.* at 61.

death penalty cases, results are strikingly similar in every type of measurements, such as by death penalty case per homicide, by case disposition, by reversals, and by the victim's race.<sup>128</sup> Black offenders who murdered white females are thirty times more likely to receive capital punishment than those who murdered black victims (15.56% vs. 0.52%).<sup>129</sup> And death penalty decisions are fourteen times more likely imposed and executed on the cases where victims are Whites.<sup>130</sup> However, no white offender has even been executed for a homicide against a black victim since 1752 in Louisiana.<sup>131</sup> In addition, such differential treatment by judges has extended to the appeal process, with death penalty decisions in cases involving white victims being less likely to be reversed.<sup>132</sup> As Spohn has summarized, "[w]hether because of conscious bias, unconscious stereotypes linking race with crime, or colorblind application of racially tinged policies, judges' and prosecutors' decisions regarding bail, prosecution, and sentencing are not racially neutral."<sup>133</sup>

## V. RACIAL BIAS IN INCARCERATION AND REENTRY

Blacks are overrepresented in prison even after accounting for the differential crime rate.<sup>134</sup> Two major aspects that need to be addressed are the use of solitary confinement in prison and decisions for parole release. Implicit racial bias inevitably influences both prison staff's and parole officers' decisions, further worsening the Black-White racial disparity in the CJ system.<sup>135</sup> Incarcerated Blacks are more likely to return to the inner-city communities, have higher

<sup>128</sup> *Id.* at 74.

<sup>129</sup> *Id.* at 69.

<sup>130</sup> *Id.* at 70.

<sup>131</sup> *Id.* at 72-73.

<sup>132</sup> *Id.* at 70.

<sup>133</sup> Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 166, 168 (Sandra Bucerius & Michael Tonry eds. 2014).

<sup>134</sup> See generally Casey T. Harris et al., *Are Blacks and Hispanics Disproportionately Incarcerated Relative to Their Arrests? Racial and Ethnic Disproportionality Between Arrest and Incarceration*, 1 RACE & SOCIAL PROBS. 187 (2009).

<sup>135</sup> Joshua C. Cochran et al., *Solitary Confinement as Punishment: Examining In-Prison Sanctioning Disparities*, 35 JUST. Q. 381, 382-85 (2018); Matthew W. Logan et al., *Correctional Shorthands: Focal Concerns and the Decision to Administer Solitary Confinement*, 52 J. CRIM. JUST. 90, 96 (2017).

probabilities of unstable families, lack of employment opportunities, suffer more physical and psychological problems, and receive fewer supportive infrastructures, compared to white ex-inmates.<sup>136</sup> This section only focuses on the administration of solitary confinement and decisions for parole release, the beginning point of inmates' reentries.

### A. Use of Solitary Confinement

A differential use of solitary confinement between black and white inmates is concerning because decisions made by prison staff are less visible and lack transparency.<sup>137</sup> Additionally, solitary confinement has deleterious effects on inmates' mental and physical health.<sup>138</sup> Yet, opponents may reason that physical infractions are more common for Blacks and that is why they are more likely to be punished by solitary confinement.<sup>139</sup> Prison staff simply view all inmates the same: as "convicts."<sup>140</sup> Although studies on experiences in prison are limited, a majority of research has evidenced racial bias in the use of solitary confinement as a punishment in prison.<sup>141</sup>

In fact, black inmates are not more likely to engage in violent infractions than Whites.<sup>142</sup> But they are more likely to be officially reported by prison staff.<sup>143</sup> Prison staff have also been charged with

<sup>136</sup> See generally BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* (2018); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276-94 (2004).

<sup>137</sup> Logan et al., *supra* note 135, at 96.

<sup>138</sup> Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 488-92 (2006); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 368 (2018).

<sup>139</sup> Derek J. Mueller et al., *Disproportionate Experiences in Custody? An Examination of Minority Youths' Outcomes in Secure Facilities*, 37 JUST. Q. 332, 335-41 (2020).

