



R E S E A R C H A N D A D V O C A C Y F O R R E F O R M



Report of The Sentencing Project to the United Nations Human Rights Committee

**Regarding Racial Disparities in the United
States Criminal Justice System**

August 2013

The United States criminal justice system is the largest in the world. At yearend 2011, approximately 7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails.¹ The U.S. has the highest incarceration rate in the world, dwarfing the rate of nearly every other nation.²

Such broad statistics mask the racial disparity that pervades the U.S. criminal justice system. Racial minorities 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. African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males.³ If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males.⁴ Racial and ethnic disparities among women are less substantial than among men but remain prevalent.⁵

The source of such disparities is deeper and more systemic than explicit racial discrimination. The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and minorities. The former is the system the United States describes in its report: a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model due to a number of factors, each of which contributes to the overrepresentation of such individuals in the system. As Georgetown Law Professor David Cole states in his book *No Equal Justice*,

These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully

¹ U.S. Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, 1, 3 tbl.2 (Nov. 2012).

² See International Centre for Prison Studies, *World Prison Brief* (2013).

³ U.S. Bureau of Justice Statistics, *Prisoners in 2011*, 8 tbl.8 (Dec. 2012).

⁴ Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 supp. 3 *The Prison Journal* 87S, 88S (Sept. 2011) (hereinafter Mauer).

⁵ *Id.*

protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.⁶

By creating and perpetuating policies that allow such racial disparities to exist in its criminal justice system, the United States is in violation of its obligations under Article 2 and Article 26 of the International Covenant on Civil and Political Rights to ensure that all its citizens—regardless of race—are treated equally under the law. The Sentencing Project notes that the Committee has specifically asked the U.S. government to address the racial disparities in its criminal justice system in paragraph 4 of its List of Issues. We welcome this opportunity to provide the Committee with an accurate portrait of the current racial disparity in the U.S. criminal justice system.

Established in 1986, The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. Staff of The Sentencing Project have testified before the U.S. Congress and state legislative bodies and have submitted amicus curiae briefs to the Supreme Court of the United States on various issues related to incarceration and criminal justice policy. The organization's research findings are regularly relied upon by policymakers and covered by major news outlets.

This report chronicles the racial disparity that permeates every stage of the United States criminal justice system, from arrest to trial to sentencing. In particular, the report highlights the influence of implicit racial bias and recounts the findings of the burgeoning scholarship on the role of such bias in the criminal justice system. The report then details the ways in which the Supreme Court of the United States has curtailed potential remedies by discounting the importance of implicit bias and requiring that intentional discrimination be proven in constitutional challenges. Finally, the report offers recommendations on ways that federal, state, and local officials in the United States can work to eliminate racial disparity in the criminal justice system and uphold its obligations under the Covenant.

⁶ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 8-9 (1999) (hereinafter Cole).

RACIAL DISPARITY IN POLICE ACTIVITY

Roughly 12% of the United States population is black. Yet in 2011, black Americans constituted 30% of persons arrested for a property offense and 38% of persons arrested for a violent offense.⁷ Black youths account for 16% of all children in America yet make up 28% of juvenile arrests.⁸

One contributing factor to the disparity in arrest rates is that racial minorities commit certain crimes at higher rates. Specifically, data suggests that black Americans—particularly males—tend to commit violent and property crimes at higher rates than other racial groups.⁹ Other studies, however, demonstrate that higher crime rates are better explained by socioeconomic factors than race: extremely disadvantaged neighborhoods experience higher rates of crime regardless of racial composition.¹⁰ Because African Americans constitute a disproportionate share of those living in poverty in the United States,¹¹ they are more likely to reside in low-income communities in which socioeconomic factors contribute to higher crime rates. As such, Ohio State University researchers Lauren Krivo and Ruth Peterson found that “it is these differences in disadvantage that explain the overwhelming portion of the difference in crime, especially violent crime, between white and African American communities.”¹²

A close examination of some other areas of the law demonstrates that higher crime rates cannot fully account for the racial disparity in arrest rates. A growing body of scholarship suggests that a significant portion of such disparity may be attributed to implicit racial bias, the unconscious associations humans make about racial groups. Implicit biases (commonly referred to as stereotypes) are activated when individuals must make fast decisions with imperfect information; biases—regardless of their accuracy—“fill in” missing information and allow individuals to make decisions in the

⁷ FBI Criminal Justice Information Services Division, *Crime in the United States, 2011*, tbl.43A, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43> (Sept. 2012).

⁸ National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, 3 (2007).

⁹ See Cole at 41-42.

¹⁰ See Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 Soc. F. 619 (1996) (hereinafter Krivo & Peterson).

¹¹ See Human Rights Committee, *Concluding Observations of the Human Rights Committee on the United States of America*, ¶ 21, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

¹² Krivo & Peterson at 642.

limited time allowed.¹³ Extensive research has shown that in such situations the vast majority of Americans of all races implicitly associate black Americans with adjectives such as “dangerous,” “aggressive,” “violent,” and “criminal.”¹⁴ Since the nature of law enforcement frequently requires police officers to make snap judgments about the danger posed by suspects and the criminal nature of their activity, subconscious racial associations influence the way officers perform their jobs.

The effects of racial bias are particularly well demonstrated in the areas of traffic stops and drug law enforcement. Between 1980 and 2000, the U.S. black drug arrest rate rose from 6.5 to 29.1 per 1,000 persons; during the same period, the white drug arrest rate increased from 3.5 to 4.6 per 1,000 persons.¹⁵ Yet the disparity between the increase in black and white drug arrests does not correspond to any significant disparity in black drug activity. In 2012, for instance, the National Institute on Drug Abuse published a study surveying drug usage among secondary school students in the United States from 1975-2011. The study found that white students were slightly more likely to have abused an illegal substance within the past month than black students.¹⁶ Yet from 1980-2010, black youth were arrested for drug crimes at rates more than double those of white youth.¹⁷ Disparity between black drug activity and black arrest rates is also present in adult populations: in Seattle in 2002, for instance, African Americans constituted 16% of observed drug dealers for the five most dangerous drugs but 64% of drug dealing arrests for those drugs.¹⁸ While these arrests were for trafficking rather than possession, the modest evidence available suggests that most drug users purchase drugs from a dealer of their own race.¹⁹

Data on traffic stops also demonstrates the influence of racial bias on law enforcement practices and arrest rates. In the U.S. Department of Justice’s report on *Contacts Between*

¹³ See, e.g., Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483, 485 (2004).

