

# What Kind of *Justice* is This? Overbroad Judicial Discretion and Implicit Bias in the American Criminal Justice System

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I. INTRODUCTION .....	44
II. BLACK AMERICAN HISTORY AND THE CRIMINAL JUSTICE SYSTEM:	
SETTING THE STAGE.....	48
A. <i>Before the Civil Rights Movement: Explicit Bias in America</i> .....	51
B. <i>The Civil Rights Movement and Beyond: Implicit Bias in America</i> .....	55
C. <i>Black Lives Matter</i> .....	59
D. <i>The Fight for Racial Equality Continues</i> .....	63
III. CRIMINAL SENTENCING PROCEDURE AND POLICY .....	64
A. <i>Procedure: Sentencing Then and Now</i> .....	64
1. Federal Sentencing .....	65
2. State Sentencing.....	67
3. Appealing a Sentence.....	68
B. <i>Policy: Goals of Punishment</i> .....	69
1. Rehabilitation .....	70
2. Retribution.....	71
IV. THE PROBLEM: OVERBROAD JUDICIAL DISCRETION AND	
IMPLICIT RACISM.....	72
A. <i>Latasba Harlins and Judge Joyce Karlin</i> .....	73
B. <i>Implicit Racial Biases in Judges</i> .....	74
C. <i>The Role of Appellate Courts</i> .....	78
V. JURY SENTENCING: A POTENTIAL SOLUTION .....	79
A. <i>Sentencing Bias</i> .....	80
B. <i>Sentencing Severity</i> .....	81
VI. THE PROBLEM OF BIASED JURIES.....	82
A. <i>Better Voir Dire</i> .....	83
B. <i>The Implicit Association Test</i> .....	85
VII. CONCLUSION .....	85

## I. INTRODUCTION

A child born to a black mother in a state like Mississippi . . . has exactly the same rights as a white baby born to the wealthiest person in the United States. It's not true, but I challenge anyone to say it is not a goal worth working for.

Justice Thurgood Marshall, 1988<sup>1</sup>

On March 16th, 1991, fifteen-year-old Latasha Harlins walked into Empire Liquor Market to purchase a bottle of orange juice.<sup>2</sup> After entering the store, Latasha headed to the refrigerated section and grabbed the \$1.79 juice she planned to buy; she was carrying \$2 in her hand.<sup>3</sup> She placed the juice in her bag and walked toward the counter to pay the store-owner's wife, a woman named Soon Ja Du.<sup>4</sup> According to eyewitness accounts, as Latasha approached her, Du called her a "bitch" and accused her of attempting to steal the juice.<sup>5</sup> Latasha replied, "I'm trying to pay for it."<sup>6</sup> Du reached across the counter and grabbed Latasha's backpack, pulling it toward her, which can be seen in video footage captured by the closed-circuit security camera filming inside the market.<sup>7</sup> Latasha then hit Du in an attempt to free herself, which caused Du to fall.<sup>8</sup> The juice fell to the ground, and Latasha bent over to retrieve it; she placed the juice on the counter and turned to leave the store without the juice when Du pointed a gun and shot Latasha in the back of her head as she walked away.<sup>9</sup> She was killed instantly.<sup>10</sup> A jury subsequently convicted Du of voluntary manslaughter.<sup>11</sup> Patricia Dwyer, the probation officer who interviewed Du following Latasha's death, recommended Du serve the maximum sentence for a voluntary manslaughter conviction at the time—sixteen years.<sup>12</sup> Dwyer explained her recommendation was based on the fact that Du failed to "assist [Latasha], exaggerated her injuries and feigned

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<sup>1</sup> G. Todd Butler & Jason Marsh, *Foreword: Celebrating the Life and Legacy of Thurgood Marshall*, 27 MISS. C. L. REV. 289, 289 (2008).

<sup>2</sup> BRENDA E. STEVENSON, *THE CONTESTED MURDER OF LATASHA HARLINS* xv (2015).

<sup>3</sup> Tasbeeh Herwees, *The Forgotten Story That Helped Spark the LA Riots*, GOOD (Apr. 28, 2017), [<https://perma.cc/V58T-V3YR>].

<sup>4</sup> *Id.*

<sup>5</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d 177, 179 (Ct. App. 1992).

<sup>6</sup> Herwees, *supra* note 3.

<sup>7</sup> *See, e.g., O.J.: Made in America—PART 2* (ESPN Films television broadcast June 14, 2016).

<sup>8</sup> *See* Herwees, *supra* note 3.

<sup>9</sup> *Id.*

<sup>10</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d at 180.

<sup>11</sup> *Id.*

<sup>12</sup> STEVENSON, *supra* note 2, at 232.

unconsciousness.”<sup>13</sup> In Dwyer’s experienced opinion, Du did not feel regret or remorse and failed to take any responsibility for causing Latasha’s death.<sup>14</sup> Du was initially sentenced to ten years in prison.<sup>15</sup> However, Superior Court Judge Joyce Karlin—a Jewish-American woman from an affluent family<sup>16</sup>—suspended the sentence, fined Du \$500, and placed her on probation.<sup>17</sup>

To justify granting Du probation instead of sentencing her to prison, Judge Karlin was statutorily required to, and did, find the voluntary homicide to be “unusual” with certain mitigating factors.<sup>18</sup> Judge Karlin defended her decision by noting Du shot the fifteen-year-old in the back of her head in response to “great duress and provocation,” thus making her sentence deserving of “special consideration.”<sup>19</sup> Judge Karlin also posed a rhetorical question in her sentencing statement, asking, “Did Mrs. Du react inappropriately to Latasha Harlins?”<sup>20</sup> She answered, “Absolutely . . . But was that overreaction understandable? I think it was.”<sup>21</sup> However, to many, especially members of the Black community, the overreaction was far from understandable, and Judge Karlin’s decision was perceived as a grave and unfathomable injustice.<sup>22</sup> To writer Rachel Monroe, viewing Du’s overreaction as

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d at 178.

<sup>16</sup> See STEVENSON, *supra* note 2, at 171. Stevenson continues:

Jews, who have the whitest skin among [racial and ethnic minorities], could, and did, benefit from their racial invisibility. As the outer accoutrements of their distinct cultures also disappeared, access to white privilege increased. Blacks, of course, could not lose their color, no matter how much they culturally assimilated . . . Those who are perceived to be most like whites find it easier to reach the top of the nation’s racial hierarchy. Those who are less like whites have traditionally found themselves on the bottom . . . “Black and Jewish experiences might appear parallel, but in fact most interactions between them were hierarchical.

*Id.* at 215–16 (citation omitted) (showing that Judge Karlin’s background was undoubtedly different from Latasha’s).

<sup>17</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d at 182. Judge Karlin placed Du on probation despite the fact she was presumptively ineligible “under Penal Code section 1203, subdivision (e)(2), which prohibits a grant of probation in cases where a firearm . . . is used.” *Id.*

<sup>18</sup> STEVENSON, *supra* note 2, at 235.

<sup>19</sup> *Id.* at 237.

<sup>20</sup> *Id.* at 238.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at xvi–xvii (“Everyone knew that the most immediate answer to this question of justice lay in the hands of the sentencing judge. Many believed that if Judge Joyce Karlin could render a sentence that left most feeling that justice had been served then, perhaps, the hostility and violence that had escalated with little abatement since Latasha’s death would begin to dissipate . . . What kind of ‘justice’ was this, many, and not just in the black community, asked.”);

understandable “depends on who you are, where your unconscious sympathies lie, what kinds of violence you’re willing to excuse, and what you think a black life is worth.”<sup>23</sup>

In most jurisdictions, the judge determines the criminal sentence after the jury convicts.<sup>24</sup> In cases involving capital sentences, most states require the jury to determine the offender’s punishment.<sup>25</sup> However, for other sentencing matters, judges are often given broad discretion and can deviate from suggested guidelines and recommended sentences.<sup>26</sup> Judicial discretion in sentencing has been an issue historically given the potential for a “compliant, biased, or eccentric judge,”<sup>27</sup> and is especially relevant today in light of the Black Lives Matter movement.<sup>28</sup> In states with sentencing guidelines, Black

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see also Mark Oliver, Opinion, *Judge Karlin’s Reelection*, L.A. TIMES (June 14, 1992, 12:00 AM), [https://perma.cc/SX64-ZE37] (“I would like Judge Karlin and all those who voted for her to put themselves in the place of Latasha Harlins’ family and ask yourself is this justice? Is this what a black life of a young teen-ager is worth, five months’ probation? I say a black life is worth the same as a white life and you people out there better realize that fact!”).

<sup>23</sup> Rachel Monroe, *Common Ground: Brenda Stevenson’s “The Contested Murder of Latasha Harlins,”* L.A. REV. BOOKS (Sept. 29, 2013), [https://perma.cc/XDH4-ZMEG].

<sup>24</sup> SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 68 (Vicki Been et al. eds., 9th ed. 2012).

<sup>25</sup> Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 954 n.4 (2003). “Of the thirty-eight states with capital punishment, twenty-nine leave the sentencing decision to the jury.” *Id.*; see, e.g., CAL. PENAL CODE § 190.3 (2018) (“If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death . . .”).

<sup>26</sup> See Hoffman, *supra* note 25, at 953 n.1 (explaining that Arkansas, Missouri, Oklahoma, Texas, and Virginia are the only states that allow juries to make sentencing decisions in criminal cases involving non-capital felonies); see also ARK. CODE ANN. § 5-4-103 (2019) (“If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding . . .”); MO. ANN. STAT. § 557.036 (2019) (“If the jury at the first stage of a trial finds the defendant guilty . . . [it] shall assess and declare the punishment as authorized by statute.”); OKLA. STAT. ANN. tit. 22, § 926.1 (2019) (“In all cases of a verdict of conviction . . . the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict . . .”); TEX. CODE CRIM. PROC. ANN. art. 37.07 (2020) (“[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . .”); VA. CODE ANN. § 19.2-295.1 (2019) (“In cases of trial by jury . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury.”).

<sup>27</sup> KADISH ET AL., *supra* note 24.

<sup>28</sup> See *About*, BLACK LIVES MATTER, [https://perma.cc/DEC8-BF2V] (last visited Mar. 29, 2021) [hereinafter *About*]. Black Lives Matter began in 2013 in response to George Zimmerman’s acquittal for killing Trayvon Martin, a seventeen-year-old black boy. *Id.* “Black Lives Matter Global Network Foundation, Inc. is a global organization . . . whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.” *Id.* Today, Black Lives Matter is believed to be one of the largest movements in American history. Larry Buchanan, Qoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), [https://perma.cc/QA8X-KYF8]. “We appear to be experiencing a social change tipping point—that is as rare in society as it is potentially consequential.” *Id.* (quoting Stanford University Professor Douglas McAdam).

people are more likely to be given sentences at the higher end of the spectrum than their white counterparts.<sup>29</sup> Furthermore, “[w]hether because of conscious bias, unconscious stereotypes linking race with crime, or colorblind application of racially tinged policies . . . [judicial] sentencing [decisions] are not racially neutral” overall.<sup>30</sup> Studies show judges hold unconscious or implicit biases and that those biases can negatively influence their judgment and decision making.<sup>31</sup>

Contrary to what many Americans believe,<sup>32</sup> the United States justice system leads to “disparate racial impacts” at different points throughout a typical criminal case, including at the sentencing stage.<sup>33</sup> That said, for our legal system to provide all citizens justice and equality, sentencing disparity among racial groups must be addressed. The outcome of Latasha Harlins’ case highlights “the vulnerability of the most defenseless in the nation’s socially constructed hierarchy—women and children of the racially, culturally, economically, and politically marginalized”—and emphasizes a need for change.<sup>34</sup> A legal system that treats people of different races as unequal demands a systemic overhaul.

Part I of this Article examines the historical relationship between Black people and the criminal justice system, including how their history relates to the modern Black Lives Matter movement, which sets the backdrop for the discussion of explicit and implicit bias in criminal sentencing.<sup>35</sup> Next, Part II

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<sup>29</sup> NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 98 (Jeremy Travis et al. eds., 2014).

<sup>30</sup> *Id.*; see also Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) (“Justice is not blind. Researchers have found that black defendants fare worse in court than do their white counterparts.”).

<sup>31</sup> Rachlinski et al., *supra* note 30, at 1196–97.

<sup>32</sup> According to a 2019 survey of adults in the United States, thirty percent believe Black Americans are treated equally to their white counterparts in dealing with police and by the criminal justice system, while three percent believe white people are treated less fairly than Black Americans. Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RESEARCH CENTER 33 (Apr. 9, 2019), [<https://perma.cc/4ZJV-UCUP>]. Further, although a majority of Americans believe there is racial inequality within the criminal justice system, eighty-seven percent of the African Americans surveyed reported a belief that “blacks are treated less fairly than whites” while only sixty-one percent of whites reported the same. *Id.* at 11.

<sup>33</sup> Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1, 3 (2013).

<sup>34</sup> STEVENSON, *supra* note 2, at xvi; see also *About*, *supra* note 28.

<sup>35</sup> Rachlinski et al., *supra* note 30, at 1196–97.

[E]xplicit bias [includes] kinds of bias that people knowingly—sometimes openly—embrace. Explicit bias exists and undoubtedly accounts for many of the racial disparities in the criminal justice system, but it is unlikely to be the sole culprit. Researchers have found a marked decline in explicit bias over time, even as disparities in outcomes persist. Implicit

explores sentencing procedures in various jurisdictions and highlights key sentencing policy goals. Part III then identifies and explains sentencing procedure inadequacies and how judicial discretion can produce inequitable outcomes. Part IV proposes jury sentencing with limitations and guidelines could lead to greater justice and equality. Finally, Part V addresses valid concerns regarding jury bias and offers a solution that could effectively reduce implicit racial bias amongst individual jurors and allow for juries that could provide more impartial results than individual judges alone.

## II. BLACK AMERICAN HISTORY AND THE CRIMINAL JUSTICE SYSTEM: SETTING THE STAGE

The question before us is, whether [Black people] . . . are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

Chief Justice Roger Brooke Taney, 1857<sup>36</sup>

Perpetrators of violence against animals are sometimes given harsher sentences than Soon Ja Du received for killing Latasha Harlins, an unarmed Black child.<sup>37</sup> This is true even though animal cruelty laws are often relatively

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bias—by which we mean stereotypical associations so subtle that people who hold them might not even be aware of them—also appears to be an important source of racial disparities in the criminal justice system.

*Id.*

<sup>36</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV (1868).

<sup>37</sup> STEVENSON, *supra* note 2, at 242. K.W. Lee, editor of the English version of the *Korean Times*, wrote that Du received:

[n]ot one day in jail for taking a human life. In stark contrast to her fellow Korean immigrant Brendan Sheen, who [was] given 30 days in county jail for abusing his dog. . . . The idea that a Korean immigrant was sentenced to a month in jail for hurting a dog, but that another Korean immigrant, Soon Ja Du, did not receive any prison time for [Latasha’s death] was proof, many said, that Los Angeles’s criminal justice system was completely biased against African Americans.