<sup>140</sup> Ben M. Crouch, *The Significance of Minority Status to Discipline Severity in Prison*, 18 SOC. FOCUS 221, 231 (1985).

<sup>141</sup> Logan et al., *supra* note 135, at 96.

<sup>142</sup> Mark T. Berg & Matt DeLisi, *The Correctional Melting Pot: Race, Ethnicity, Citizenship, And Prison Violence*, 34 J. CRIM. JUST. 631, 637 (2006).

<sup>143</sup> Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 L. & SOC'Y REV. 931, 940 (1980).

filing racially biased disciplinary reports.<sup>144</sup> A review of almost 60,000 disciplinary cases in New York state prisons has discovered that Blacks are disciplined at higher rates than Whites—sometimes twice as often.<sup>145</sup> Previous disciplinary records are fourteen times more likely to explain prison staff's decisions to use solitary confinement for black inmates compared to their white counterparts (48.8% vs. 3.6%).<sup>146</sup> The racial disparity is largest when prison staff are granted greater discretions, such as “disobeying a direct order”.<sup>147</sup> It is highly possible that staff associate blackness with culpability and dangerousness as much as other law enforcement agents do. Such implicit racial bias in prison discipline may have ripple effects on future decisions for parole release, education attainments, and employments.

Olson has found that the probability of a black inmate being placed in solitary confinement is 31.6%, while the probability for a white inmate is 25.6%.<sup>148</sup> Echoing Olson, another study has illustrated that black inmates are 20% more likely to report being placed in solitary confinement, compared to white inmates, with a subsample of 6,844 inmates.<sup>149</sup> For example, in Clinton prison, black inmates are approximately four times more likely to be sent to solitary confinement, and on average, they are held for thirty-five days longer than white inmates.<sup>150</sup> Consistent with the general trend, prisons with a higher percentage of black inmates utilize solitary confinement more often.<sup>151</sup> The administration of solitary confinement as a prison punishment seems to be partially influenced by an inmate's race.<sup>152</sup>

<sup>144</sup> Shanhe Jiang & Marianne Fisher-Giorlando, *Inmate Misconduct: A Test of the Deprivation, Importation, and Situational Models*, 82 PRISON J. 335, 338 (2002).

<sup>145</sup> Michael Schwartz et al., *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

<sup>146</sup> Poole & Regoli, *supra* note 143, at 942.

<sup>147</sup> Schwartz et al., *supra* note 145, at 1.

<sup>148</sup> Jeremiah C. Olson, *Race and Punishment in American Prisons*, 26 J. PUB. ADMIN. RES. & THEORY 758, 765 (2016) (controlling for severity of offenses, the number of arrests, the number of prior incarcerations, sentence lengths, and mental illness histories, as well as prison fixed effects in terms of organizational culture, institutional resources, and demographic compositions).

<sup>149</sup> Logan et al., *supra* note 135, at 96-97.

<sup>150</sup> Schwartz et al., *supra* note 145, at 1.

<sup>151</sup> Jeremiah Wade-Olson, *Race, Staff, and Punishment: Representative Bureaucracy in American State Prisons*, 51 ADMIN. & SOC'Y 1397, 1412 (2019).

<sup>152</sup> *See Id.*

Differential treatments inside the prison clearly manifest the implicit racial bias from prison staff.

### B. Decision for Parole Release

Almost 95% of incarcerated people are released back to society, and around 39% of parolees are under discretionary parole guidelines.<sup>153</sup> One counterargument is that parole officers stick to the parole guidelines, focusing on three factors in parole decisions: “time served, offense seriousness, and risk of recidivism.”<sup>154</sup> An analysis from National Corrections Reporting Program data has claimed no racial disparity in parole board decisions.<sup>155</sup> However, this study has not controlled for the implicit or explicit racial bias among parole officers, which could increase the probability of finding black parolees’ violations than Whites. Since parole board decisions have become more open to the inputs from victims, prosecutors, and judges, final decisions for parole release will become increasingly affected by implicit racial bias from multiple sources.<sup>156</sup>

Despite few quantitative studies focusing on parole decisions, evidence supports the existence of implicit racial bias.<sup>157</sup> Race can influence parole release hearing selections.<sup>158</sup> Black inmates wait longer than Whites before being considered for parole release—192 months vs. 143.5 months, respectively.<sup>159</sup> Although the number of black inmates eligible for parole release hearings doubles that of white inmates, fewer Blacks are selected by the parole board.<sup>160</sup>

<sup>153</sup> Kathryn D. Morgan & Brent L. Smith, *The Impact of Race on Parole Decision-Making*, 25 JUST. Q. 411, 413 (2008).