¹⁴ See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psychol.* 876, 876 (2004).

¹⁵ Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *Criminology* 105, 106 (2006).

¹⁶ National Institute on Drug Abuse, *Monitoring the Future: National Survey Results on Drug Use, 1975-2011*, 130 *tbl.4-7* (2012).

¹⁷ Office of Juvenile Justice and Delinquency Prevention, *Law Enforcement and Juvenile Crime*, available at http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05274 (Dec. 2012).

¹⁸ Beckett, 44 *Criminology* at 117 *tbl.2*. The five drugs observed were methamphetamine, heroin, powder cocaine, crack cocaine, and ecstasy.

¹⁹ K. Jack Riley, National Institute of Justice, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Major U.S. Cities*, 1 (Dec. 1997).

Police and the Public released in 2011, the Bureau of Justice Statistics found that while white, black, and Hispanic drivers were stopped at similar rates nationwide, black drivers were three times as likely to be searched during a stop as white drivers and twice as likely as Hispanic drivers.²⁰ Furthermore, black drivers were twice as likely to experience the use or threat of violent force at the hands of police officers than both white and Hispanic drivers.²¹ Such statistics are consistent with research indicating that the implicit racial association of black Americans with dangerous or aggressive behavior significantly increases police officers' willingness to employ violent or even deadly force against them.²²

The national statistics mask greater disparities in some locales. In one New Jersey study, racial minorities made up 15% of drivers on the New Jersey Turnpike, yet 42% of stops and 73% of arrests made by police were of black drivers—even though white drivers and racial minorities violated traffic laws at almost identical rates. Other data from New Jersey showed that whites were less likely to be viewed as suspicious by police—even though stopped white drivers were twice as likely to be carrying illegal drugs as stopped black drivers and five times as likely to be carrying contraband as stopped Hispanic drivers.²³ In Volusia County, Florida, 148 hours of video footage documenting more than 1,000 highway stops by state troopers showed that only five percent of drivers on the roads were racial minorities but minorities constituted more than eighty percent of the people stopped and searched by police.²⁴ The police practice of targeting minority drivers has become so widespread that many black communities have begun referring to the phenomenon as “DWB” or “driving while black.”²⁵

The most widely publicized example of racial profiling in recent times is the “stop and frisk” tactic employed by the New York Police Department (NYPD). African Americans constitute 25% and Hispanic Americans constitute 29% of New York City's population.²⁶ Yet between 2010 and 2012, 52% of those stopped by the NYPD during

²⁰ Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and Public*, 2008, 1 (Oct. 2011).

²¹ *Id.* at 12 tbl.18.

²² See Joshua Correll et al., *The influence of stereotypes on decisions to shoot*, 37 *Eur. J. of Soc. Psy.* 1102, 1115 (2007); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. Personality and Soc. Psy.* 1314, 1328 (2002).

²³ Alexander at 133.

²⁴ David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 *J. Crim. L. & Criminology* 544, 561 (1997).

²⁵ Cole at 36.

²⁶ U.S. Census Bureau, *Census 2010* (2010).

“stop and frisk” were black and 32% were Hispanic.²⁷ White New Yorkers are 44% of the city’s population,²⁸ but only 9% of those stopped were white.²⁹ Nevertheless, among those stopped, arrest rates were virtually the same across races,³⁰ and blacks and Hispanics were slightly less likely than whites to be caught with weapons or contraband such as drugs.³¹

NYPD often cites the fact that racial minorities tend to be clustered in neighborhoods designated as “high crime areas” to justify racial disparity in stop rates. Yet data compiled by Dr. Jeffrey Fagan shows that when New York’s neighborhoods are divided into quintiles based on crime rates, NYPD officers cite “high crime area” as the justification for stops at nearly identical rates in every quintile.³² In other words, police consider neighborhoods with the lowest crime rates to be “high crime areas” just as much as neighborhoods with the highest crime rates. The racial disparity in the implementation of “stop and frisk” has led to ongoing class action litigation against the NYPD led by the Center for Constitutional Rights. In August 2013, U.S. District Court Judge Shira Scheindlin ruled that the policy violated the Fourteenth Amendment’s promise of equal protection and mandated that the police department implement a variety of specific remedies.

RACIAL DISPARITIES IN TRIALS

Contact with law enforcement officials and arrests are merely the first step in minority defendants’ journey through the criminal justice system. Once racial minorities enter the system, they continue to confront racial bias at every stage of litigation. This section highlights the influence of racial bias on all the major actors in a criminal trial: defense counsel, prosecutors, judges, and juries. It is important to note that the portions of following section that address indigent defense counsel and prosecution are not sweeping indictments of all public defenders and prosecutors in the United States. Thousands of public defenders and prosecutors work diligently and effectively each day to represent their clients and ensure that justice is done in a racially fair manner. Nevertheless, data demonstrates that implicit racial bias—in combination with

²⁷ Second Supplemental Report of Jeffrey Fagan, Ph.D. at 11 tbl.3, *Floyd v. City of New York*, 2013 U.S. Dist. LEXIS 68790 (S.D.N.Y. 2013) (08 Civ. 01034 (SAS)) (hereinafter Fagan).

²⁸ U.S. Census Bureau, *Census 2010* (2010).

²⁹ Fagan at 11 tbl.3.

³⁰ *Id.* at 34 tbl.14. Arrest rates were 6.73% for whites, 6.19% for blacks, and 6.36% for Hispanics.

³¹ *Id.* at 35 tbl.15. Weapons or contraband were seized in 2.16% of white stops, 1.43% of black stops, and 1.49% of Hispanic stops.

³² *Id.* at 33 fig.13.

challenges caused by inadequate resources and training—influences both indigent defense and prosecutorial decisionmaking and contributes to racial disparity in the criminal justice system in significant ways. Where current policies allow implicit racial bias to go unmonitored and unchecked, they warrant closer scrutiny and present opportunities for reform.