*Id.*

lenient.<sup>38</sup> Following Du’s sentencing, a Black woman who lived in Los Angeles wrote, “[u]ntil now I did not think it was possible to be killed twice . . . [h]owever, that is just what happened to 15-year-old Latasha Harlins at the hands of our justice system.”<sup>39</sup> She described Judge Karlin’s decision as a “slap in the face,” noting Du’s sentence sent a message to the Black community “that it [wa]s open season on [their] children.”<sup>40</sup> Perhaps the injustice for people of color<sup>41</sup> in the criminal justice system can best be seen through sentencing disparities that essentially suggest Black lives are not quite as important as white lives, or any other life for that matter.<sup>42</sup> Another citizen lamented, “In my mind at this moment, a Black person’s life is not worth as much as a dog.”<sup>43</sup>

Although Black people *should* be treated equally in the eyes of the law, in reality, disparate treatment of people of color by the hands of the American criminal justice system has consistently led to inequitable outcomes.<sup>44</sup> As a country founded on the oppression of Black slaves, racism has plagued most

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<sup>38</sup> See, e.g., CAL. PENAL CODE § 597(a), (d) (citing *id.* § 1170(h)) (stating that “[e]very person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime punishable” by up to three years imprisonment); Jordan Fenster, *Animal Cruelty Laws Are Ineffective and Outdated*, *Advocates Say*, ROCKLAND/WESTCHESTER J. NEWS (Feb. 1, 2018, 9:11 AM), [<https://perma.cc/U4BH-KV8U>] (“Most animal abuse in New York state is a misdemeanor, punishable by a year in jail and a \$1,000 fine.”). Further, those convicted of non-violent drug crimes often receive substantially longer sentences than Soon Ja Du. See Patrick A. Langan et al., *Felony Sentences in the United States, 1990*, BUREAU JUST. STAT. BULL., Dec. 1994, at 1, 6, [<https://perma.cc/Q35Q-XQ9S>]. In 1990, the year before Du killed Latasha, the average “maximum sentence length . . . for felons sentenced to” incarceration for drug crimes was just short of four years. *Id.*

<sup>39</sup> STEVENSON, *supra* note 2, at 243.

<sup>40</sup> *Id.*

<sup>41</sup> In this Article, the term “people of color” is used to refer to American racial minorities as a whole.

<sup>42</sup> See EDDIE S. GLAUDE, JR., *DEMOCRACY IN BLACK* 204–05 (1st paperback ed. 2017) (“Too many Americans remain committed to white privilege and are willing to defend that privilege at whatever cost. They refuse to give up the idea that white lives matter more than others. . . . We cannot stick our heads in the sand with the hope that *they* will finally do the right thing. . . . We have to say, without qualification BlackLivesMatter!”).

<sup>43</sup> STEVENSON, *supra* note 2, at 243; see also GLAUDE, *supra* note 42, at 31 (“When we think about the [statistical] differences between whites and blacks . . . we can see that in this country, white people, particularly those with money, matter more than others. It has been this way since the very day this country was founded.”).

<sup>44</sup> See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* 10 (rev. & expanded 1st ed. 2006) (“[The] physical and social locations [of minority communities] give these communities a different relationship to the criminal justice system.”); William Julius Wilson, *The Black Community: Race and Class*, in *DEBATING DIVERSITY* 207, 207 (Ronald Takaki ed., 3d ed. 2002) (“Despite the passage of antidiscrimination legislation . . . conditions are getting worse not better for the vast majority of black Americans.”).

aspects of life in America from the time of its inception.<sup>45</sup> Although the world is much different today than it was during the antebellum era, Black people have continuously faced hardships, which have been exacerbated by the racial biases that taint the criminal justice system.<sup>46</sup> Almost one century after the Emancipation Proclamation,<sup>47</sup> Black people in the South “still inhabited a starkly unequal world of disenfranchisement, segregation and various forms of oppression, including race-inspired violence.”<sup>48</sup> As a result, in modern times, even self-proclaimed non-racists with no consciously bigoted views often hold unconscious, implicit racial biases.<sup>49</sup> While the 1960s Civil Rights Movement did lead to significant progress,<sup>50</sup> the judicial system continues to fail members of marginalized groups. Indeed, people of color continue to be sentenced in criminal proceedings at disproportionate rates, and those who victimize them are punished less harshly,<sup>51</sup> but this “extreme overrepresentation of people of color [and] disproportionate sentencing of racial minorities . . . can only be fully understood through the lens of our racial history.”<sup>52</sup>

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<sup>45</sup> GLAUDE, *supra* note 42, at 9, 26 (“The evil of slavery shadowed the birth of this country [and America’s] claims to democracy have always been shadowed by the belief that some people—white people—are valued more than others.”); *see also, e.g., Dred Scott*, 60 U.S. 393 at 404.

<sup>46</sup> *See Civil Rights: Law and History*, FINDLAW (July 24, 2017), [https://perma.cc/JYC4-UC5T] (“[T]he former slaves and their descendants, along with other racial and ethnic minorities, did not receive equal treatment under the law.”); *see also* Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012, 9:00 AM), [https://perma.cc/5T8Y-XM5R] (“While people of color make up about 30 percent of the United States’ population, they account for 60 percent of those imprisoned.”).

<sup>47</sup> *Emancipation Proclamation*, HISTORY (Jan. 25, 2021), [https://perma.cc/ZC8K-DBSA] (“On September 22[,] [Abraham Lincoln] issued the preliminary Emancipation Proclamation, which declared that as of January 1, 1863, all enslaved people in the states currently engaged in rebellion against the Union ‘shall be then, thenceforward, and forever free.’”). However, the Emancipation Proclamation did not free a single slave. *Id.*

<sup>48</sup> *Black Lives Matter: Related Topics*, MIAMI DADE C. (Feb. 16, 2021), [https://perma.cc/AH25-YM3T].

<sup>49</sup> Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENTENCING PROJECT (Sept. 3, 2014), [https://perma.cc/SB52-NS7N]. For a more in-depth discussion of implicit bias, *see infra* Part III.

<sup>50</sup> *See, e.g., Civil Rights Movement*, HISTORY (Jan. 29, 2021), [https://perma.cc/8HAN-WJJQ].

<sup>51</sup> *See* STEVENSON, *supra* note 2, at 55–56 (“Once accused, black men and women tend[] to be more readily convicted and receive[] harsher punishments than their white counterparts.”). A study conducted by the General Accounting Office published in 1990 concluded: “In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.” Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CTR. (June 4, 1998) (emphasis omitted), [https://perma.cc/SRX3-HMBB].

<sup>52</sup> BRYAN STEVENSON, JUST MERCY 301 (2014) [hereinafter JUST MERCY].



*A. Before the Civil Rights Movement: Explicit Bias in America*

The slave went free; stood a brief moment in the sun; then moved back again toward slavery. The whole weight of America was thrown to color caste. The colored world went down. . . . A new slavery arose.

W.E.B. Du Bois, 1935<sup>53</sup>

The United States was founded on slavery and the “architects [of slavery] perpetuat[ed] a race-based hierarchy where blacks were, and remained, on the bottom.”<sup>54</sup> In 1619, African slaves were brought to Jamestown, Virginia, to assist in the production of valuable crops.<sup>55</sup> People of color were not considered equal to whites and crime rates and punishment “seem[ed] to be graduated by the color of the skin, and not the color of the crime.”<sup>56</sup> Slavery persisted for centuries but was ultimately abolished after the Union’s Civil War victory in 1865.<sup>57</sup> However, although slavery had ended and approximately four million Black slaves were freed,<sup>58</sup> the “racialized marginality that tainted every aspect of a black southerner’s life” prevailed.<sup>59</sup> As a result, Black Americans were unable to participate in society to the same extent as white Americans and were often targeted based on the color of their skin by the public institutions that were supposed to protect them.<sup>60</sup> After the Civil War, Black people were generally unable to vote, own land, or compete for jobs and, as

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<sup>53</sup> W.E.B DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860–1880* 30 (1st ed. 1998).

<sup>54</sup> See STEVENSON, *supra* note 2, at 9.

<sup>55</sup> *First Enslaved Africans Arrive in Jamestown, Setting the Stage for Slavery in North America*, HISTORY (Mar. 16, 2020), [<https://perma.cc/MN9B-TF7L>].

<sup>56</sup> STEVENSON, *supra* note 2, at 32. As Frederick Douglass, a former slave, eloquently stated while addressing a predominantly white audience in 1852, “[t]he rich inheritance of justice, liberty, prosperity[,] and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me.” Frederick Douglass, *Address at the Rochester Ladies’ Anti-Slavery Society: What to the Slave Is the Fourth of July?* (July 5, 1852). He continued, “[w]hether we turn to the declarations of the past, or to the professions of the present, the conduct of the nation seems equally hideous and revolting.” *Id.*

<sup>57</sup> *Slavery in America*, HISTORY (Jan. 13, 2021), [<https://perma.cc/WTW9-W5YB>].

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

<sup>59</sup> STEVENSON, *supra* note 2, at 9; see also 2 ALAN BRINKLEY, *THE UNFINISHED NATION* 398 (Steve Drummond & Jim Strandberg eds., 4th ed. 2004) (“If conditions were bad for Southern whites, they were far worse for Southern blacks. . . . As soon as the war ended, hundreds of thousands of [freed slaves] left their plantations in search of a new life of freedom. But most had nowhere to go, and few had any possessions except the clothes they wore.”).

<sup>60</sup> BRINKLEY, *supra* note 59, at 404–05 (“Throughout the South in 1865 and early 1866, state legislatures were enacting sets of laws known as the Black Codes, which authorized local officials to apprehend unemployed blacks, fine them for vagrancy, and hire them out to private employers to satisfy the fine. Some of the codes forbade blacks to own or lease farms or to take any jobs other than as plantation workers or domestic servants.”).

a result, “were vulnerable to a high tide of discrimination and abuse.”<sup>61</sup> Furthermore, the legal rights other citizens enjoyed remained almost entirely unavailable to Black people.<sup>62</sup> For centuries, people of color, especially Black Americans, faced institutional racism that still permeates daily life today.<sup>63</sup> The Constitution’s framers had “no serious discussion of the Constitution forbidding slavery [and] at least three provisions of the original Constitution recognized and arguably promoted slavery.”<sup>64</sup> In 1857, the Supreme Court concluded Black people *were not* American citizens under the Constitution, but

[o]n the contrary . . . were at [the time the Constitution was drafted] considered as a subordinate and inferior class of beings, who have been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power.<sup>65</sup>

Although the Reconstruction period following the Civil War began an era of great change, it failed to effectively end the mistreatment of Black

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<sup>61</sup> STEVENSON, *supra* note 2, at 10. In 1989, Attorney Bryan Stevenson founded the Equal Justice Initiative, a human rights organization dedicated “to challenging racial and economic injustice.” *About EJI*, EQUAL JUSTICE INITIATIVE, [https://perma.cc/PU84-KFB2] (last visited May 5, 2021). In his #1 NEW YORK TIMES bestselling book, *Just Mercy*, he explains: “there are . . . institutions in American history that have shaped our approach to race and justice but remain poorly understood. The first, of course is slavery. This was followed by the reign of terror that shaped the lives of people of color following the collapse of Reconstruction until World War II.” JUST MERCY, *supra* note 52, at 299.

<sup>62</sup> STEVENSON, *supra* note 2, at 10.

<sup>63</sup> See JESSE H. CHOPER ET AL., LEADING CASES IN CONSTITUTIONAL LAW 710 (2017) (“Even in many ‘free’ states, at the time of the Constitutional Convention and thereafter African Americans were denied the vote, excluded from jury services, and separated from whites in public conveyances.”); GLAUDE, *supra* note 42, at 30 (“America isn’t exactly like the extreme examples of Nazi Germany or apartheid South Africa, but we do live in a country where, every day, black people confront the damning reality that we are less valued. The data are crystal clear.”); see also Matthew Clair & Jeffrey S. Denis, *Sociology of Racism*, 19 INT’L ENCYCLOPEDIA. SOC. & BEHAV. SCIS. 857, 860–62 (2015) (stating that institutional racism is “primarily a phenomenon of higher-level entities, such as social processes, social forces, and institutions” and that “significant racial inequalities in socioeconomic, health, and other outcomes” continue to persist today).

<sup>64</sup> CHOPER ET AL., *supra* note 63 “Art. I, § 2 . . . based a state’s representation in the House of Representatives on its free population and three-fifths of ‘all other Persons’ within its territory; Art. I, § 9 . . . barred Congress from abolishing the slave trade before 1808; and Art. IV, § 2 . . . provided that ‘no Person held to Service or Labor’ under the laws of one state could escape that status upon flight to another state.” *Id.*

<sup>65</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857); see also CHOPER ET AL., *supra* note 63 (“Racism and practices of race discrimination are deeply embedded in American constitutional history.”).

people.<sup>66</sup> While Reconstruction led to the development of institutions and established “important legal precedents that helped [Black people] survive, [which] became the basis of later efforts to win freedom and equality,” it failed to give them legal protection or resources that would lead to true equality.<sup>67</sup> Despite the legal abolition of slavery, “black people found themselves relegated to second-class status as the country continued to exploit their labor.”<sup>68</sup> For another one hundred years, Black Americans were viewed by the legal system as lesser beings than white Americans, undeserving of sharing the same public facilities or attending the same schools.<sup>69</sup> “Apartheid was the order of the day, and whites did not hesitate to employ the threat and reality of violence, including lynching, to maintain the racial status quo. Again, black people could not rely on the local police or courts for redress.”<sup>70</sup>

In 1866, almost one century after the United States declared independence from British rule, Congress passed the first Civil Rights Act, which finally afforded Black people the right to American citizenship.<sup>71</sup> However, after the Fifteenth Amendment<sup>72</sup> was adopted in 1870, many reformers believed “their long campaign on behalf of black people was now over” and that having the right to vote meant Black people could now be entirely self-sufficient.<sup>73</sup> Reconstruction so disillusioned white people that nearly one century passed before they would again attempt to combat racial injustice and inequality.<sup>74</sup>

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<sup>66</sup> BRINKLEY, *supra* note 59, at 397, 399 (“To most African Americans at the time . . . Reconstruction was . . . a small but important first step in the effort to secure civil rights and economic power for former slaves. . . . [However,] [m]ost black men and women who continued to live in what came to be known as the New South had little power to resist their oppression for many decades.”).

<sup>67</sup> *Id.* at 397.

<sup>68</sup> GLAUDE, *supra* note 42, at 33.