<sup>154</sup> *Id.* at 415.

<sup>155</sup> Stéphane Mechoulan & Nicolas Sahuguet, *Assessing Racial Disparities in Parole Release*, 44 J. LEGAL STUD. 39, 39 (2015).

<sup>156</sup> Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 281 (2017).

<sup>157</sup> Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 CRIMINOLOGY 907, 907 (2008); Morgan & Smith, *supra* note 153, at 412.

<sup>158</sup> Morgan & Smith, *supra* note 153, at 417.

<sup>159</sup> *Id.* at 426; *see also* Huebner & Bynum, *supra* note 157, at 923 (applying a series of survival analyses with both official longitudinal data and presentence investigation report to reveal that Blacks wait for a longer time before receiving parole release than Whites, net of individual characteristics, legal factors, and neighborhood effect).

<sup>160</sup> Kathryn D. Morgan, *Race Issues in Probation and Parole*, ENCYCL. CRIMINOLOGY & CRIM. JUST. 4251, 4252 (2014).

While one out of four white inmates are granted parole release, fewer than one out of six black inmates are.<sup>161</sup> Black inmates also serve about 4.5% longer sentences (0.78 months) in prison than Whites, controlling for severity of offenses, prior incarceration, and maximum sentence received.<sup>162</sup> Parole officers' implicit bias disfavoring Blacks and the association of Blacks with dangerousness shapes their release decisions, especially when relevant information for assessment is limited.<sup>163</sup> Delaying parole release for eligible black inmates not only reflects implicit racial biases in parole release decisions and selections, but also contributes to the collateral consequences of incarceration and failure of reentry for Blacks.<sup>164</sup>

## VI. CONCLUSION

The pronounced racial disparity across nearly all stages of the CJ system is disheartening. Recent empirical research with rigorous methods and analytical techniques have overwhelmingly evidenced the existence of implicit and explicit racial bias disfavoring Blacks in legal decision making among law enforcement agents. Such racial bias tends to widen the racial gap in the CJ system, as well as in the society.

Ideally, race, or being Black, should not have an impact on the criminal justice outcome. However, given the history of Black oppressions in the United States, the conclusion in this review is not surprising. This review does not imply that every white American holds racial bias against Blacks because most people have already agreed that racial inferiority and racial biases are wrong.<sup>165</sup> Rather, implicit racial bias that harbored within law enforcement agents—such as (but not limited to) police, prosecutors, judges, prison staff, and parole officers—matters more than explicit bias. Such implicit bias could have more unintentional and detrimental consequences because it operates unconsciously for almost everyone. Even well-

<sup>161</sup> Schwirtz et al., *supra* note 145.

<sup>162</sup> Mindy S. Bradley & Rodney L. Engen, *Leaving Prison: A Multilevel Investigation of Racial, Ethnic, and Gender Disproportionality in Correctional Release*, 62 CRIME & DELINQ. 253, 267 (2016).

<sup>163</sup> Huebner & Bynum, *supra* note 157, at 925-26.

<sup>164</sup> *Id.* at 908; see Western, *supra* note 136, at 26-45.

<sup>165</sup> Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RES. CTR. (Apr. 9, 2019), <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/>.

2021

*RACIAL BIAS STILL EXISTS*

103

intentioned criminal justice agents are not immune from its impact on their legal decisions and practice. Hence, implicit and explicit racial bias still exists in the current CJ system, possibly exacerbating the Black-White racial disparity in the future.