Indigent Defense Counsel

Fifty years after the celebrated Supreme Court decision *Gideon v. Wainwright* held that indigent defendants have a right to publicly appointed defense counsel in all criminal trials,³³ U.S. Attorney General Eric Holder declared that “America’s indigent defense counsel systems exist in a state of crisis.”³⁴ Most indigent defense agencies are grossly understaffed and underfunded. In 2012, more than 70% of public defender offices reported that obtaining adequate funding and providing adequate compensation for their attorneys were extremely or very challenging to the ability of their office to provide indigent defense services.³⁵

An analysis of funding at both the state and federal levels indicates that effective indigent defense is not a priority in many jurisdictions in the United States. At the state and local level, 15,026 public defenders in 957 indigent defense offices handled 5,572,450 cases in 2007.³⁶ On average, each office handled 5,823 new cases and each public defender handled 371 cases—more than one new case for each day of the year. The states spent a total of \$2.3 billion on indigent defense in 2007, or \$414.55 per case.³⁷ Furthermore, of the \$5.9 billion in federal grants that agencies could have used for indigent defense, fully two thirds of agencies reported that they did not allocate any funding for that purpose.³⁸ Indeed, only 54% of agencies reported that they were even aware that discretionary funds *could* be used for indigent defense.³⁹ Of the agencies that

³³ 372 U.S. 335 (1963).

³⁴ Eric Holder, Remarks at the Justice Department’s 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (Mar. 15, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html>.

³⁵ U.S. Gov’t Accountability Office, GAO-12-569, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, 10 (May 2012) (hereinafter GAO-12-569).

³⁶ Bureau of Justice Statistics, *Census of Public Defender Officers, 2007*, 3 tbl.1 (Sept. 2010).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 29 tbl.8.

did allocate grant money to indigent defense, the amount allocated for that purpose constituted only 4.7% of their total grant money allocations.⁴⁰

The crippled state of indigent defense in the United States disproportionately affects racial minorities because black and Hispanic defendants are far more likely to need the services of a public defender than their white counterparts. The median income for black and Hispanic Americans is roughly \$20,000 less than the median income for white Americans.⁴¹ The poverty rate is roughly 25% for both black and Hispanic Americans, compared to 9% for white Americans.⁴² In the criminal justice context, such statistics mean that black and Hispanic defendants are often more likely than white defendants to rely on an indigent defense system of overworked, underpaid attorneys—therefore increasing their chances of being convicted.

The chronic overburdening of public defenders also creates an opportunity for implicit racial bias to influence the decisions they make. Because public defenders are responsible for many more cases than they can effectively manage, they must decide which of their cases will receive the bulk of their limited resources and attention—a process called “triage” because of its similarity to that of emergency room doctors in deciding which of their patients to treat first. As professors Song Richardson and Phillip Goff write, “for most [public defenders], the question is not ‘how do I engage in zealous and effective advocacy,’ but rather ‘given that all my clients deserve aggressive advocacy, how do I choose among them?’”⁴³

As the law enforcement context demonstrates, implicit racial bias thrives in situations in which individuals must make snap judgments with imperfect information, particularly when they are cognitively depleted, anxious, or distracted—precisely the type of environment in which most public defenders in the United States work on a daily basis. Racial bias may affect public defenders’ initial appraisal of which cases are worth their time and energy as well as how they interact with their clients.⁴⁴ While specific research has yet to be done on the extent to which implicit racial bias influences the indigent

⁴⁰ *Id.* at 32-33 figs.9 & 10. The majority of discretionary grant funding was used for law enforcement purposes. See *id.* at 2-25 figs.5&6.

⁴¹ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, 6 tbl.1 (Sept. 2011).

⁴² *Id.* at 15 tbl.14.

⁴³ L Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2632 (2013).

⁴⁴ For an extensive discussion of the ways implicit racial bias may affect each of these areas, see *id.* at 2635-38.

defense system, extensive documentation on the impact of implicit racial bias in similar fields strongly suggests that such bias has some impact on public defenders and further contributes to racial disparity in the criminal justice system.⁴⁵

Prosecution

The office of prosecutor is regarded by many as the most powerful position in the U.S. criminal justice system.⁴⁶ Prosecutors decide which cases to investigate, which suspects to charge, which charges to bring, and which penalties to pursue upon conviction. As the U.S. criminal justice system has been flooded with an unprecedented number of defendants over the past three decades, prosecutors have become increasingly subject to the mounting pressures of “triage” similar to public defenders. While the exercise of discretion in such circumstances is not unreasonable, it also creates the opportunity for biased decisionmaking that may contribute further to racial disparity.

The racial disparity revealed by several studies of prosecutorial decisions suggests that implicit racial bias does in fact influence prosecutors’ decisionmaking. A study conducted shortly after the Supreme Court reauthorized the use of capital punishment in 1976 found that the probability of a black defendant being indicted for killing a white person was more than twice as high as that of a white defendant killing a black person. Furthermore, prosecutors were significantly more likely to upgrade cases to felony murder status in cases in which defendants were black rather than white.⁴⁷ Similarly, a study conducted in 1993 in Los Angeles found that 95% of the 4,632 crack cocaine defendants prosecuted in California state court were black and 100% of the 42 crack cocaine defendants prosecuted in federal court were either black or other racial minorities.⁴⁸

One of the most well-studied interactions between racial bias and prosecutorial decisionmaking involves substantial assistance departures. Federal law allows prosecutors to request that a judge “depart” from the mandatory minimum sentence for a crime in a particular case when the defendant has provided “substantial assistance” to

⁴⁵ See, e.g., Chet D. Schrader & Lawrence M. Lewis, *Racial Disparity in Emergency Department Triage*, 49 J. Emergency Med. 511 (2013); Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (Inst. for the Study of Labor, Discussion Paper No. 2764, 2007); Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 Eur. J. Soc. Psychol. 1102 (2007).

⁴⁶ See Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor*, 5 (2008) (hereinafter Davis).

⁴⁷ William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 Crime & Delinq. 563, 611–14 (1980).