<sup>69</sup> See *Civil Rights: Law and History*, *supra* note 46 (“In 1896, the U.S. Supreme Court ruled that state governments could separate people of different races as long as the separate facilities were equal. This ‘separate but equal’ doctrine lasted until 1954.”); see also BRINKLEY, *supra* note 59, at 425 (“[T]he Jim Crow laws also stripped blacks of many of the modest social, economic, and political gains they had made in the late nineteenth century.”).

<sup>70</sup> STEVENSON, *supra* note 2, at 19.

<sup>71</sup> BRINKLEY, *supra* note 59, at 405.

<sup>72</sup> U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

<sup>73</sup> BRINKLEY, *supra* note 59, at 416.

<sup>74</sup> *Id.* at 418–19.

Reconstruction was not as disastrous an experience for Southern white elites as most believed at the time. Within little more than a decade after the end of a devastating war, the white South had regained control of its own institutions and, to a great extent, restored its traditional ruling class

Although former slaves became citizens and were theoretically protected under the Constitution's Equal Protection Clause,<sup>75</sup> individuals and public institutions in the South regularly violated or ignored the constitutional provisions that granted these rights, and white supremacy groups such as the Ku Klux Klan began to grow and prosper by 1877.<sup>76</sup>

During [this] terror era[,] there were hundreds of ways in which people of color could commit a social transgression or offend someone that might cost them their lives. Racial terror and the constant threat created by violently enforced racial hierarchy were profoundly traumatizing for African Americans. Absorbing these psychosocial realities created all kinds of distortions and difficulties that [continue to] manifest themselves today . . . .<sup>77</sup>

“[T]he notion of a black victim due legal redress was an anomaly. It was not a question of justice—there was no justice, and there was no greater symbol of their legal vulnerability than the spectacle of public lynchings.”<sup>78</sup> In 1892, Ida B. Wells began a movement seeking the enactment of a federal anti-lynching law, with hopes it “would allow the national government to do what state and local governments in the South were generally unwilling to do: punish those responsible for lynchings.”<sup>79</sup> But, as of 2020, the federal government has yet to enact such a law.<sup>80</sup>

Unfortunately, many of the new political rights Black Americans in the South were granted during the Reconstruction period were short-lived, and “white supremacy forced most African Americans to the margins of the southern political world, where they would mostly remain until the 1960s.”<sup>81</sup>

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to power. The federal government imposed no drastic economic reforms on the region, and indeed few lasting political changes of any kind other than the abolition of slavery.

*Id.* at 418.

<sup>75</sup> U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>76</sup> *Slavery in America*, *supra* note 57; *see also* BRINKLEY, *supra* note 59, at 415 (“Secret Societies . . . used terrorism to frighten or physically bar blacks from voting.”).

<sup>77</sup> JUST MERCY, *supra* note 52, at 299–300.

<sup>78</sup> STEVENSON, *supra* note 2, at 10.

<sup>79</sup> BRINKLEY, *supra* note 59, at 425.

<sup>80</sup> *See* Nicholas Fandos, *Frustration and Fury as Rand Paul Holds Up Anti-Lynching Bill in Senate*, N.Y. TIMES (June 5, 2020), [https://perma.cc/N4XL-QH8Y]; *see also* Emmett Till Antilynching Act, H.R. Rep. No. 116–267 (2020).

<sup>81</sup> BRINKLEY, *supra* note 59, at 426. The South was “a region with a deep commitment among its white citizens to the subordination of African Americans—a commitment solidified in the 1890s and the early twentieth century when white southerners erected an elaborate legal system of segregation (the ‘Jim Crow’ laws).” *Id.*; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW*

“Sunshine gave way to darkness, and the Jim Crow system of segregation emerged—a system that put black people nearly back where they began, in a subordinate racial caste.”<sup>82</sup> By the end of the nineteenth century, every Southern state “had laws on the books that disenfranchised blacks and discriminated against them in virtually every sphere of life, lending sanction to a [widespread] racial ostracism.”<sup>83</sup>

*B. The Civil Rights Movement and Beyond: Implicit Bias in America*

Today, life for Black people in the United States is considerably better than it was in the antebellum period or even in the following century.<sup>84</sup> In 1954, the Supreme Court overturned *Plessy v. Ferguson*, which upheld the constitutionality of a law requiring “equal but separate accommodations for the white, and colored races,”<sup>85</sup> in the landmark case, *Brown v. Board of Education*, finding the “separate but equal” doctrine to have “no place” in public education.<sup>86</sup> Shortly thereafter, the 1960s Civil Rights Movement sparked substantial change in the way the law and society treated people of color.<sup>87</sup> As a result, the criminal justice system now theoretically affords as much protection to Black citizens as whites; however, with a culture largely founded on slavery and discrimination, unconscious—and even overt—prejudices persist within the very institutions designed to provide equal protection and justice to all.<sup>88</sup>

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30 (rev. ed. 2012) (“The backlash against the gains of African Americans in the Reconstruction Era was swift and severe.”).

<sup>82</sup> ALEXANDER, *supra* note 81, at 20.

<sup>83</sup> *Id.* at 35 (“[Jim Crow laws] extended to schools, churches, housing, jobs, restrooms, hotels, restaurants, hospitals, orphanages, prisons, funeral homes, morgues, and cemeteries.”).

<sup>84</sup> BRINKLEY, *supra* note 59, at 418. Despite the Reconstruction’s failures, “future generations could be grateful for two great charters of freedom—the Fourteenth and Fifteenth Amendments to the Constitution—which, although widely ignored at the time, would one day serve as the basis for a ‘Second Reconstruction’ that would renew the drive to bring freedom to all Americans.” *Id.* at 419.

<sup>85</sup> *Plessy v. Ferguson*, 163 U.S. 537, 540, 552 (1895).

<sup>86</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>87</sup> See BRINKLEY, *supra* note 59, at 839 (“[The 1960s] saw the emergence of a sustained and enormously powerful civil rights movement that won a series of important legal victories, including two civil rights acts that dismantled the Jim Crow system.”).

<sup>88</sup> See GLAUDE, *supra* note 42, at 30 (“Of course, we are not the same country we were in 1860 or even 1960. Slavery is roundly seen as evil, and legal segregation is ostensibly gone. . . . But despite the real gains we have made, white supremacy continues to shape this country.”). According to American writer and activist James Baldwin,

[w]hite children, in the main, and whether they are rich or poor, grow up with a grasp of reality so feeble that they can very accurately be described as deluded—about themselves and the world they live in. . . . The reason for this, at bottom, is that the doctrine of white supremacy, which still controls most white people, is itself a stupendous delusion: but to be born black in America is an immediate, a mortal challenge.

LIPSITZ, *supra* note 44, at 159.

Despite its successes, the Civil Rights Movement left much to be desired in the realm of justice and inclusion for all American citizens; it “awakened expectations of social and economic equality that laws alone could not provide and that remained in many respects unfulfilled.”<sup>89</sup> Even with the abolition of separate but equal laws, racism, racial inequality, and de facto segregation in the United States persisted.<sup>90</sup> By the middle of the decade, “the issue of race was moving out of the South into the rest of the nation and beyond the issue of formal, legal segregation to an attack on the informal practices that often sustained discrimination.”<sup>91</sup> The consequences of these practices can be seen in the race-related riots that emerged in the years to follow.<sup>92</sup> In his novel set during the Watts Riots, author Walter Mosley provides insight into the mind of a Black man fed up with systemic racism and injustice in the United States:

If everybody in the world despises you and hates you, sees your features as ugly and simian, makes jokes about your ways of talking, calls you stupid and beneath contempt; if you have no history, no heroes, and no future where a hero might lead, then you might begin to hate yourself. . . . And then one hot summer’s night you just erupt and go burning and shooting and nobody seems to know why.<sup>93</sup>

In addition to the number of other riots, urban violence, and civil unrest that occurred during the 1960s,<sup>94</sup> three major riots resulted from two instances of police brutality and the assassination of Dr. Martin Luther King, Jr.<sup>95</sup> In 1965, “racial tension reache[d] a breaking point” in Watts, a predominantly Black neighborhood in Los Angeles after two white police officers

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<sup>89</sup> BRINKLEY, *supra* note 59, at 839, 931–32 (“For the black middle class . . . progress was remarkable in the more than thirty years after the high point of the civil rights movement. [However,] [d]isparities between black and white professionals did not vanish.”).

<sup>90</sup> *See id.* at 820–21. In 1963, President Kennedy introduced “legislative proposals prohibiting segregation in ‘public accommodations,’ barring discrimination in employment, and increasing the power of the government to file suits on behalf of school integration.” *Id.* However, three months later, his assassination “gave new impetus to the battle for civil rights legislation.” *Id.*

<sup>91</sup> *Id.* at 822–23.

<sup>92</sup> *See* Jamilah King, *Before Freddie Gray: A Timeline of American Unrest*, TAKEPART (Apr. 29, 2015), [https://perma.cc/T69N-9SCD].

<sup>93</sup> WALTER MOSLEY, *LITTLE SCARLET* 255–56 (1st ed. Grand Central Publishing 2008).

<sup>94</sup> *See* HENRY LOUIS GATES, JR., *LIFE UPON THESE SHORES: LOOKING AT AFRICAN AMERICAN HISTORY 1513–2008*, at 361–62 (1st paperback ed. 2013).

<sup>95</sup> *See* *Watts Rebellion Begins*, HISTORY (Aug. 10, 2020), [https://perma.cc/3JC2-ZN2A] [hereinafter *Watts Riot*]; Jessica Mazzola & Karen Yi, *50 Years Ago Newark Burned*, NJ.COM (May 15, 2019), [https://perma.cc/LY4L-RTX]; *Martin Luther King, Jr. Assassination*, HISTORY (Feb. 10, 2020), [https://perma.cc/BT5G-B5MD] [hereinafter *MLK Assassination*] (“King had led the civil rights movement since the mid-1950s, using a combination of impassioned speeches and nonviolent protests to fight segregation and achieve significant civil rights advances for African Americans.”).

“scuffle[d]” with a Black man they suspected was driving while intoxicated.<sup>96</sup> Rumors of the altercation spread, and “it took little evidence to convince Watts residents that the police had once again mistreated one of their neighbors.”<sup>97</sup> Soon after, the most deadly riot of the time began, driven by members of the Black community who were angered by another case of “racially motivated abuse by the police,”<sup>98</sup> and in “[r]esistance to racial prejudice” in America.<sup>99</sup> As a result, thirty-four people died.<sup>100</sup>

Two years later, in Newark, New Jersey, two white police officers pulled over a Black man and beat him severely.<sup>101</sup> In response, those who were “frustrated by high unemployment, inadequate schools, substandard housing [and] yet another abuse by police” erupted in anger; “Newark’s black residents had had enough.”<sup>102</sup> Twenty-six people were killed in the four days of rioting that ensued.<sup>103</sup> Then, the following year, on April 4th, 1968, James Earl Ray assassinated Dr. Martin Luther King, Jr. while he was standing on his hotel balcony.<sup>104</sup> Dr. King’s “tragic death produced a great outpouring of grief [and] [a]mong African Americans, it also produced anger.”<sup>105</sup> Prompted by this anger and grief, riots broke out in more than sixty cities in the United States, and forty-three people died.<sup>106</sup>

In more recent years, racial tension has triggered additional occurrences of civil unrest.<sup>107</sup> “More than a quarter century had passed since the Watts

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<sup>96</sup> *Watts Riot*, *supra* note 95.

<sup>97</sup> GATES, *supra* note 94, at 363.

<sup>98</sup> *Watts Riot*, *supra* note 95.

<sup>99</sup> GATES, *supra* note 94, at 361.

<sup>100</sup> BRINKLEY, *supra* note 59, at 823.

<sup>101</sup> Errin Haines Whack, *Newark Riots Recall an Era Echoed by Black Lives Matter*, L.A. TIMES (July 12, 2017, 11:20 AM), [<https://perma.cc/G273-ZEA8>].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (“The 1967 riots prompted President Lyndon Johnson to launch an inquiry into the cause of the racial disorders. [The Kerner Commission found] the country [was] ‘moving toward two societies, one black, one white—separate and unequal.’”).

<sup>104</sup> BRINKLEY, *supra* note 59, at 834; *MLK Assassination*, *supra* note 95 (“King had led the civil rights movement since the mid-1950s, using a combination of impassioned speeches and non-violent protests to fight segregation and achieve significant civil rights advances for African Americans.”).

<sup>105</sup> BRINKLEY, *supra* note 59, at 835; *see also MLK Assassination*, *supra* note 95 (“Though blacks and whites alike mourned King’s passing, the killing in some ways served to widen the rift between black and white Americans, as many blacks saw King’s assassination as a rejection of their vigorous pursuit of equality through the nonviolent resistance he had championed.”).

<sup>106</sup> BRINKLEY, *supra* note 59, at 835.

<sup>107</sup> *Id.* at 932–33 (“[T]he rise of the black middle class . . . accentuated (and perhaps even contributed to) the increasingly desperate plight of other African Americans, whom the economic growth and the liberal programs of the 1960s and beyond had never reached. . . .

riot, yet the underlying cauldron of racial tension was as explosive as ever.”<sup>108</sup> The Los Angeles Riots—also known as the “Rodney King Riots”—began in 1992, prompted predominately by the police beating of Rodney King, a Black man,<sup>109</sup> and the shooting death of Latasha Harlins.<sup>110</sup> The officers who assaulted Mr. King were acquitted,<sup>111</sup> and, as mentioned, in Ms. Harlins’ case, Judge Karlin sentenced Du to probation.<sup>112</sup> As a result of these two events, combined with built-up frustration toward the systemic disenfranchisement of Black Americans, “black residents of South Central Los Angeles, one of the poorest communities in the city, erupted in anger—precipitating one of the largest racial disturbances of the twentieth century.”<sup>113</sup> More than fifty people died during the riots and “race relations” between Black and white Americans “grew increasingly sour in these difficult years.”<sup>114</sup>

Several years later, on February 4, 1999, four white New York police officers—who “were patrolling in an unmarked car and dressed in street

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Nonwhites were disadvantaged by many factors in the changing social and economic climate of the 1980s and 1990s. Among them was a growing public and political impatience with affirmative action and other programs designed to advance their fortunes. . . . And they suffered, in many cases, from a sense of futility and despair, born of years of entrapment in brutal urban ghettos.”)

<sup>108</sup> GATES, *supra* note 94, at 418.