⁴⁸ Richard Berk & Alec Campbell, *Preliminary Data on Race Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 37 (1993).

law enforcement. Research shows that prosecutors request substantial assistance departures at higher rates for “salvageable” and “sympathetic” defendants—those who are white, female, and have children.⁴⁹ A 2001 analysis of more than 77,000 cases in the federal system from 1991 to 1994 revealed that black and Hispanic male defendants were significantly less likely to receive substantial assistance departures than white male defendants. This disparity remained even when the data was controlled for the severity of the offense, prior criminal history, and the specific district court’s sentencing tendencies.⁵⁰ When prosecutors did request substantial assistance departures for nonwhite male defendants, the average downward adjustment such defendants received was roughly six months less than that for white male defendants.⁵¹ Accordingly, departures from standard sentencing guidelines accounted for 56% of the total racial disparity in sentence lengths in the federal system from 1991-1994.⁵²

Juries, Trial Judges, and Presumptions of Innocence

Prosecutors and defense attorneys fulfill important roles in American trials by presenting evidence, questioning witnesses, and framing legal issues, but they do not make the final determination of guilt or innocence for defendants. In the American system, that role falls to the jury or—in some cases in certain jurisdictions—the trial judge. One of the most celebrated hallmarks of the United States criminal justice system is the presumption of innocence, the concept that defendants are innocent and must be treated as such until they are proven guilty in a court of law. Yet a growing body of research suggests that implicit racial bias affects trial judges and jury members’ ability to evaluate guilt and innocence objectively, skewing their judgment of black defendants’ cases toward guilty verdicts regardless of the evidence presented at trial.

In 1986, the Supreme Court held in *Batson v. Kentucky* that it is unconstitutional for prosecutors to strike jurors from a jury in a criminal trial on the basis of race.⁵³ Nevertheless, the all-white jury remains far too common a phenomenon in the U.S. An analysis of juries in death penalty cases in 2001, for instance, found that 25% of the

⁴⁹ The “salvageable” and “sympathetic” descriptors were coined by I.H. Nagel & S.J. Schulhofer, *A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines*, 66 So. Cal. L. Rev. 501 (1992).

⁵⁰ David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J. L. & Econ. 285, 308-09 tbl.10 (2001).

⁵¹ *Id.* at 311.

⁵² *Id.* at 303.

⁵³ 476 U.S. 79 (2012).

examined juries had no black members and roughly 70% had two or fewer.⁵⁴ The authors' analysis revealed both a strong "white male dominance effect" and a "black male presence effect" in cases involving black defendants and white victims: the presence of five or more white male jurors dramatically increased the likelihood of conviction and subsequent imposition of a death sentence in such cases, while the presence of one or more black male jurors substantially reduced the probability of the same.⁵⁵ Furthermore, jury members' conception of appropriate punishment polarized along racial lines in black defendant/white victim cases, with white jurors strongly favoring death and black jurors strongly favoring life imprisonment.⁵⁶ Such racial effects were notably absent in capital cases in which the defendant and the victim were members of the same race.⁵⁷

As with other areas of the criminal justice system, research indicates that such racial effects are likely more attributable to implicit racial bias and subconscious activation of racial stereotypes than to explicit racial discrimination. Because American social norms have evolved considerably over the past fifty years, most white American jurors are no longer comfortable expressing overt racial prejudice in their decisionmaking. Nevertheless, research consistently demonstrates that white jurors are substantially more likely to convict black defendants than white defendants based on similar evidence⁵⁸ Interestingly, University of Michigan researchers Samuel Sommers and Phoebe Ellsworth found that white juror racial bias essentially vanishes in cases in which race is a salient factor of the trial.⁵⁹ Sommers and Ellsworth theorize that the prominence of racial issues in a trial may serve as a subtle reminder to white jurors to be on guard against prejudice in their decisionmaking; when race is non-salient in a trial, the same white jurors may let their guard down and allow their decisions to be subconsciously affected by racial stereotyping.⁶⁰

⁵⁴ William Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 191 n.99 (2001).

⁵⁵ *Id.* at 193.

⁵⁶ *Id.* at 200.

⁵⁷ *Id.* at 201.

⁵⁸ See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psy. Pub. Pol'y & L. 201, 217 (2001); see also Justin Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187 (2010) (finding that mock jurors possessed an implicit association between "black" and "guilty").

⁵⁹ Sommers & Ellsworth at 219.

⁶⁰ *Id.* at 209.

A verdict is not immune from the effects of implicit racial bias when it is rendered by a trial judge rather than a jury. A 2009 study led by Cornell Law Professors Jeffrey Rachlinski and Sheri Johnson found the same—or perhaps even higher—levels of implicit racial bias in trial judges as in the general population.⁶¹ The authors’ analysis further showed that judges’ bias influences their decisions in determining both whether to convict defendants and the sentence to impose in each case.⁶²

RACIAL DISPARITY IN SENTENCING

Once minority defendants are convicted, they are likely to be sentenced more harshly than white defendants convicted for similar crimes. As in other areas of the criminal justice system, much overt racial discrimination in the sentencing process has been eliminated over the past decades—yet race remains a significant factor in sentencing decisions. In 2000, Professor Cassia Spohn concluded after her comprehensive survey of 40 studies covering 30 years of sentencing outcomes at both the state and federal levels:

Although it is irrefutable that the primary determinants of sentencing decisions are the seriousness of the offense and the offender’s prior criminal record, race/ethnicity and other legally irrelevant offender characteristics also play a role. Black and Hispanic offenders—and particularly those who are young, male, or unemployed—are more likely than their white counterparts to be sentenced to prison; they also may receive longer sentences than similarly situated white offenders. Other categories of racial minorities—those convicted of drug offenses, those who victimize whites, those who accumulate more serious prior criminal records, or those who refuse to plead guilty or are unable to secure pretrial release—also may be singled out for more punitive treatment.⁶³

Professor Spohn’s conclusion has been further verified by research conducted over the past decade. In his 2001 analysis of 77,236 federal cases from 1991 to 1994, for instance, Professor David Mustard found that even when cases were controlled for the severity of the offense, the defendant’s prior criminal history, and the specific district court’s sentencing tendencies, blacks received sentences 5.5 months longer than whites and Hispanics received sentences 4.5 months longer than whites.⁶⁴ When income was

⁶¹ Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195, 1210 (2009).

⁶² *Id.* at 1220-23.

⁶³ Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 55-56, available at <http://www.justicestudies.com/pubs/livelink3-1.pdf> (2000).

⁶⁴ Mustard, *supra* note 50, at 300. Significantly, females of all races received sentences 5.5 months shorter than males of all races.

considered as a variable, the disparity became even greater: blacks with incomes of less than \$5,000 were sentenced most harshly of all, receiving sentences that were on average 6.2 months longer than other defendants.⁶⁵ Because the average sentence length was 46 months, this data means that poor black defendants received sentences on average 13% longer than other defendants.