<sup>109</sup> *Id.*

<sup>110</sup> STEVENSON, *supra* note 2, at 279 (“Latasha Harlins was a ‘kind of rallying cry,’ during the riots . . . ‘the name you heard most frequently on people’s lips during the uprising was Lat[a]sha Harlins . . . .”); *see also id.* at 313 (“As far as I am concerned, the riots were more about Latasha Harlins than Rodney King. I mean a black child walks into a store with the money to buy some orange juice, is shot in the back of the head by the store’s owner, the jury finds her guilty, and the woman who shot her serves no jail time. Come on!”). In the words of Tupac Shakur:

Here on Earth, tell me what’s a black life worth?  
A bottle of juice is no excuse, the truth hurts  
and even when you take the shit,  
move counties, get a lawyer, you can’t shake the shit.  
Ask Rodney, *Latasha*, and many more.  
It’s been going on for years, there’s plenty more.  
When they ask me, “When will the violence cease?”  
when your troops stop shootin’ n—s down in the street.

2PAC, I WONDER IF HEAVEN GOT A GHETTO (Interscope Records 1997) (emphasis added).

<sup>111</sup> GATES, *supra* note 94, at 418; BRINKLEY, *supra* note 59, at 933.

<sup>112</sup> *See supra* Part I.

<sup>113</sup> BRINKLEY, *supra* note 59, at 933.

<sup>114</sup> *Id.*



clothes”<sup>115</sup>—shot and killed Amadou Diallo, an African immigrant.<sup>116</sup> Amadou was twenty-three-years-old on the day he was killed.<sup>117</sup> Even though he was unarmed and had committed no crime, the officers fired forty-one shots at Amadou while he was standing in the vestibule of his Bronx apartment building.<sup>118</sup> This entirely unjustifiable killing “unleashed a storm of protest against the police and [New York’s] aggressive policing policies.”<sup>119</sup> A short time later, the officers were charged with second-degree murder; however, on February 26, 2000, all four were acquitted of all charges.<sup>120</sup>

### C. *Black Lives Matter*

Black people have been 28% of those killed by police since 2013 despite being only 13% of the [American] population.<sup>121</sup>

Additional instances of racism in the criminal justice system throughout the past decade led to the development of the Black Lives Matter Movement.<sup>122</sup> On February 26, 2012, neighborhood watch volunteer George Zimmerman shot and killed Trayvon Martin, an unarmed black teenager.<sup>123</sup> Zimmerman was subsequently charged with second-degree murder but was later acquitted.<sup>124</sup> When the “‘not guilty’ [verdict] was announced, African

<sup>115</sup> Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), [https://perma.cc/3FZW-QU26].

<sup>116</sup> *Id.*

<sup>117</sup> Christian Red, *Years Before Black Lives Matter, 41 Shots Killed Him*, N.Y. TIMES (July 19, 2019), [https://perma.cc/Q9JS-8M52].

<sup>118</sup> Robert D. McFadden, *Four Officers Indicted for Murder in Killing of Diallo, Lawyer Says*, N.Y. TIMES (Mar. 26, 1999), [https://perma.cc/S4NJ-XBRT]. After his killing, Amadou, who had no criminal record, was found to be “in possession only of a wallet and a pager.” *Id.*

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

<sup>120</sup> Fritsch, *supra* note 115. At the trial, one of the officers for the killing, “acknowledged that he never considered [the fact that Amadou] might have had a legitimate reason for being where he was, or that he might have lived in the building.” *Id.* The officers all similarly “acknowledged that they never considered the situation from Mr. Diallo’s point of view.” *Id.*; see also Michael Harriot, *White Men Can’t Murder: Why White Cops Are Immune to the Law*, ROOT (June 22, 2017, 1:28 PM), [https://perma.cc/9WQY-X8MF] (“[D]ata . . . from 2007 to 2017 [shows] only three cases of a white police officer serving time for killing an African American . . . . Police are 33 percent less likely than a regular citizen to be convicted of a crime, and the conviction rate for cops charged with some form of murder is 35 percent—half that of the normal population . . . . Part of the reason for the discrepancy in convictions of police officers is that the justice system is tilted toward them.”).

<sup>121</sup> *Police Violence Map*, MAPPING POLICE VIOLENCE (June 30, 2020), [https://perma.cc/W9FU-DKCB].

<sup>122</sup> See Hasan Kwame Jeffries, *Justice Denied: The Killing of Trayvon Martin in Historical Perspective*, ORIGINS (Nov. 2013), [https://perma.cc/Q9DT-8WJ5].

<sup>123</sup> *Id.*

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

Americans saw the outcome as another painful link in a chain of unpunished cruelty dating back hundreds of years.<sup>125</sup> As news of Zimmerman's acquittal started to spread, protests erupted throughout the country.<sup>126</sup>

Black Americans had a different reaction to the outcome than white Americans did because they "placed the shooting and trial in historical perspective. They located it on the continuum of anti-black violence, assumed black criminality, and racial bias in the criminal justice system that stretches back generations."<sup>127</sup> Following this tragic event, Alicia Garza, Patrisse Cullors, and Opal Tometi founded a "Black-centered political will and movement building project called #BlackLivesMatter."<sup>128</sup> Unfortunately, similar incidents occurred over the following years.<sup>129</sup> In 2014, white police officer, Darren Wilson, shot and killed Michael Brown, an unarmed Black teenager.<sup>130</sup> However, a grand jury chose not to indict Wilson for the shooting death of the teenager.<sup>131</sup> Again, as news of the decision began to spread, "protesters surged forward."<sup>132</sup> The Ferguson Unrest, as it later became known, was led by demonstrators who called for "action to be taken following the release of a federal report that alleged overwhelming racial bias in the town's policing."<sup>133</sup>

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

<sup>126</sup> *Id.* ("Before the trial and Zimmerman's arrest, a USA TODAY/Gallup Poll found that 73% of African Americans believed that, if [Trayvon] had been white, Zimmerman would have been immediately arrested . . . After the trial, the chasm in perspective remained. According to a Pew Research Center poll, 86 percent of African Americans were dissatisfied with the verdict, as compared to just 30 percent of whites.")

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

<sup>128</sup> *Herstory*, BLACK LIVES MATTER, [https://perma.cc/938G-ZRPF] (last visited Mar. 26, 2021). The founders of Black Lives Matter describe the movement as "an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise." *Id.*

<sup>129</sup> *Police Violence Map*, *supra* note 121. Black Americans are three times "more likely to be killed by police than white" Americans and ninety-eight point three percent "of killings by police from 2013–2020 have not resulted in officers being charged with a crime." *Id.*

<sup>130</sup> Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), [https://perma.cc/U2DP-JYM4].

<sup>131</sup> *Id.*; *see also* Harriot, *supra* note 120 ("Even when prosecutors charge the cops, the grand jury process ensures that many officers will never face trial. In most states, when evidence is presented [to] a grand jury, the [state represents the victim]. While this seems legitimate in most criminal cases, in the cases of police shootings, the prosecutors trying to indict the police officers are essentially teammates of the accused. It's why Darren Wilson never faced a trial . . .").

<sup>132</sup> Buchanan et al., *supra* note 130.

<sup>133</sup> It seems the Black community was fully justified in their outrage given the findings that ninety-three percent of people arrested in Ferguson were Black although the city's Black population is only sixty-seven percent. *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), [https://perma.cc/T76Q-Y69N] [hereinafter *Ferguson Unrest*]. The

A year later, police killed another young Black man named Freddie Gray.<sup>134</sup> Following his brutal and aggressive arrest, officers brought Freddie to the hospital in critical condition.<sup>135</sup> He subsequently succumbed to a lethal spinal cord injury.<sup>136</sup> Six officers were charged with manslaughter and murder related to Freddie's death; however, they were cleared of all charges.<sup>137</sup> As a result, demonstrators began protesting "excessive use of force. . . . Many carried banners, some of which read "Black lives matter" - an echo of similar protests around the country."<sup>138</sup> To most Black people, "[p]olice actions and community responses" to these horrendous occurrences "increasingly expose a painful reality: the United States remains a nation fundamentally shaped by its racist past and present."<sup>139</sup>

Then, just months ago, on May 25, 2020, Minneapolis police officer Derek Chauvin killed George Floyd, an unarmed Black man, during an arrest following an allegation that George had purchased cigarettes with a counterfeit \$20 bill.<sup>140</sup> Security camera and bystander videos show "Chauvin, who is white, [pressing] his knee on [George's] neck for at least eight minutes and 15 seconds" and continuing to do so even after George became unconscious.<sup>141</sup> Two other officers assisted Chauvin in keeping George pinned to the ground, while a third stood by and did nothing while George slowly died.<sup>142</sup> Transcripts from the moments leading up to George's death show "he told officers 'I can't breathe' more than [twenty] times," to no avail.<sup>143</sup>

Following George's death, Americans began gathering in large numbers to protest "state violence against black people," leading to what has been

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United States Justice Department investigation also found the Ferguson "court's practices impose[d] unnecessary harm, overwhelmingly on African Americans." *Id.* The justice department investigation found, among other things, "[p]olice were quick to escalate force and when they did, African-Americans accounted for 90% of officers' use of force" and also perceived "[e]xplicit racial bias in communications between police and court." *Id.*

<sup>134</sup> *Freddie Gray's Death in Police Custody - What We Know*, BBC NEWS (May 23, 2016), [https://perma.cc/3JD3-MTW4] [hereinafter *Gray's Death*].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ("[Mr. Gray's] spine was 80% severed at his neck.").

<sup>137</sup> Rebecca R. Ruiz, *Baltimore Officers Will Face No Federal Charges in Death of Freddie Gray*, N.Y. TIMES (Sept. 12, 2017), [https://perma.cc/JT85-U5KM].

<sup>138</sup> *Gray's Death*, *supra* note 134.

<sup>139</sup> GLAUDE, *supra* note 42, at 30.

<sup>140</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Mar. 18, 2020), [https://perma.cc/VQN4-GVZH].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Maanvi Singh, *George Floyd Told Officers 'I Can't Breathe' More than 20 Times, Transcripts Show*, GUARDIAN (July 9, 2020), [https://perma.cc/9SKC-JKY9] ("Before he died, Floyd cried for his dead mother and his children. 'Momma, I love you. Tell my kids I love them. I'm dead,' he said.").

described as “the biggest collective demonstration of civil unrest in our generation’s memory.”<sup>144</sup> Many people are now seeking justice for George’s death as well as the deaths of other people of color who have been victimized by those in power—including Ahmaud Arbery, a 25-year-old unarmed Black man who was pursued and shot by former police officer Gregory McMichael;<sup>145</sup> Breonna Taylor, a 26-year old Black woman who was killed in her own bed by white officers who entered the wrong house with a no-knock warrant;<sup>146</sup> and Elijah McClain, a 23-year old unarmed Black man who was stopped and killed by three white police officers for “look[ing] ‘sketchy’” while walking home from a convenience store.<sup>147</sup> “The unifying theme, for the first time in America’s history, is at last: Black Lives Matter,”<sup>148</sup> but much more must still be done.

<sup>144</sup> Jenna Wortham, *A ‘Glorious Poetic Rage,’* N.Y. TIMES (June 5, 2020), [https://perma.cc/6XJ9-X8B4].

<sup>145</sup> Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), [https://perma.cc/J3GY-PRTM]. On February 23, 2020, Ahmaud “was killed in a neighborhood a short job away from his home after being confronted by [Gregory McMichael] and his son.” *Id.* McMichael, believing Ahmaud “looked like a man suspected in several break-ins in the area,” hopped in his truck with his son and some guns to chase Ahmaud, which eventually led to McMichael shooting Ahmaud to death. *Id.* McMichael and his son were not arrested for several months following the shooting due to their connection to law enforcement and the local district attorney’s office. *Id.*

<sup>146</sup> #JusticeforBre: *Demand Louisville Divest From LMPD, and Invest in Communities*, COLOR CHANGE (Sept. 23, 2020), [https://perma.cc/S87M-H8LF]. Breonna was killed in her home on March 13, 2020, when officers Brett Hankison, Jonathan Mattingly, and Myles Cosgrove “barged in without a warning nor announcement and broke through her door.” *Id.* When police entered, Breonna’s boyfriend thought their home was being burglarized and fired his gun in self-defense. *Id.* Police responded by firing more than twenty shots at Breonna. *Id.* Later, it was discovered that the officers had entered the wrong house. *Id.* To date, none of the officers involved have been charged for Breonna’s wrongful death. *Id.*

<sup>147</sup> Knez Walker et al., *What Happened to Elijah McClain? Protests Help Bring New Attention to His Death*, ABC NEWS (June 30, 2020), [https://perma.cc/2E5Y-KA69]. These were Elijah’s last words:

I can’t breathe. I have my ID right here. My name is Elijah McClain. That’s my house. I was just going home. I’m an introvert. I’m just different. That’s all. I’m so sorry. I have no gungun. I don’t do that stuff. I don’t do any fighting. Why are you attacking me? I don’t even kill flies! I don’t eat meat! But I don’t judge people, I don’t judge people who do eat meat. Forgive me. All I was trying to do was become better. I will do it. I will do anything. Sacrifice my identity, I’ll do it. You all are phenomenal. You are beautiful and I love you. Try to forgive me. I’m a mood Gemini. I’m sorry. I’m so sorry. Ow, that really hurt. You are all very strong. Teamwork makes the dream work. Oh, I’m sorry I wasn’t trying to do that. I just can’t breathe correctly.

Dan Evon, *Are These Elijah McClain’s Last Words on Police Video?*, SNOPE (June 26, 2020), [https://perma.cc/93FM-HK4H]; see also Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Aug. 16, 2020), [https://perma.cc/WAL6-UDVX] (reporting that, to date, none of the officers involved have been charged for Elijah’s death).

<sup>148</sup> Wortham, *supra* note 144.

*D. The Fight for Racial Equality Continues*

Today, overt racism is generally frowned upon and denounced in public institutions, but covert or implicit racism, as well as racial subordination,<sup>149</sup> continues to permeate these establishments, which has led to racial injustice in the American penal system.<sup>150</sup> Although many Americans may believe race is no longer an issue in this country, ignoring the historical trends that exemplify the systemic oppression of Black Americans does not make them go away.<sup>151</sup> White Americans exhibit:

[an] extraordinary naivety [that] . . . is diagnostic of the type of racial insensitivity labeled as “laissez faire racism.” . . . This phenomenon is marked less by overt racial animosity than a blind eye toward the prevalent discrimination faced by African Americans. For only when information is blatant and unmistakable . . . do Whites distinguish between Black and White targets. Under other circumstances, when the information is [ambivalent, such as that] found in the “real world,” many White respondents fail to appreciate . . . that the races are treated differently in the halls of justice.<sup>152</sup>

Americans express outrage at the police killings of unarmed people of color; however, in 1992, Judge Joyce Karlin sent a message that killing Black people is a crime unmeritorious of true punishment.<sup>153</sup> Many members of the Black community believed Judge Karlin’s sentencing “decision [was] racist,

<sup>149</sup> ROY L. BROOKS, *THE RACIAL GLASS CEILING* ix (2017) (explaining racial subordination is “the act of impeding racial progress in pursuit of legitimate, nonracist interests.”).

<sup>150</sup> See ALEXANDER, *supra* note 81; see also *id.* at 17 (“[One problem is that a] formally race-neutral criminal justice system can manage to round up, arrest, and imprison an extraordinary number of black and brown men, when people of color are actually no more likely to be guilty of drug crimes and many other offenses than whites. . . . the legal rules that structure the system guarantee discriminatory results.”). Implicit bias is one possibility. Rachlinski, et al., *supra* note 30, at 1195 (“Race matters in the criminal justice system. Black defendants appear to fare worse than similarly situated white defendants. Why?”). For example, in Iowa, a black person is over seven times more likely to be arrested than a white person for marijuana possession, despite the fact that both groups use marijuana at about the same rate. *Iowa Ranks Among the Worst States in Racial Disparities for Marijuana Arrests*, ACLU (Apr. 19, 2020), [https://perma.cc/ER5C-2Z3X]. See generally EZEKIEL EDWARDS ET AL., *A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM* (Rebecca McCray ed., 2020).

<sup>151</sup> See GLAUDE, *supra* note 42, at 31 (“At every crucial moment in our nation’s history, when there have been fundamental changes in how we’ve dealt with race, white people asserted the value gap and limited the scope of change.”).

<sup>152</sup> MARK PEFFLEY & JON HURWITZ, *JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES* 138 (2010) (citation omitted).

<sup>153</sup> See *supra* INTRODUCTION; see also Monroe, *supra* note 23 (“The consequences of this failure of empathy, failure of imagination, whatever you want to call it, are severe and widespread: In states with Stand Your Ground laws, 17 percent of white-on-black shootings are deemed justifiable, while only 1 percent of black-on-white shootings are deemed the same.”).

insensitive, inaccurate, unjust, and reaffirm[ed]” their nightmares that their children could “be killed right before [their] eyes . . . and [that] the only justice [they could] count on getting from the criminal justice system [was] injustice.”<sup>154</sup> Although these police-related deaths are not directly attributable to the outcome of Soon Ja Du’s trial,<sup>155</sup> they are interconnected and are the result of a system that fails to effectively protect people of color, setting the stage for judges, who are predominately white,<sup>156</sup> to abuse their broad discretion in sentencing Black people. “Latasha is remembered every time a child of color is killed and their communities feel that justice is not rendered.”<sup>157</sup>

### III. CRIMINAL SENTENCING PROCEDURE AND POLICY

Sentencing procedure in the United States has changed over time, and although it varies by jurisdiction, overall, “[t]he current approach to non-capital sentencing represents a striking departure from early American history.”<sup>158</sup> Today, the penal system’s policy goals have shifted from a focus on rehabilitation to a focus on retribution.<sup>159</sup> Combined with current criminal procedure and a racially charged political climate, this has established a unique environment for criminal sentencing.<sup>160</sup>

#### *A. Procedure: Sentencing Then and Now*

Sentencing procedure in the United States at both the state and federal levels took a highly “discretionary and indeterminate form” until the 1970s.<sup>161</sup> Previously, trial court judges could choose any sentence within wide boundaries and were subject to minimal, if any, restrictions or constraints.<sup>162</sup> Judges

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<sup>154</sup> STEVENSON, *supra* note 2, at 245.

<sup>155</sup> *See supra* notes 37–40 and accompanying text.

<sup>156</sup> *See infra* Section III.B.

<sup>157</sup> STEVENSON, *supra* note 2, at 313.

<sup>158</sup> Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 224 (2002).

<sup>159</sup> Hoffman, *supra* note 25, at 997–98 (“With a rapidity rarely seen in complex social situations, the rehabilitative ideal came crumbling down just forty years after its ascension. . . . The sudden abandonment of rehabilitation gave way to an amalgam of retribution and incapacitation . . .”).

<sup>160</sup> *See infra* Section II.A.

<sup>161</sup> KADISH ET AL., *supra* note 24, at 1158.

<sup>162</sup> *Id.*; *see also* Hoffman, *supra* note 25, at 965 (“[Judicial] sentencing did not begin to make significant inroads into the . . . practice of jury sentencing until the penitentiary became the predominant form of punishment . . . . When the rehabilitative ideal began its ascendancy in the early 1920s and 1930s, judge sentencing became even more common and jury sentencing even less common.”).

were given nearly limitless discretion to impose prison sentences.<sup>163</sup> In 1984, in an attempt to resolve the issue the Supreme Court later recognized as “significant sentencing disparities among similarly situated offenders” caused by overbroad sentencing discretion, Congress enacted the Sentencing Reform Act (“SRA”).<sup>164</sup> Variations of discretionary sentencing systems are still utilized in most states, but “dissatisfaction with so much [judicial] discretion . . . triggered fundamental change in many places.”<sup>165</sup>

Today, judges make all non-capital federal sentencing determinations “subject . . . to the constraints of the Federal Sentencing Guidelines and occasionally to organic sentencing constraints contained in some federal criminal statutes.”<sup>166</sup> Entirely indeterminate sentencing has ceased to exist for the most part.<sup>167</sup> Legislatures or sentencing commissions in almost every state have created somewhat narrow limits for possible prison sentences.<sup>168</sup> Additionally, in most states, traditional judicial discretionary approaches to sentencing have been altered in capital cases to allow juries to decide the outcome.<sup>169</sup> However, although the traditional systems have been adapted in an attempt to address concerns that arise from excessive judicial discretion, the system is still flawed in many jurisdictions, and trial judges are largely permitted to make sentencing decisions that differ substantially from jury, parole officer, or statutory recommendations.<sup>170</sup> Furthermore, trial judges are given such broad sentencing discretion that appellate courts rarely challenge their decisions.<sup>171</sup>

## 1. Federal Sentencing

In response to the problems that arose from overbroad judicial discretion in sentencing, Congress established the Sentencing Reform Act of 1984

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<sup>163</sup> Hoffman, *supra* note 25, at 967.

<sup>164</sup> U.S. SENTENCING COMM’N, FEDERAL SENTENCING: THE BASICS 1 (2015) [hereinafter *Federal Sentencing*]; see also Peugh v. United States, 569 U.S. 530, 535 (2013) (deeming broad federal sentencing discretion insufficient prior to 1984).

<sup>165</sup> KADISH ET AL., *supra* note 24, at 1158.

<sup>166</sup> Hoffman, *supra* note 25, at 953 n.1.

<sup>167</sup> *Id.* at 967.

<sup>168</sup> *Id.*

<sup>169</sup> KADISH ET AL., *supra* note 24, at 1162. In 1977, a judge relied on a confidential report to sentence a murderer to death after the jury recommended life imprisonment, but the Supreme Court found the procedure “constitutionally defective and vacated the death sentence.” *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Thomas Seigel, *Appealing a Criminal Sentence*, LAWYERS.COM (Feb. 16, 2021), [HTTPS://PERMA.CC/7D8T-WN7G] (“Sentencing appeals sometimes succeed when the judge has made errors in following the law or applying the facts. But the error must be significant in order to trigger a resentencing.”).

(“SRA”).<sup>172</sup> The members of Congress who enacted the SRA found “each judge was left to apply his own notions of the purposes of sentencing [and] [a]s a result, every day federal judges meted out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”<sup>173</sup> The SRA “was enacted against a history . . . of racial, geographical and other unfair disparities in sentencing” and the original guidelines were about “fairness, consistency, predictability, reasoned discretion and minimizing the role of congressional politics and the ideology of the individual judge in sentencing.”<sup>174</sup> Through the SRA, Congress established a new sentencing structure for defendants found guilty of federal criminal offenses and established seven factors that federal courts must consider at sentencing.<sup>175</sup> The SRA also created the United States Sentencing Commission (“Commission”), which developed the sentencing guidelines judges are required to follow.<sup>176</sup> The Commission required courts to sentence criminal defendants within the designated guideline range unless the Commission “created a permissible basis for a ‘departure’” or failed to sufficiently consider a mitigating or aggravating circumstance when it developed the guidelines.<sup>177</sup>

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<sup>172</sup> *Federal Sentencing*, *supra* note 164, at 1 (citing Sentencing Reform Act of 1984, Pub. L. No. 98473, 98 Stat. 1987).

<sup>173</sup> *Id.*

<sup>174</sup> Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1127 (2005) (quoting *Blakey v. Washington* and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (2004), 2004 WL 1638424 (Westlaw)).

<sup>175</sup> *Federal Sentencing*, *supra* note 164, at 2 (footnotes omitted) (“(1) [T]he nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the four primary purposes of sentencing, i.e., retribution, deterrence, incapacitation, and rehabilitation; (3) the kinds of sentences available (e.g., whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute); (4) the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines; (5) any relevant ‘policy statements’ promulgated by the Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.”).

<sup>176</sup> *Id.* at 1.

<sup>177</sup> *Id.* at 2.



In 2005, the Supreme Court held the existing guidelines violated the Sixth Amendment<sup>178</sup> “by permitting judges to find facts that raised the maximum guideline range by a preponderance of the evidence.”<sup>179</sup> To remedy the situation, the Court struck mandatory guidelines and enacted “effectively advisory” guidelines.<sup>180</sup> The federal government also enacted mandatory minimum sentences in an attempt to eradicate racial discrimination by the Court; however, “racial disparities have increased with the proliferation of mandatory minimum laws.”<sup>181</sup> In a 2004 report, the Commission concluded, “[t]oday’s sentencing policies . . . have a greater adverse impact on Black offenders than did the factors taken into account by judges in the [previous] discretionary system.”<sup>182</sup> Additionally, a report from 2010 found Black criminal offenders in the federal system “received sentences that were 10.0 percent longer than those imposed on white offenders” for the same crime.<sup>183</sup>

## 2. State Sentencing

State sentencing procedures vary significantly from one state to the next, but, in general, they differ from federal sentencing guidelines as a whole.<sup>184</sup> Although many states have sentencing guidelines that limit judges’ discretion to an extent, most utilize discretionary sentencing schemes of some kind.<sup>185</sup> Furthermore, the majority of state courts maintain greater judicial discretion than federal judges.<sup>186</sup> Some states utilize systems involving voluntary guidelines that are not binding on the judges, while others have advisory guidelines in place that require judges to “perform guidelines calculations, but [do not require them] to sentence in conformity with the result.”<sup>187</sup> In either system, however, a judge’s sentencing decision is not “subject to meaningful appellate review.”<sup>188</sup> In six states, juries determine criminal sentences with guidance from statutory ranges, but this is an unusual procedure.<sup>189</sup> Sentencing guidelines exist to assist judges in their sentencing determinations, which are

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<sup>178</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

<sup>179</sup> *Federal Sentencing*, *supra* note 164, at 3; *see also* *United States v. Booker*, 543 U.S. 220 (2005).

<sup>180</sup> *Federal Sentencing*, *supra* note 164 at 3.

<sup>181</sup> KADISH ET AL., *supra* note 24, at 1168.

<sup>182</sup> U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 135 (2004).

<sup>183</sup> U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCE IN FEDERAL SENTENCING PRACTICES 3 (2010).

<sup>184</sup> Robinson & Spellman, *supra* note 174, at 1159.

<sup>185</sup> KADISH ET AL., *supra* note 24, at 1158.

<sup>186</sup> Robinson & Spellman, *supra* note 174, at 1159.

<sup>187</sup> KADISH ET AL., *supra* note 24, at 1175.

<sup>188</sup> *Id.*

<sup>189</sup> Robinson & Spellman, *supra* note 174, at 1158.

expected to fall somewhere on a spectrum between high and low; however, judges maintain flexibility in their decisions and are free to “depart from [the sentencing guideline] range when unusual circumstances present themselves.”<sup>190</sup> Judges are also able to consider factors that require subjective impressions, which can easily introduce “unwarranted disparities” in sentencing determinations.<sup>191</sup> In California, “broadly defined guidelines” are used to assist the judge in sentencing determinations.<sup>192</sup> For example, although voluntary manslaughter is punishable up to eleven years according to statute,<sup>193</sup> sentencing guidelines allow the trial judge to “grant probation in a manslaughter case . . . and to forego imposing a jail term as a condition of probation.”<sup>194</sup>

### 3. Appealing a Sentence

In United States jurisdictions, defendants are generally given the right to appeal their sentence, but in most cases, higher courts will not alter the sentencing judge’s decision.<sup>195</sup> “A state appellate court may have the power to review whether a trial court satisfied a statutory obligation to consider applicable sentencing guidelines,” but departing from the guidelines does not in itself give a defendant grounds to appeal.<sup>196</sup> Many jurisdictions limit appellate court sentence modification to situations where the trial judge engaged in an “abuse of discretion.”<sup>197</sup> As long as a trial judge stays within broad sentencing guidelines, “an appeals court will not overturn a sentence unless it suffers from one of a limited number of errors.”<sup>198</sup> In other state jurisdictions, appellate courts use a “mixed standard of review” when assessing a sentence determination, considering (1) “whether the trial court’s reason for imposing a . . . sentence is in accord with the law and supported by competent evidence” and (2) whether the “sentence was in the best interest of the defendant under [the] abuse-of-discretion standard.”<sup>199</sup> Given this current standard

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<sup>190</sup> Kadish et al., *supra* note 24, at 1177.

<sup>191</sup> *Id.* at 1178.

<sup>192</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d 177, 187 (Ct. App. 1992).

<sup>193</sup> CAL. PENAL CODE § 193 (West 2011).

<sup>194</sup> *People v. Superior Court*, 7 Cal. Rptr. 2d at 187.

<sup>195</sup> Seigel, *supra* note 171.

<sup>196</sup> 21 AM. JUR. 2D *Criminal Law* § 792 (2018) [hereinafter 21 AM. JUR.].

<sup>197</sup> *Id.*; *see also* Commonwealth v. Hoch, 936 A.2d 515, 519 (Pa. 2007) (citing Pennsylvania v. Walls, 926 A.2d 957, 961 (Pa. 2007)) (explaining that appellate courts use an “abuse of discretion” standard of review when considering the appropriateness of a trial court’s sentence).

<sup>198</sup> Seigel, *supra* note 171.