Capital Punishment

Racial disparity is particularly pronounced in cases involving the most severe penalty imposed by the U.S. criminal justice system: the death penalty. The United States has executed 1,335 individuals⁶⁶ since the Supreme Court reinstated capital punishment in its 1976 decision *Gregg v. Georgia*.⁶⁷ As of January 1, 2013, more than 3,100 prisoners awaited execution on death row in the U.S.⁶⁸ Of those, 42% were black.⁶⁹

Numerous studies have shown that two racial variables affect capital punishment sentencing: the race of the perpetrator and the race of the victim. First, defendants convicted of the homicide of a white victim are substantially more likely to face the death penalty than those convicted of killing nonwhite victims. White people constitute half of murder victims in the United States each year,⁷⁰ but 77% of persons executed since 1976 were convicted of killing white victims.⁷¹ Comparatively, black people also constitute half of murder victims,⁷² but only 13% of persons executed since 1976 were convicted of killing black victims.⁷³ A 1990 Government Accountability Office survey of 28 separate studies found that in 82% of the studies, the race of the victim was shown to influence the likelihood of a defendant receiving the death penalty, with those convicted of murdering white victims more likely to be sentenced to death than those convicted of murdering black victims even when the cases were controlled for crime-specific variables.⁷⁴

⁶⁵ *Id.* at 301.

⁶⁶ Death Penalty Information Center, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited June 13, 2013).

⁶⁷ 428 U.S. 153 (1976).

⁶⁸ Deborah Fins, NAACP Legal Defense Fund, *Death Row USA: Winter 2013*, 1 (2013) (hereinafter *Death Row USA*). The exact number was 3,125.

⁶⁹ *Id.*

⁷⁰ Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008*, 3 tbl.1 (November 2011).

⁷¹ *Death Row USA* at 5.

⁷² Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008*, 3 tbl.1 (November 2011).

⁷³ *Death Row USA* at 5.

⁷⁴ U.S. Gov't Accountability Office, GAO GGD-90-557, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, 5 (Feb. 1990) (hereinafter GAO GGD-90-557).

Second, black defendants are more likely to be sentenced to death regardless of the race of their victims. An extensive 1998 study of Philadelphia death penalty cases found that black defendants were 38% more likely to be sentenced to death, even when the researches controlled for the severity of the homicide.⁷⁵ The GAO confirmed that 75% of the 28 studies it surveyed in 1990 found that black defendants were more likely to receive the death penalty than white defendants.⁷⁶

When these two factors are taken together, the impact of race on capital sentencing is staggering. Since 1976, the United States has executed *thirteen times* more black defendants with white victims than white defendants with black victims.⁷⁷ Such statistical disparities have led many of the most respected American jurists to call for the abolition of the death penalty altogether because of its racially disparate impact, among other factors.⁷⁸

The “War on Drugs”

The United States government’s War on Drugs has perhaps contributed more than any other single factor to the racial disparities in the criminal justice system. Since its official beginning in 1982, the number of Americans incarcerated for drug offenses has skyrocketed from 41,000 in 1980 to nearly a half-million in 2007.⁷⁹ Furthermore, harsher sentencing laws such as mandatory minimums keep drug offenders in prison for longer periods of time: in 1986, released drug offenders had spent an average of 22 months in federal prison. By 2004, federal drug offenders were expected to serve almost three times that length: 62 months in prison.⁸⁰

Data demonstrates that the War on Drugs has been waged in racially disparate ways. From 1999-2005, African American constituted roughly 13% of drug users on average⁸¹ but 36% of those arrested for drug offenses⁸² and 46% of those convicted for drug

⁷⁵ David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

⁷⁶ GAO GGD-90-557 at 6.

⁷⁷ Death Penalty Information Center, <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#deathrowpop> (last visited June 13, 2013).

⁷⁸ See, e.g., William Brennan, Jr., *Neither Victims Nor Executioners*, 8 Notre Dame J.L. Ethics & Pub. Pol’y 1, 4 (1994).

⁷⁹ Marc Mauer & Ryan King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, 2 (2007).

⁸⁰ *Id.* at 7-8.

⁸¹ Marc Mauer, *The Changing Racial Dynamics of the War on Drugs*, 8 tbl.3 (2009).

⁸² *Id.* at 10 tbl.5.

offenses.⁸³ While the War on Drugs creates racial disparity at every phase of the criminal justice process, disparities in sentencing laws for various types of drugs and harsh mandatory minimum sentences disproportionately contribute to disparity.

One of the most frequently decried aspects of the War on Drugs is the chronic disparity between federal sentencing laws for crack and powder cocaine offenses. For more than two decades, the ratio of the amount of powder cocaine needed to trigger the same sentence as an amount of crack cocaine was 100:1—even though crack and powder are pharmacologically identical.⁸⁴ Because black Americans constitute 80% of those sentenced under federal crack cocaine laws each year,⁸⁵ the disparity in sentencing laws leads to harsher sentences for black defendants for committing similar offenses to those of their white or Latino counterparts convicted of possessing powder cocaine. While the Fair Sentencing Act of 2010 reduced the crack/cocaine sentencing quantity disparity to 18:1, thousands continue to languish in prison serving sentences applied under the old laws because the act has not been applied retroactively.⁸⁶

Furthermore, the Fair Sentencing Act did nothing to alter the harsh federal mandatory minimum sentences imposed for virtually all drug offenses. Mandatory minimums are most often triggered by sale of a certain quantity of a given drug; federal law prescribes a five-year mandatory minimum sentence for sale of one gram of LSD, for example.⁸⁷ Once the mandatory minimum is triggered, judges must impose the mandatory sentence regardless of mitigating factors such as the defendant's role in the offense or the likelihood of committing a future offense. In 2010, the number of black male offenders convicted of a federal offense subject to a mandatory minimum sentence was twice that of convicted white males.⁸⁸ Mandatory minimum provisions doubled the average length of sentences received by black defendants, from 76 months for all federal offenses to 152 months when the federal offense was subject to a mandatory minimum provision.⁸⁹

⁸³ *Id.* at 11 tbl.6.

⁸⁴ Alexander at 51.

⁸⁵ U.S. Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, tbl.34 (2012).

⁸⁶ Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda*, 9 (2011).

⁸⁷ 21 U.S.C. § 841.

⁸⁸ United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 142 fig.7-15 (Oct. 2011).

⁸⁹ *Id.* at 139 tbl.7-3.

The blind application of mandatory minimums often leads to travesties of justice like the case of Tonya Drake, a twenty-five year old mother of four on welfare. A stranger on the street approached her, gave her a \$100 bill and a package, and told her that if she mailed the package for him she could keep the change—which amounted to \$47.40. Unbeknownst to Tonya Drake, the package contained crack cocaine. She is now serving ten years in federal prison. At her sentencing hearing, Judge Richard Gadbois, Jr., said, “This woman doesn’t belong in prison for ten years for what I understand she did. That’s just crazy, but there’s nothing I can do about it.”⁹⁰

Unfortunately, Tonya Drake’s story is far from an anomaly in the War on Drugs. Literally hundreds of thousands of Americans—disproportionately Americans of color—have seen their lives ravaged by the U.S.’s policies regarding drug activity. The War on Drugs is a perfect illustration of the way the effects of racial bias become amplified as defendants move through the criminal justice system: bias causes law enforcement officers to stop, search, and arrest racial minorities at disproportionate rates; minority defendants bear a disproportionate risk of facing stiff charges but have smaller chances of receiving a substantial assistance departure or being represented by effective defense counsel; they are more likely to be convicted by juries and trial judges on similar evidence; and they are likely to receive harsher penalties for similar crimes. Each step in the process further widens the racial gap in the criminal justice system.

CLOSING THE COURTHOUSE DOOR: DISCRETION, RACIAL BIAS, AND THE SUPREME COURT

Even as the effects of racial bias on every aspect of the criminal justice system have become increasingly well documented and understood, opportunities for meaningful reform have been increasingly foreclosed. Over the past half-century, various Supreme Court decisions have refused to acknowledge the importance of implicit racial bias and have therefore allowed its effects on the criminal justice system to flourish. This process occurs in two phases: first, the Court grants law enforcement officials and prosecutors wide discretion in determining whom to stop, search, arrest, and charge, thereby increasing the opportunity for racial bias to influence decisionmaking. Second, the Court shuts down challenges to such policies rooted in evidence of their racially disparate impact, requiring instead that plaintiffs show explicit and intentional discrimination on the part of criminal justice personnel. The colorblindness of the

⁹⁰ Cole at 142.

Constitution—once a hallmark of the protections of minority rights in the United States—has instead become a mechanism whereby racial minorities are frequently locked out of the courthouse and into prison cells.

Increasing Discretion of Law Enforcement Personnel

Two lines of precedent over the past forty years have drastically expanded the discretion of law enforcement personnel under the Fourth Amendment, which protects citizens against “unreasonable searches and seizures.” The first began with *Terry v. Ohio* in 1968, in which the Supreme Court held that a brief investigatory stop did not require police to meet the full probable cause standard of the Fourth Amendment.⁹¹ Rather, such a stop is constitutional so long as police possess “reasonable suspicion that crime is afoot.”⁹² Furthermore, if there is reason to believe that a suspect might be armed or carrying contraband, police may conduct a brief “frisk” of a suspect’s person. In the 45 years since *Terry* was decided police forces across the United States have used the language in *Terry* to justify employing “stop and frisk” tactics for an ever-expanding list of reasons. In New York City, for example, the justification for officers’ reasonable suspicion in more than fifty percent of stops was “furtive movements”—a nebulous term that has escaped precise definition by even the most seasoned police veterans.⁹³

The second line of precedent involves “consent searches,” which allow police officers to circumvent the probable cause requirement when suspects voluntarily consent to be searched. While consent searches have always been a standard law enforcement practice in the U.S., the Court significantly diluted the meaning of “voluntary” in the 1991 case *Florida v. Bostick*.⁹⁴ The Court ruled that the appropriate test for whether consent is voluntary is whether a reasonable person would have felt free to terminate the encounter with the police. Applying the test to Bostick’s case, the Court determined a reasonable person on a crowded bus with police standing over him, displaying badges and guns and blocking his exit, should have felt free to terminate the encounter.⁹⁵

In so ruling, the Supreme Court ignored the coercion inherent in every citizen interaction with the police. As Judge Prentice Marshall observed in a different case, “implicit in the introduction of the officer and the initial questioning is a show of

⁹¹ 392 U.S. 1 (1968).

⁹² *Id.* at 30.

⁹³ Fagan at 22 tbl.11.

⁹⁴ 501 U.S. 429 (1991).

⁹⁵ *Id.* at 439.

authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse an answer.”⁹⁶ It is not surprising, therefore, that one officer testified that he had searched more than 3,000 bags without once being refused consent.⁹⁷

Lowering the Standard for Indigent Defense Counsel

While the Court’s decision in *Gideon v. Wainwright* guarantees defendants the right to counsel in all criminal trials, two cases decided together in 1984, *Strickland v. Washington*⁹⁸ and *United States v. Cronin*,⁹⁹ have allowed the quality of indigent defense to diminish by lowering the standard of what is considered competent performance by defense attorneys in criminal trials. In the words of Georgetown Law Professor David Cole, “too often, assistance of counsel for the poor can be like getting brain surgery from a podiatrist.”¹⁰⁰

In *Strickland* and *Cronin*, the Court established “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”¹⁰¹ In order to overcome such a “highly deferential” standard, defendants must prove that their attorneys’ performance was “outside the wide range of professionally competent assistance.”¹⁰² Defendants must then prove that their attorneys’ incompetence prejudiced the outcome of their trials—in other words, that there is a “reasonable probability that the result would have been different” if the defendants had received effective counsel.¹⁰³

Application of the *Strickland* standard by the U.S. federal judiciary has exacerbated the “state of crisis” in indigent defense. Very few defendants have been able to meet the *Strickland* standard to have their convictions invalidated due to ineffective indigent defense counsel; consequently, federal, state, and local governments have been permitted to underfund and understaff their public defense agencies. Courts have found that defendants failed to meet the *Strickland* standard when their defense counsel slept during portions of the trial, when counsel abused cocaine and heroin throughout the

⁹⁶ *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882, 889 (N.D. Ill. 1975).

⁹⁷ Cole at 16.

⁹⁸ 466 U.S. 668 (1984).

⁹⁹ 466 U.S. 668 (1984).

¹⁰⁰ Cole at 76-77.

¹⁰¹ *Id.* at 689.

¹⁰² *Id.* at 690.