<sup>199</sup> 21 AM. JUR., *supra* note 196.

of review, appellate courts rarely find the severity of trial court sentences to be the product of discretionary abuse.<sup>200</sup>

In federal court, the Supreme Court “adopted the same abuse-of-discretion standard, unanimously holding a district court’s decision to depart from the [Sentencing] Guidelines ‘will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.’”<sup>201</sup> Under this standard of review, the higher court will not reverse the court’s sentencing decision without a “substantial showing” there was an obvious judgment error.<sup>202</sup> “Congress did not intend to vest appellate courts with wide-ranging authority over the district courts’ sentencing decisions.”<sup>203</sup> This means judges may sentence criminal defendants outside recommended guideline ranges as long as they “have given due consideration to the guidelines” without any significant oversight by higher courts.<sup>204</sup>

### *B. Policy: Goals of Punishment*

Justifications for criminal punishment generally fall under one of two broad categories: retributive and utilitarian.<sup>205</sup> Retributivists believe punishment is appropriate and justified because the individual is deserving of punishment<sup>206</sup> and aim to prevent further crime by “removing the desire for *personal* avengement . . . against the defendant.”<sup>207</sup> The philosophy behind retribution is that a defendant’s adequate punishment for a crime allows victims of the crime, or society in general, to feel a “certain satisfaction that our criminal procedure is working effectively, which [theoretically] enhances faith

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<sup>200</sup> Seigel, *supra* note 171 (“Sentencing appeals with the best chance of success involve cases where the judge has made a mistake in applying the law . . . If a trial court makes findings of fact during a sentence and one or more of those findings is mistaken, you may appeal on those grounds. . . . [However,] [a]ppeals based on the severity of a sentence rarely succeed.”); *see, e.g.*, *State v. Struhs*, 346 P.3d 279, 286 (Idaho 2015) (citing *State v. Arthur*, 177 P.3d 966, 971 (Idaho 2008)) (“In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.”); *People v. Edwards*, 946 N.Y.S.2d 269, 272 (App. Div. 2012) (emphasis added) (citing *People v. Fairley*, 881 N.Y.S.2d 199, 202 (App. Div. 2009)) (“Defendant’s sentence, which is within the permissible statutory parameters, ‘will not be disturbed on appeal absent evidence of *clear* abuse of discretion or the existence of *extraordinary* circumstances.”).

<sup>201</sup> *Rita v. United States*, 551 U.S. 338, 363 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

<sup>202</sup> David Gougen, *Standards of Review of Appeal*, LAWYERS.COM (Oct. 30, 2017), [<https://perma.cc/E7AR-QS77>].

<sup>203</sup> KENNETH J. FISHMAN, *HANDLING NARCOTIC AND DRUG CASES* § 509 (Feb. 2020).

<sup>204</sup> Seigel, *supra* note 171.

<sup>205</sup> KADISH ET AL., *supra* note 24, at 90.

<sup>206</sup> *Id.*

<sup>207</sup> *The Purposes of Punishment*, U. MINN. LIBR., [<https://perma.cc/E78M-LQMJJ>] (last visited May 5, 2021).

in law enforcement and our government.”<sup>208</sup> Alternatively, utilitarians believe punishment is defensible based on the purposes it serves.<sup>209</sup> Utilitarians “seek to justify punishment on the basis of the good consequences it is expected to produce in the future,” such as rehabilitation.<sup>210</sup>

### 1. Rehabilitation

In the early twentieth century, the “rehabilitative ideal” became a focus in the world of criminal law and punishment.<sup>211</sup> This ideal maintains a belief that punishment’s main purpose is creating a “change in the character, attitudes and behavior of convicted offenders[.]”<sup>212</sup> Moving away from more punitive goals of punishment, many members of the legal community believed measures for treating convicted offenders were therapeutic.<sup>213</sup> The general belief behind the rehabilitative ideal was that the “purpose of the criminal law was not to punish or to deter, but rather to cure criminals of their antisocial tendencies.”<sup>214</sup> In the early 1920s and 1930s, when the rehabilitative ideal began to emerge as a prominent train of thought regarding punishment in the United States, judicial sentencing grew in prominence, while jury sentencing declined.<sup>215</sup> Judges were given “almost unlimited discretion to impose penitentiary sentences, and the purpose of those sentences was to rehabilitate.”<sup>216</sup> However, in the 1970s, the focus on the rehabilitative ideal began to shift in the United States<sup>217</sup> and was eventually superseded by retributivist policy goals.<sup>218</sup> Americans’ departure from a rehabilitative ideal toward a retributivist one resulted from critics who saw “rehabilitation as a serious threat to individual liberty” and the reality that it failed to accomplish its goal of changing criminals for the better.<sup>219</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> KADISH ET AL., *supra* note 24, at 90.

<sup>210</sup> *Id.*

<sup>211</sup> Hoffman, *supra* note 25, at 965.

<sup>212</sup> *Rehabilitative Ideal*, SOC. INDEX, [<https://perma.cc/DK5X-FS5W>] (last visited May 6, 2021).

<sup>213</sup> Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226, 226 (1959).

<sup>214</sup> Hoffman, *supra* note 25, at 965.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 967.

<sup>217</sup> *Id.* at 997 n.169.

<sup>218</sup> *Id.* at 967–68.

<sup>219</sup> *Id.* at 997–98 (“Four decades worth of data . . . showed that all the idealistic efforts of this [rehabilitation] movement had virtually no effect on the propensity of people to commit crimes.” (footnote omitted)).

## 2. Retribution

Today, the criminal justice system aims to punish criminals because their crimes are deserving of proportionate punishment, a stark contrast from the idea criminals deserve to be rehabilitated.<sup>220</sup> Americans now emphasize “the notion that criminals must suffer just deserts.”<sup>221</sup> Retributivist views insist the punishment for criminal offenders must be as severe as their offense.<sup>222</sup> However, some members of the legal community argue modern sentencing procedure is inconsistent with American retributivist policy goals.<sup>223</sup> As the focus on rehabilitation rose in the United States, the use of jury sentencing fell, but the decline of a rehabilitative focus on punishment has not led to a renewed use of jury sentencing.<sup>224</sup> As Judge Morris Hoffman argues, “[j]ury sentencing . . . resonates with the reemergence of retribution as the primary justification for punishment.”<sup>225</sup>

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<sup>220</sup> Hoffman, *supra* note 25, at 967–68.

<sup>221</sup> *Id.* at 995.

For the just deserts model to be feasible and effective, a scale or “tariff” of crimes and punishments is required. The underlying principle of the tariff system is that offenders receive a punishment that is proportionate to both the severity of the offense and the culpability, or blameworthiness, of the offender. To establish a tariff, crimes need to be ranked or categorized according to their relative seriousness and punishments should be categorized alongside according to their relative unpleasantness . . . . The principles of “just deserts” could, in theory, ensure a fair and impartial system of justice. However, the desire for consistency and proportionality needs to be carefully balanced with a flexibility that allows for unique circumstances and the impact of structural inequalities on offending behavior and criminalization.

Alana Barton, *Just Deserts Theory*, ENCYCLOPEDIA PRISONS & CORRECTIONAL FACILITIES 1, 4 (2012) (emphasis omitted), [<https://perma.cc/8CDE-JUDP>].

<sup>222</sup> KADISH ET AL., *supra* note 24, at 93.

<sup>223</sup> Hoffman, *supra* note 25, at 992.

<sup>224</sup> *See id.* at 953 n.1, 954, 965–66.

<sup>225</sup> *Id.* at 992.

#### IV. THE PROBLEM: OVERBROAD JUDICIAL DISCRETION AND IMPLICIT RACISM

Blacks were first at the mercy of slave masters. Then came Jim Crow segregation and the Ku Klux Klan. Now, prejudice wears a black robe.

Josh Salman et al., 2016<sup>226</sup>

Overbroad judicial discretion and subconscious, or implicit, racism can lead to inequitable sentencing outcomes.<sup>227</sup> Although some form of discretion is necessary when making sentencing determinations, given each case's factual differences, empirical evidence supports the proposition that Black and white Americans are treated differently in the penal system.<sup>228</sup> When sentencing is predominately left to an individual, implicit biases can affect the outcome and lead to unintentional inequitable results.<sup>229</sup> Although implicit biases can impact jury decision making, studies have found "juries are generally less susceptible to extralegal biases" than individuals, including individual judges.<sup>230</sup> Furthermore, the jury, unlike a judge, is capable of bringing "community standards and morals to bear on trial decisions, which can produce a just result even when strict adherence to the law would not."<sup>231</sup> This is particularly important given the fact "[t]rial judges are overwhelmingly white. But, criminal defendants are disproportionately nonwhite."<sup>232</sup>

<sup>226</sup> Josh Salman et al., *Florida's Broken Sentencing System*, HERALD TRIB. (Dec. 12, 2016), [<https://perma.cc/K4VN-AR4S>].

<sup>227</sup> See, e.g., *People v. Superior Court*, 7 Cal. Rptr. 2d 177, 179 (1992) (Ct. App. 1992) (providing an example of racism leading to an inequitable sentencing outcome).

<sup>228</sup> Charles M. Blow, *Crime, Bias and Statistics*, N.Y. TIMES (Sept. 7, 2014), [<https://perma.cc/J48Q-MVL2>] ("A damning report released by the Sentencing Project last week lays bare the bias and the [criminal justice system's] interconnecting systemic structures that reinforce it and disproportionately affect African-Americans.").

<sup>229</sup> *The Color of Justice*, CONST. RIGHTS FOUND. (2017), [<https://perma.cc/9ALV-H8DU>] ("The RAND Corporation study found that convicted African-Americans were more likely than whites to go to prison. And their sentences were longer. 'This disparity,' the study concluded, 'suggests . . . judges . . . are exercising discretion in sentencing . . . decisions in ways that result in de facto discrimination against blacks.'") (last visited May 6, 2021).

<sup>230</sup> Norbert L. Kerr & Robert M. Bray, *Simulation, Realism, and the Study of the Jury*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 322, 349 (Neil Brewer & Kipling D. Williams eds., 2005).

<sup>231</sup> Lora M. Levett et al., *The Psychology of Jury and Juror Decision Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 365, 394 (Neil Brewer & Kipling D. Williams eds., 2005) (citation omitted).

<sup>232</sup> Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1910 (2017).

*A. Latasha Harlins and Judge Joyce Karlin*

In the end, Judge Karlin’s sentencing decision reflected what she perceived to be her differences from Latasha and the common ground—as a woman, wife, [and] member of a model minority [group] . . . —she found with Du. And even she felt victimized—that she, and her career, had suffered as a result of what she labeled as an unwarranted attack by a “vocal minority” on her right to judicial discretion in sentencing . . . .<sup>233</sup>

The outcome of Soon Ja Du’s trial seems to show Judge Karlin was influenced by some sort of implicit bias against Latasha Harlins when making Du’s sentencing determination that effectively let the killer of a fifteen-year-old child go free.<sup>234</sup> Judge Karlin could have sent Du to prison, but instead, she exercised her judicial discretion to unjustifiably allow Du to avoid prison time altogether.<sup>235</sup> On appeal, the court sided with Judge Karlin and, on April 21, 1992, concluded she did not abuse her judicial discretion.<sup>236</sup> However, many members of the Black community and beyond believed her sentence showed she had “no remorse, no understanding, [and] no compassion” for the Harlins family and that she did not value Black lives.<sup>237</sup> The decision “set in people’s minds the concept that there was a different standard of justice in different communities, based on either race or class.”<sup>238</sup>

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<sup>233</sup> STEVENSON, *supra* note 2, at 312.

<sup>234</sup> *See supra* Part I.

<sup>235</sup> *See* *People v. Superior Court*, 7 Cal. Rptr. 2d 177, 187 (Ct. App. 1992).

<sup>236</sup> *Id.* (“Such a decision may indeed be controversial. Nevertheless, the only issue to be resolved on appellate review is whether the trial court exercised its discretion in a manner which was ‘arbitrary, capricious, or beyond the bounds of reason.’ We conclude, on the basis of the entire record, that the respondent court did not abuse its discretion.”). Eight days later, a jury acquitted the police officers who had been charged with assaulting Rodney King. *Riots Erupt in Los Angeles After Police Officers Are Acquitted in Rodney King Trial*, HISTORY (Apr. 27, 2020), [<https://perma.cc/V6Z6-FUG3>]. Hours after the verdict, “outrage and protest turned to violence as the L.A. riots began.” *Id.* A reporter later noted,

many of the people who burned and the people who watched the burning approvingly would remember three transcendent reasons [for the riots]: Rodney King, Latasha Harlins and Baby . . . . “Baby” was the dog whose Korean owner had been sentenced to jail time in Los Angeles after he was convicted of beating the cocker spaniel at about the same time that Judge Karlin had set Soon Ja Du free after she was convicted of killing Latasha.

STEVENSON, *supra* note 2, at 278–79; *see also* Oliver, *supra* note 22 (“Judge Karlin should realize her decision is just as much an igniter of the Los Angeles riots as the acquittal of the four Los Angeles police officers.”).

<sup>237</sup> STEVENSON, *supra* note 2, at 262.

<sup>238</sup> *Id.* at xxviii.

Social science studies have shown the existence of a “racial empathy gap,” which means “empathy for the pain experienced by another does not occur or occurs with less intensity when white subjects witness or imagine pain inflicted on black individuals.”<sup>239</sup> Thus, when Judge Karlin imagined Latasha Harlins’ experience, shooting, and death in making her sentencing determination, she was likely unable to empathize in the same way she would have had Latasha been white.<sup>240</sup> Judge Karlin was essentially the sole decision-maker in determining Du’s sentence, and “[s]he had the racial and cultural affiliation, the class status, the education, and the occupation to place her in the position, literally, to judge two women whose lives and communities were very different from hers.”<sup>241</sup>

### B. *Implicit Racial Biases in Judges*

The seriousness of the offense, and the offender’s prior criminal record tend to weigh most heavily on a sentence. Beyond those factors . . . judges have considerable discretion, applying their own *biases* to additional pieces of information . . . .<sup>242</sup>

Today, racial disparities continue to exist in the way the criminal justice system treats people of color.<sup>243</sup> A 2016 study of sentencing disparity in Florida sheds light on the fact that Black people are sentenced to more time in prison—sometimes up to twice the amount of time as white defendants with “identical criminal histories”—even when they are convicted of committing the same crime under the same circumstances.<sup>244</sup> The study also shows

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<sup>239</sup> L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 883 (2017).

<sup>240</sup> See STEVENSON, *supra* note 2, at 262.

<sup>241</sup> *Id.* at 266.

[W]hile it is true that Jewish, Asian, and black women were all maligned as inferior, and socially marginal (or invisible), the impact of European American racism did not affect them “equally.” Skin color and the ability and desire to culturally assimilate influenced one’s access to acceptance. The racial hierarchy of women, therefore, was balanced by one’s closeness to whiteness in appearance, language, behavior, education, religion, and wealth. *Id.* at 215.

<sup>242</sup> Janette Gagnon & Emanuella Grinberg, *Mad About Brock Turner’s Sentence? It’s Not Uncommon*, CNN (Sept. 4, 2016, 4:28 PM) (emphasis added), [<https://perma.cc/HF2J-A99W>].

<sup>243</sup> See *The Color of Justice*, *supra* note 229 (“[A] Bureau of Justice Statistics analysis showed that if current incarceration rates remain unchanged, 32 percent of black males and 17 percent of male Latinos born in 2001 can expect to spend time in prison during their lifetime. This compares to only 6 percent of white males who will go to prison. African-Americans make up 12 percent of the U.S. population, but today compose 40 percent of all prison inmates and 42 percent of those sentenced to death.”).