¹⁰³ *Id.* at 694.

course of the trial, and when counsel admitted that he was not prepared on the law or the facts of the case.¹⁰⁴ In one case, an attorney in a capital murder trial was found competent even though he “consumed large amounts of alcohol each day of the trial, drank in the morning, during court recess, and throughout the evening, and was arrested during jury selection for driving to the courthouse with a .27 blood-alcohol content.”¹⁰⁵ The attorney’s alcoholism was so severe that he died of the disease between the end of the trial and the date the California Supreme Court handed down its decision in the case.¹⁰⁶

Closing the Door to Challenges Based on Racially Disparate Impact

As the Court has expanded discretion in some areas of the criminal justice system, it has refused to hear challenges based on the racially disparate impact of such discretion in two others: prosecution and capital punishment.

In the 1896 decision of *Yick Wo v. Hopkins*, the Court established that selective prosecution—the practice of only charging defendants of a certain race of certain crimes—was unconstitutional under the Fourteenth Amendment to the Constitution. Yet in the 127 years since *Yick Wo*, the Court has not invalidated a single federal or state criminal case because prosecutors exercised their discretion in a racially disparate manner. Rather, the Court has made claims of selective prosecution—like claims of ineffective defense counsel—practically impossible to prove.

In 1992, the Supreme Court ruled in *United States v. Armstrong* that defendants must prove a “colorable showing” of selective prosecution before proceeding even to the discovery phase of trial.¹⁰⁷ Because the vast majority of the evidence that would prove claims of selective prosecution is in prosecutors’ offices, defendants cannot access it without the authority of court orders that arise from discovery motions. By refusing to allow claims of selective prosecution to advance to discovery unless the defendant proves a “colorable showing,” the Court essentially requires defendants to prove a claim in order to get access to the evidence they need to prove it.

In an attempt to meet the “colorable showing” standard, Armstrong’s lawyers submitted evidence demonstrating that no white individuals had been prosecuted for

¹⁰⁴ *Id.*

¹⁰⁵ *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989).

¹⁰⁶ *Id.*

¹⁰⁷ 517 U.S. 456 (1992).

crack cocaine offenses in a three-year period. Additionally, the defense submitted two sworn statements. The first recounted the observation of a halfway house intake coordinator that in his experience treating crack addicts, whites and blacks dealt and used the drug equally. In the second, a defense attorney stated that many white defendants were prosecuted for crack offenses in state court. The government also submitted a list of 2,400 individuals charged with crack offenses over a three-year period; all but eleven were black and none were white. Yet the Court overturned the trial court's finding that such evidence was enough to meet the colorable showing standard, finding that Armstrong's evidence was insufficient even to warrant further investigation in the discovery phase.

In 1987, the Supreme Court faced the most conclusive evidence demonstrating the link between race and the criminal justice system it had ever seen in *McCleskey v. Kemp*.¹⁰⁸ McCleskey, a black man sentenced to death in Georgia, argued that the implementation of the death penalty in Georgia violated the Eighth and Fourteenth Amendments to the Constitution because of its racially disparate impact. To support his claims, McCleskey relied on an exhaustive study conducted by Professor David Baldus and his colleagues who studied more than 2,000 murder cases in Georgia in the 1970s. As in Baldus's later study in Philadelphia, the Georgia study revealed that black defendants with white victims were significantly more likely to be sentenced to death than white defendants with black victims.¹⁰⁹

In its 5-4 majority opinion, the Court called into question the reliability of the Baldus study, but ultimately ruled that the study's validity did not matter. Even if the Baldus study were accurate and vast racial disparities existed in Georgia's implementation of capital punishment, the Court decided, it was not cruel and unusual punishment unless McCleskey and similarly situated black defendants could show that the prosecutor, judge, or jury acted with *intentional* racial animus in their specific cases. Since traditional rules in both the federal and state criminal justice systems bar defendants from probing into prosecutors' and juries' motivations, such a showing is practically impossible to make. Unless a jury member or prosecutor voluntarily admits to acting for racially biased reasons—taboo in the United States' colorblind society—minority defendants

¹⁰⁸ 481 U.S. 279 (1987).

¹⁰⁹ In the Georgia study, black defendants with white victims were sentenced to death 22% of the time while white defendants with black victims received the death penalty 3% of the time. The disparity held true even when the study factored in thirty nonracial factors such as multiple murders, long criminal records, or strong eyewitness testimony. See Cole at 133.

cannot challenge the racially disparate impact of capital punishment under the Constitution. Not surprisingly, the *McCleskey* standard has never been met.¹¹⁰

RECOMMENDATIONS TO THE COMMITTEE

As the evidence presented in this report indicates, the causes of the racial disparities in the U.S. criminal justice system are complex and deeply rooted. While the laws of the United States may be facially colorblind, a growing body of evidence shows that the individuals who apply such laws do not make cognitively colorblind decisions. As studies repeatedly demonstrate, the belief that the United States of the present is unaffected by the centuries of its explicitly racist past—while perhaps well-intentioned—is at best wishful thinking and potentially blinds decision makers to the implicit racial bias that lingers in the American consciousness.

There are concrete measures, however, that the United States can adopt to reduce both the existence and the effects of racial bias in its criminal justice system. Eliminating racial disparity in its criminal justice system will not be easy for the United States, but it can and must take steps to do so in order to uphold its obligations under its own constitution and international law. As such, The Sentencing Project respectfully urges the Committee to recommend that the United States adopt the following ten measures.

1. Establish a National Criminal Justice Commission.

The United States should establish a National Criminal Justice Commission to examine incarceration and racial disparities. The commission should develop recommendations for systemic reform of the criminal justice system at the federal, state, and local levels.

2. Scale back the War on Drugs.

The United States should substantially scale back its War on Drugs. Specifically, the Department of Justice should reconsider and reduce the volume of low-level drug offenders prosecuted in federal court. The resources saved by decreasing the number of prosecutions should be invested in evidence-based drug prevention and treatment measures.

¹¹⁰ *Id.* at 136.

3. Eliminate mandatory minimum sentences.

The United States should eliminate mandatory minimum sentences. Judges should be allowed to consider individual case characteristics when sentencing a defendant in every case.

4. Abolish capital punishment.

The United States should abolish capital punishment. Regardless of its other moral implications, history has repeatedly demonstrated that the capital punishment system of the United States cannot operate in a racially neutral manner. At the very least, the United States should pay particular attention to increasing the quality of defense representation in capital cases and increase oversight of such cases to ensure that they are administered as fairly and race-neutrally as possible.