<sup>244</sup> The Editorial Board, Opinion, *Unequal Sentences for Blacks and Whites*, N.Y. TIMES (Dec. 17, 2016), [<https://perma.cc/C5AG-LTK6>].



individual judges' implicit biases can “drive[] sentencing inequity.”<sup>245</sup> Implicit biases are viewpoints or stereotypes that can unconsciously affect individual perception and judgment and cause “feelings and attitudes about other people based on characteristics such as race” and ethnicity.<sup>246</sup> Part of the problem is that most state courts are not diverse.<sup>247</sup> As the Sentencing Project reports, “[s]entencing policies, implicit racial bias, and socioeconomic inequity contribute to racial disparities at every level of the criminal justice system.”<sup>248</sup> “Unconscious racial bias . . . can undercut empathy and sympathy by introducing forces that magnify the risks of . . . sentencing error.”<sup>249</sup> Essentially, the length of a sentence is directly correlated with skin color; the longer a sentence is, the less likely the defendant is white.<sup>250</sup>

“Empirical research has shown that social background, including race, ethnicity, and gender, have measurable individual and group effects on judges.”<sup>251</sup> Several studies also show judges harbor implicit biases, which has contributed to the racial disparity in the American penal system.<sup>252</sup> For example, Black people who commit crimes often come from underprivileged backgrounds.<sup>253</sup> Judges, who generally come from middle-class backgrounds, might have difficulty relating to various aspects of the defendant's record or

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<sup>245</sup> *Id.*; see also Gagnon & Grinberg, *supra* note 242 (emphasis added) (“Sentencing is the most difficult job a judge has because even though we’re given guidelines for how to go about it, it’s still *very, very subjective* . . .”).

<sup>246</sup> Kirwan Institute for the Study of Race and Ethnicity, *Understanding Implicit Bias*, OHIO STATE U., [https://perma.cc/JQG3-GYXE] (last visited May 6, 2021).

<sup>247</sup> See, e.g., Salman et al., *supra* note 226 (emphasis added) (“Blacks make up 16 percent of Florida’s population and one-third of the state’s prison inmates. *But fewer than 7 percent of sitting judges are black* and less than half of them preside over serious felonies. White judges in Florida sentence black defendants to 20 percent more time on average for third-degree felonies. Blacks who wear the robe give more balanced punishments.”). A white majority is not exclusive to Florida’s judges—most judges in the United States are white. George & Yoon, *supra* note 232, at 1903.

<sup>248</sup> *Criminal Justice Facts*, SENT’G PROJECT, [https://perma.cc/U3J8-BLSS] (“Overall, African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted they are more likely to face stiff sentences.”) (last visited May 6, 2021).

<sup>249</sup> Taslitz, *supra* note 33, at 4.

<sup>250</sup> See Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System*, HUFFINGTON POST (May 25, 2011), [https://perma.cc/V787-QW3X] (“A July 2009 report by the Sentencing Project found that two-thirds of the people in the US with life sentences are non-white. In New York, it is 83%.”).

<sup>251</sup> George & Yoon, *supra* note 232, at 1908.

<sup>252</sup> Rachlinski et al., *supra* note 30, at 1196 (“[I]n Connecticut, [studies showed] judges set bail at amounts that were twenty-five percent higher for black defendants than for similarly situated white defendants [and in] 1984, David Mustard found that federal judges imposed sentences on black Americans that were twelve percent longer than those imposed on comparable white defendants.”).

<sup>253</sup> *The Color of Justice*, *supra* note 229.

empathizing with their situation and could harbor negative feelings without being aware.<sup>254</sup> Thus, a record showing “unemployment, trouble in school, [and] family problems” might be viewed as aggravating circumstances that lead to harsher sentences.<sup>255</sup> Implicit biases can negatively impact “the behaviors and judgments of even the most consciously egalitarian individuals in ways” they fail to recognize and thus are incapable of controlling.<sup>256</sup>

Alternatively, judges who identify with defendants might impose more lenient sentences than are deserved because “implicit biases can also influence feelings of empathy.”<sup>257</sup> Judicial preferences for certain types of defendants—often white males—have also led to inequitable sentences.<sup>258</sup> An investigation conducted by the Herald-Tribune found the system allows judges to exercise their “discretion to show mercy”; however, judges “show it more often to the people who look like them.”<sup>259</sup> For example, in 1994, Judge Robert E. Cahill sentenced a man who killed his wife upon learning of her affair to only eighteen months in prison because he felt “such a killing was understandable.”<sup>260</sup> In 2009, Judge Jan Jurden sentenced multimillionaire du Pont family heir, Robert Richards, to eight years in prison for raping his three-year-old daughter, but subsequently suspended the sentence for probation because

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* (“In a 1999 survey of studies on discrimination in the justice system, researcher Christopher Stone found that much of the disparity in sentencing could be traced to differences in arrest charges and prior records of those convicted. He concluded: ‘. . . studies of individual jurisdictions and specific parts of the court process do find some evidence of race bias in a significant number of cases.’”).

<sup>256</sup> Richardson, *supra* note 239, at 865.

<sup>257</sup> *Id.* at 883 (“[R]esearchers found that people who felt more empathy for white defendants than black defendants would give white defendants more lenient sentences, even when everything else about the case was identical.”).

<sup>258</sup> German Lopez, *Report: Black Men Get Longer Sentences for the Same Federal Crime as White Men*, VOX (Nov. 17, 2017) (citing U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), [https://perma.cc/B4PN-SSC5]), [https://perma.cc/H6M5-YGAD] (“a new report by the US [sic] Sentencing Commission . . . found that black men got 19.1 percent longer sentences for the same federal crimes as white men between fiscal years 2012 and 2016. This was after accounting for several variables, including criminal history, whether someone pleaded guilty, age, education, and citizenship. . . . According to the commission’s report, judges are less likely to cut black men a break than white men. White men were more likely to get their sentences reduced under the judge’s discretion than black men, and white men got larger reductions than the ones black men got.”).

<sup>259</sup> Salman et al., *supra* note 226 (“I have two kids. One is a white kid from the suburbs. The judge sees that the kid kind of looks like his son and talks like his son, and the judge thinks: ‘This kid is a good kid. I’ll give him a second chance.’ . . . Second kid is urban, has a bounce in his step, from a poor community. When he speaks, his tone is a little different, and the judge thinks: ‘This kid has a bad attitude. I’m not going to give him a second chance.’”).

<sup>260</sup> Associated Press, *Punishment is 18 Months for Killing Cheating Wife*, N.Y. TIMES (Oct. 19, 1994), [https://perma.cc/VF26-PWIL].

he felt Richards would “not fare well” in prison.<sup>261</sup> More recently, in 2016, Judge Aaron Persky sentenced Brock Turner—a young man convicted of sexually assaulting an unconscious girl—to a mere six months in prison, noting Turner was already “punished by losing his swimming scholarship and the media attention from the trial.”<sup>262</sup>

A 2009 study found eighty-seven percent of white judges harbored lower than average implicit views toward Black people.<sup>263</sup> The study also found white judges “demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the internet.”<sup>264</sup> This suggests the majority of white judges studied had more subconscious negative beliefs about Black people than the general population, which means most American judges could hold subconscious views that have the “potential to produce racially biased distortions in the administration of justice.”<sup>265</sup> Although this does not conclusively prove individual judges are more likely than juries to harbor implicitly biased views that could hinder equitable sentencing results, it does support the proposition.

The study went on to conclude that, despite making a professional commitment to apply the law equally, judges do not tend to exhibit the same behaviors as individuals with “longstanding and intense *personal* commitments to eradicating bias in themselves.”<sup>266</sup> Unlike most judges studied, individuals with such self-awareness tend to not exhibit as many implicit biases, whereas “a professional commitment to equality” impacts “automatic racial associations” much less.<sup>267</sup> Therefore, even if a judge takes a professional oath to apply the law equitably, it will not likely impact the judge’s behavior and decisions in the face of implicit biases.

Judges, like most people, “have cognitive blind spot bias,” which is an ability to see other people are biased, but an inability to see bias in oneself.<sup>268</sup>

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<sup>261</sup> *Revealed: Multimillionaire du Pont Family Heir Was Spared Jail for Raping His Three-Year-Old Daughter Because Judge Decided He Would ‘Not Fare Well’ Behind Bars*, DAILY MAIL (Mar. 31, 2014, 9:07 AM), [https://perma.cc/34E8-YU2K].

<sup>262</sup> Matt Zarrell, *Judge in Brock Turner Case Could Soon Be Thrown Off Bench*, N.Y. DAILY NEWS (Jan. 24, 2018, 12:41 PM), [https://perma.cc/RfV5-2W3A].

<sup>263</sup> Rachlinski et al., *supra* note 30, at 1210.

<sup>264</sup> *Id.* at 1211.

<sup>265</sup> *Id.* at 1221.

<sup>266</sup> *Id.* at 1221–22. An individual who consciously focuses on not being biased is much less likely to harbor implicit biases, than individuals who are required by their job or by law to view situations objectively. *Id.*

<sup>267</sup> *Id.* at 1222.

<sup>268</sup> Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, YALE L.J. F. 391, 396 (2017).

Judges are often unaware of their own tendencies<sup>269</sup> and, because they are generally acting in an individual capacity when making sentencing determinations, have no one to confront them about their biases. However, “[w]ithout checks to ensure equality, bias reigns.”<sup>270</sup> This creates a problem because judges are unlikely to be aware of their biases and will likely fail to question whether implicit or explicit racial biases impact their judgments and decisions.<sup>271</sup> Without having other individuals to debate, discuss, and communicate with when making sentencing decisions, a judge will rely on his own perception of justice, even if he holds implicit biases. The judiciary does not need to be “consciously biased” for race and ethnicity to lead to “pernicious and disturbing consequences on behaviors and judgments.”<sup>272</sup>

### C. *The Role of Appellate Courts*

A discretionary sentencing decision made by a trial court is presumed to be correct when under review by an appellate court, and the higher “court will look for reasons to sustain [the] trial court’s discretionary decision.”<sup>273</sup> This current procedure for sentencing review fails to act as a safety net for unreasonable sentencing decisions made by trial courts. Because the standard is so high and because trial judges are afforded such broad discretion, an appellate judge often has little to no power to change it, even if she disagrees with the sentence.<sup>274</sup> This lack of any substantial review further contributes to an individual judges’ ability to determine sentencing based on his own worldviews—generally those of a white male.<sup>275</sup> “[W]hite men cast a long shadow over state courts”<sup>276</sup> and hold positions as state judges at a rate that nearly doubles the number of white men in the United States’ population as a whole.<sup>277</sup> Given the fact that nearly half of all federal district court judges are white males, and that the overwhelming majority of state benches consist

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<sup>269</sup> Salman et al., *supra* note 226.

<sup>270</sup> *Id.*

<sup>271</sup> Bennett, *supra* note 268, at 397.

<sup>272</sup> Richardson, *supra* note 239, at 892.

<sup>273</sup> 5 AM. JUR. 2D *Appellate Review* § 579 (2018).

<sup>274</sup> *Id.* (“A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court . . .”).

<sup>275</sup> See BARRY J. McMILLION, CONG. RES. SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 17–19 (2017) (footnotes omitted) (“Of the 570 active U.S. district court judges serving on June 1, 2017, 406 (71%) were white, 81 (14%) were African American, 58 (10%) were Hispanic, 16 (3%) were Asian American, 1 (.02%) was American Indian, and 8 (1.4%) were multiracial. . . . [and] white men represent 49.3% of federal district court judges . . .”).

<sup>276</sup> George & Yoon, *supra* note 232, at 1903.

<sup>277</sup> *Id.* at 1907.

of white people,<sup>278</sup> most judges are likely impacted by some sort of implicit, if not explicit, biases against people of color when making sentencing decisions. Approximately four in ten people in the United States are people of color; however, less than two out of ten judges are people of color, and “in sixteen states, judges of color account for fewer than one in ten state judges.”<sup>279</sup>

## V. JURY SENTENCING: A POTENTIAL SOLUTION

In capital cases where defendants are found guilty of murder and their life is on the line, most juries are granted the authority to determine the sentence,<sup>280</sup> but in cases where defendants are found guilty of other crimes, a single judge is usually authorized to have the final say.<sup>281</sup> In capital cases, juries are entrusted to decide whether the defendant should receive a death sentence, presumably based on the assumption that juries as a whole can be more impartial than individual judges.<sup>282</sup> However, unbiased sentencing in other criminal matters is equally important, especially from the modern retributivist perspective.<sup>283</sup> In recent years, some scholars and members of the legal community have begun to reconsider and even promote the concept of jury sentencing in all criminal trials as opposed to judicial sentencing.<sup>284</sup> Proponents of jury sentencing have good reason to believe judicial sentencing discretion should be eliminated and left to juries.<sup>285</sup> That said, jury sentencing may be an effective solution to an inequitable system that allows those who intentionally kill people of color to walk free.<sup>286</sup>

Relevant arguments in favor of judicial sentencing over jury sentencing “typically rel[y] on certain assumptions about the[ir] relative sentencing competence.”<sup>287</sup> Specifically, two important arguments exist that attempt to justify broad judicial discretion in sentencing as opposed to jury sentencing: (1)

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<sup>278</sup> *Id.* at 1903.

<sup>279</sup> *Id.*

<sup>280</sup> Hoffman, *supra* note 25, at 954 n.4.

<sup>281</sup> *Id.* at 953 n.1.

<sup>282</sup> *See id.* at 954, 990; *see also* U.S. CONST. amend. VI.

<sup>283</sup> *See* discussion *supra* Section II.B.2.

<sup>284</sup> *See id.*; *see also* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 *YALE L.J.* 1775 (1999).

<sup>285</sup> Hoffman, *supra* note 25, at 956.

<sup>286</sup> *Id.* at 951, 953 (“There are powerful historical, constitutional, empirical, and policy justifications for a return to the practice of having juries, not judges, impose sentences in criminal cases. . . . One of the paradoxes of the American criminal justice system is that it reposes almost unassailable confidence in jurors’ ability to reach just verdicts on guilt or innocence, but almost no confidence in their ability to impose just sentences.”).

<sup>287</sup> *Id.* at 985.

“judges are less susceptible to prejudice than jurors” and (2) “judges are more lenient than juries.”<sup>288</sup> However, empirical evidence tends to show these arguments have significant flaws and supports the proposition that judges may not always be the most suitable decision-makers when it comes to equitable sentencing.<sup>289</sup>

#### *A. Sentencing Bias*

Social science research disproves the conclusion that judges are less susceptible to prejudice than juries.<sup>290</sup> One study conducted by Alfred Blumstein and Jacqueline Cohen, which focused on “ordinary people’s views of the appropriate length of sentences for crimes,” measured “those views across different racial, gender, and educational strata.”<sup>291</sup> Blumstein and Cohen’s study on “Sentencing of Convicted Offenders” showed different demographic groups exhibited substantial agreement in terms of the sentencing severity that should be imposed on perpetrators of various offenses.<sup>292</sup> The researchers concluded this “sugge[sted] the feasibility of generating consensus on a proportional, just deserts sentencing schedule.”<sup>293</sup> This means that groups, such as juries, are likely effectively able to generate proportional sentencing determinations that coincide with the criminal punishment policy goal of retribution.

[I]t appears . . . more dangerous to leave the sentencing decision to a single person, whose membership in a particular group might skew his or her views considerably, than to leave it to many people, whose memberships in many groups will force them to accommodate their inter-strata differences.<sup>294</sup>

Additionally, the view that juries are more biased than judges may stem from evidence showing race-based differences in capital cases.<sup>295</sup> Although

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<sup>288</sup> *Id.* at 985–86.

<sup>289</sup> *Id.* at 951.

<sup>290</sup> *Id.* at 986.

<sup>291</sup> Hoffman, *supra* note 25, at 986.

<sup>292</sup> Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public’s View*, 14 L. & SOC’Y REV. 223 (1980).

<sup>293</sup> *Id.* at 223.

<sup>294</sup> Hoffman, *supra* note 25, at 986–87. Of course, not all juries are racially diverse, especially in locales where racism remains prevalent and when lawyers are able to utilize current voir dire procedures to weed out people of color from juries. See *infra* Section V.A. However, altering voir dire procedures and changing jury composition requirements could help create juries that are more representative of the actual population. *Id.*

<sup>295</sup> Hoffman, *supra* note 25, at 987 n.138.

jurors decide capital sentences in most states, data fails to support the belief that racial disparities in death sentences can be directly attributed to the juries imposing the sentence.<sup>296</sup> “Instead, it appears that when there are racial differences in death cases, they manifest themselves early in the process—in the charging and other pretrial stages of the case—and not in the sentencing.”<sup>297</sup> Additionally, as Judge Morris Hoffman points out, if judges are actually less susceptible to prejudice than jurors, it would not make sense for the system to trust juries “with the most important and prejudice-sensitive part of the trial—the guilt phase.”<sup>298</sup>

### B. Sentencing Severity

Contrary to the conventional belief that juries are more sympathetic to defendants, judges actually acquit more.<sup>299</sup> From 1989 to 2002, the federal judicial conviction rate was fifty-five percent compared to the federal jury conviction rate of eighty-four percent,<sup>300</sup> which suggests juries punish criminal defendants at a higher rate than judges. As far as sentencing goes, “[p]racticitioners seem to assume that juries would be harsher sentencers than judges,” but evidence fails to support this proposition as well.<sup>301</sup> Even if juries are harsher sentencers than judges, it might not necessarily be a problem, depending on the defendant and the nature of the crime committed.<sup>302</sup>

Judge Morris Hoffman notes, “[a]s for juror harshness . . . it is not clear to me why the critics assume these are bad things.”<sup>303</sup> He continues by posing a particularly poignant rhetorical question, “[w]hy does the system assume

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<sup>296</sup> *Id.* at 987.

<sup>297</sup> *Id.* at 987 n.138. Studies have shown “the influence of race was stronger during earlier stages of litigation—such as the decision by the prosecutor to pursue the death penalty—than during later stages.” *Id.* (citing SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 22 (1989)).

<sup>298</sup> *Id.* at 990.

<sup>299</sup> Jason Krause, *Judge v. Jury*, A.B.A. J. (June 5, 2007, 7:06 AM), [<https://perma.cc/257E-CDS2>].

<sup>300</sup> *Id.*

<sup>301</sup> Hoffman, *supra* note 25, at 988. For example, until 2017, Alabama law permitted judges to use their judicial discretion to override a jury’s decision in capital cases. *See* ALA. CODE §§ 13A-5-46, -47 (1975). “[J]udges almost exclusively use[d] this power to turn life sentences into death sentences, although [they were] also authorized to reduce death verdicts to life if they so [chose].” STEVENSON, *supra* note 2, at 70. “Since 1976, judges in Alabama have overridden jury sentencing verdicts in capital cases 111 times. In 91 percent of these cases, judges replaced life verdicts from juries with death sentences.” *Id.* On April 11, 2017, “Alabama became the last state to abolish judge override . . .” *The Death Penalty in Alabama: Judge Override*, EQUAL JUST. INITIATIVE, [<https://perma.cc/KT5R-DTNM>] (last visited May 6, 2021).

<sup>302</sup> *See* Hoffman, *supra* note 25, at 988.

<sup>303</sup> *See id.* at 9

that jurors are too harsh rather than that judges are too lenient?”<sup>304</sup> Especially in a climate focused on retribution in punishment, perhaps harsher sentences are desirable, particularly in serious criminal cases. Given this trend for retribution, “[a] return to jury sentencing” would produce results more in line with American policy goals.<sup>305</sup> “If the system punishes people not to deter them or to cure them, but simply to have them pay for what they did, then the act of sentencing is indeed a moral act and not a legal one.”<sup>306</sup> In which case, judges would be no more fit to determine adequate sentences than any other layperson.<sup>307</sup>

At the very least, an argument can be made that trial judges’ intense day-to-day experiences with a part of life about which most jurors have no knowledge actually makes judges worse sentencers rather than better ones: [their] very experience [may deaden them] to the seriousness of crimes and the requirements of just desert. Ordinary citizens with little or no exposure to criminal excess may be the best people to gauge that excess.<sup>308</sup>

## VI. THE PROBLEM OF BIASED JURIES

Although this Article argues juries may be less biased and more effective decision-makers in sentencing matters than many judges acting alone in their sentencing determinations, juries and individual jurors also hold implicit biases that can negatively impact racially equitable sentencing outcomes.<sup>309</sup> This problem is highlighted by the Black Lives Matter movement, which points out that the officers who kill unarmed Black people are generally not convicted by judges *or* juries.<sup>310</sup> However, individuals with explicit biases can be kept from serving on juries by implementing effective voir dire measures,<sup>311</sup> and implicit biases can be effectively reduced or even eliminated from juries through the use of the Implicit Association Test, which can educate and weed out individuals with implicit biases.<sup>312</sup> Therefore, jury sentencing could

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 998.

<sup>306</sup> *Id.*

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

<sup>308</sup> Hoffman, *supra* note 25, at 990–91.

<sup>309</sup> Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 829, 829 (2012) (“[J]urors harbor not only explicit, or conscious bias, but also implicit, or unconscious, bias.”).

<sup>310</sup> See Harriot, *supra* note 120 (explaining why police are treated differently than ordinary civilians by judges and juries in American courts).

<sup>311</sup> See *infra* Section V.A.

<sup>312</sup> See *infra* Section V.B.



provide the benefits of group discussion and relatability to the defendant while also preventing racial bias from obstructing neutral decision making in sentencing.

Although many aspects of the current system contribute to racial inequality in the United States, sentencing is one area where injustice is prominent. Both trial and grand juries “give every possible benefit of the doubt” when it comes to police officers killing on duty; however, “once a case goes to court, and even a conviction, the tendency to give police officers every benefit appears to extend to the sentencing as well.”<sup>313</sup> This means that even if a grand jury indicts the defendant officer and the trial jury convicts him, the judge can stand in the way of justice being served in terms of adequate sentencing length.<sup>314</sup> Although juries might protect defendants, such as in instances of jury nullification for drug convictions,<sup>315</sup> in many cases, “a jury drawn from the community might actually protect the community by convicting.”<sup>316</sup> Juries “give the community a voice in criminal justice.”<sup>317</sup> Alternatively, judges like Judge Karlin “who are drawn from the legal elite, are likely less skeptical of police than inner-city residents, many of whom may have experienced police misconduct firsthand.”<sup>318</sup>

#### *A. Better Voir Dire*

Because American “laws are premised in part on the idea that our courts will be staffed by judges” capable of understanding the viewpoints and circumstances of the communities they are designed to serve, the “courts must be representative to fulfill their purposes.”<sup>319</sup> However, because federal and state judges are overwhelmingly white males,<sup>320</sup> the judiciary is unrepresentative of the population, and most judges are likely tainted by implicit biases

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<sup>313</sup> Taylor Kate Brown, *The Cases Where US Police Have Faced Killing Charges*, BBC NEWS (Apr. 8, 2015), [https://perma.cc/WB6F-MYYA]; see also Harriot, *supra* note 120.

<sup>314</sup> See, e.g., *supra* text accompanying notes 10–17 (discussing superior court judge’s suspension of a ten-year sentence and instead placing the defendant on probation).

<sup>315</sup> See, e.g., Lily Dane, *Good News: Jury Nullification is Interfering with Marijuana Convictions*, DAILY SHEEPLE (July 15, 2014), [https://perma.cc/84F2-8H4G] (“[A] judge in Montana threw out a man’s criminal marijuana possession charge because he could not find a jury that would convict the man for simple possession of marijuana . . .”).

<sup>316</sup> See Daniel Epps, Opinion, *Police Officers Are Bypassing Juries to Face Judges*, WASH. POST (Sept. 20, 2017), [https://perma.cc/HQ99-GT5Z].

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* (“Advocates for officers may argue that judges are less biased against the police than city residents. But one person’s ‘bias’ is another’s lived experience.”).

<sup>319</sup> George & Yoon, *supra* note 232, at 1908 (“The intuition here is that because judges inevitably draw upon their own experiences when deciding cases, the judiciary benefits when their experiences draw upon a broader set of the population.”).

<sup>320</sup> *Id.*

against individuals outside their community. Although having a more diverse judiciary might solve some of the issues associated with sentencing disparity, it would be difficult to quickly and effectively create such a judiciary. However, creating more diverse and representative juries would be a fairly easy task in comparison. To eradicate or reduce unjust sentencing determinations, judges and attorneys can utilize better voir dire procedures.

The voir dire process of jury selection varies by jurisdiction; however, two legally recognized goals are relevant in all jurisdictions: identifying (1) jurors who are unable to be fair and neutral and eliminating them for cause and (2) those who fail to meet legal standards and eliminating them with a peremptory challenge.<sup>321</sup> In 1990, the media attacked the quality of jury decisions, which led to the American Bar Association's ("ABA") development of the *ABA Principles for Juries and Jury Trials*.<sup>322</sup> Principle Ten says "courts should use open, fair and flexible procedures to select a representative pool of prospective jurors" and that "[j]uror source pools should be assembled so as to assure representativeness and inclusiveness."<sup>323</sup> Principle Eleven says, "courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury."<sup>324</sup> However, these principles might not be enough on their own to ensure their adherence.

Currently, lawyers can exclude potential jurors for legitimate reasons but may also dismiss more with peremptory challenges without having to give a reason.<sup>325</sup> State numbers for peremptory challenges vary, but in federal felony cases, the prosecutor has six, and the defense usually has ten.<sup>326</sup> Although it may not be possible to eliminate racial discrimination, one solution is to "limit the number of jurors that lawyers can strike for no reason at all to just one or two per side."<sup>327</sup> Additionally, a requirement that the jury must be as representative of the population as possible could increase the chances that individual jurors would bring different views to the table, which could reduce instances of racial bias in a juror who was not weeded out through traditional voir dire methods.

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<sup>321</sup>See Laurel Johnson, *The Peremptory Paradox: A look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENVER CRIM. L. REV. 201, 202–04 (2015).

<sup>322</sup>Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, 47 JUDGES' J. 14, 14 (2008).

<sup>323</sup>AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 10 (2005) (emphasis removed).

<sup>324</sup>*Id.* at 13 (emphasis removed).

<sup>325</sup>Jon O. Newman, Opinion, *To Save Our Justice System, End Racial Bias in Jury Selection*, N.Y. TIMES (May 27, 2016), [<https://perma.cc/JTX6-75HP>].

<sup>326</sup>*Id.*

<sup>327</sup>*Id.*

*B. The Implicit Association Test*

Although many potential jurors may still have the implicit biases that negatively impact fair outcomes for people of color in the American penal system, the Implicit Association Test (“IAT”) could also be used to reduce the harm implicit biases may cause. The IAT is a test that “aims to reveal the presence and strength of the test taker’s implicit bias.”<sup>328</sup> The test, which was developed by social psychology researchers Anthony Greenwald, Mahzarin Banaji, and Brian Nosek and published online in 1998,<sup>329</sup> “measures attitudes and beliefs that people may be unwilling or unable to report.”<sup>330</sup> As has been suggested by various legal scholars, including Anna Roberts, the IAT could be used to both screen possible jurors as well as educate them about implicit bias.<sup>331</sup> Roberts argues the IAT should be used in the early stages of juror orientation, which would “allow[] test takers physically to experience their bias.”<sup>332</sup> If utilized and implemented as both a voir dire measure as well as an educational tool throughout all United States jurisdictions, the IAT could solve or significantly reduce the problem of juror bias, thus making jury members the prime candidates to determine criminal sentences.

## VII. CONCLUSION

Latasha Harlins—remember that name. ‘Cause, a bottle of juice ain’t something to die for.

Tupac Shakur, 1993<sup>333</sup>

According to Judge Morris Hoffman, “[t]here are no constitutional, empirical, or policy reasons why a [civil] defendant . . . has the right to have both his guilt and damages assessed by a jury, but a criminal defendant has only half that right.”<sup>334</sup> As a country that prides itself on its ability to provide equality for *all*, the current systems that contribute to the disenfranchisement of black people must be altered to show that black lives *do* matter. To do so, the United States must deal with the pervasive institutional racism and racial subordination present throughout its criminal justice system. Change is necessary to achieve true justice and altering sentencing methods to reduce racial

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<sup>328</sup> Roberts, *supra* note 309, at 829.

<sup>329</sup> See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

<sup>330</sup> *Overview*, PROJECT IMPLICIT, [https://perma.cc/E5QS-X2N5] (last visited May 6, 2021).

<sup>331</sup> See Roberts, *supra* note 309, at 831.

<sup>332</sup> *Id.*

<sup>333</sup> 2PAC, *Something 2 Die 4*, on STRICTLY 4 MY N—Z (Interscope Records 1993).

<sup>334</sup> Hoffman, *supra* note 25, at 951. “No state takes the decision about compensatory damages away from juries in ordinary, common-law-based civil cases.” *Id.* at 953 n.2.

bias can help facilitate that change. “Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.”<sup>335</sup>

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<sup>335</sup> Letter from Martin Luther King, Jr. to Bishop C.C.J. Carpenter et al. (Apr. 16, 1963), *in* WHY WE CAN'T WAIT 64, 75 (1994).