5. Fully fund indigent defense agencies.

The United States should fully fund and staff indigent defense agencies. The federal government should increase the number and value of grants specifically allocated for indigent defense and establish oversight and accountability systems to ensure such funds are used as intended. The government should also ensure that state and local governments know which discretionary grants can be used to fund indigent defense agencies and encourage them to use an appropriate portion of discretionary grant funding for that purpose. The United States should provide funding and resources sufficient for the defense bar to operate at the same level of effectiveness at trial as prosecutors.

6. Adopt a policy requiring the use of racial impact statements.

The United States should adopt a policy requiring the use of racial impact statements for proposed sentencing policies. Such a policy would require legislators to prepare an analysis assessing the possible racial consequences of any proposed legislation before enacting it in order to avoid any unintended disparate racial effects.¹¹¹ Three states— Iowa, Connecticut, and Oregon—have adopted racial impact statements since 2008.

7. Allow social framework evidence and structural reform litigation in trials.

The United States should modify its racial discrimination jurisprudence in two ways: permit social framework evidence and structural reform litigation. The admission of social framework evidence in discrimination trials would permit juries and judges to

¹¹¹ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 vol. 4 Criminal Justice 16 (Winter 2009).

consider expert testimony regarding the general existence and effects of implicit bias against racial minorities in reaching verdicts in discrimination cases against specific entities.¹¹² Structural reform litigation would allow racial minorities to challenge specific government policies as discriminatory on the basis of their demonstrated racially disparate impact without being required to prove intentional racial discrimination.¹¹³ Under a structural reform litigation model, the plaintiff in *McCleskey v. Kemp* would have been allowed to proceed with his case by relying on the evidence that black men were significantly more likely than white men to receive the death penalty in Georgia without needing to show that any individual actor in his specific case had acted in an intentionally discriminatory manner. Though some limited precedent already exists for both social framework evidence and structural reform litigation in American jurisprudence,¹¹⁴ the U.S. Congress should solidify their existence and importance by codifying them in Titles VI, VII, and XI of the Civil Rights Act of 1964.¹¹⁵

One state has provided a model for how social framework evidence could be incorporated into existing law. In 2009, North Carolina enacted the Racial Justice Act, which prohibited prosecutors or courts from seeking or imposing the death penalty on the basis of race. The act allowed death row inmates to challenge their sentences using social framework evidence, including statistics that demonstrated the racially disparate application of the death penalty in their districts. If defendants proved that race was a significant factor in the imposition of the death penalty in their cases, their sentences were automatically commuted to life in prison without the possibility of parole. Unfortunately, North Carolina repealed the Racial Justice Act in 2013 after Gov. Pat McCrory stated that the law effectively shut down capital punishment in the state.¹¹⁶

8. Enact the Racial Profiling Act of 2013.

The United States should enact the End Racial Profiling Act of 2013. Indeed, the act serves as a model of what effective racial bias legislation could look like in every area of the criminal justice system. The act, reintroduced into the United States Senate by

¹¹² *Id.* at 493-94.

¹¹³ *Id.* at 494-98.

¹¹⁴ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Univ. of S.W. Tex. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2520 (permitting social framework evidence in a sex discrimination case); *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987 at *3 (E.D. Wash. July 7, 2006) (finding for plaintiffs in a challenge to Washington's felony disenfranchisement law based on racially disparate impact), *aff'd* 590 F.3d 989 (9th Cir. 2008), *rev'd en banc* 623 F.3d 990 (9th Cir. 2010).

¹¹⁵ 42 U.S.C. § 2000.

¹¹⁶ CNN, "Racial Justice Act" repealed in North Carolina, <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty> (June 21, 2013).

Senator Ben Cardin in May 2013, would prohibit racial profiling, mandate training on racial profiling for federal law enforcement officials, and require that federal officials collect data on the racial impact of all routine or spontaneous investigatory activities. The act would also make federal funds to state and local law enforcement agencies contingent on their adoption of effective policies that prohibit racial profiling. Finally, the act would authorize the Department of Justice to provide grants for the development of effective, non-discriminatory policing practices and require the attorney general to provide periodic reports to assess the ongoing effects of any practices that have been shown to be racially discriminatory.

9. Develop and implement training to reduce racial bias.

The United States should develop and implement training designed to mitigate the influence of implicit racial bias for every actor at every level of the criminal justice system: police officers, public defenders, prosecutors, judges, and jury members. While it is difficult to eliminate completely racial bias at the individual level, studies have repeatedly shown that it is possible to control for the effects of implicit racial bias on individual decisionmaking.¹¹⁷ In other words, while it may be impossible in the current culture of the United States to ensure that individuals are cognitively colorblind, it is possible to train individuals to be *behaviorally* colorblind.¹¹⁸ The United States should work with leading scholars on implicit bias to develop the most effective training programs to reduce the influence of implicit racial bias.

10. Adopt racial disparity-conscious policies.

Finally, as a general measure, the United States should adopt policies that reflect a basic understanding that while laws that are racially neutral on their face represent admirable progress in the struggle against racism in the U.S., such facial neutrality has proven insufficient to eliminate racial bias and consequently racial disparity in the criminal justice system. Policies should be guided instead by an awareness that facially colorblind laws may be applied in a racially disparate manner due to *both* implicit racial bias and

¹¹⁷ See, e.g., Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Response to Criminal Suspects*, 16 *Psy. Sci.* 180, 183 (2005) (finding that repeated training of police officers on computer simulations eliminated racial shooter bias and that the effects were still present 24 hours later); Rachilinski et al., *supra* note 61, at 1221 (finding that implicit racial bias in trial judges is substantially mitigated when judges become aware of the need to monitor themselves for it); Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 *Harv. L. & Pol'y Rev.* 149, 169 (describing the efforts of one federal district judge to mitigate implicit racial bias in jurors by training them on it before trial); cf. Sommers & Ellsworth, *supra* note 58 (finding that white juror bias was essentially eliminated in trials in which race was a salient factor, likely because jurors were reminded to be on guard against racially motivated decisions).

¹¹⁸ See Kang & Lane, *supra* note 118, at 487.

explicit racial discrimination. The United States should affirmatively adopt a commitment to behavioral realism—the idea that the law should be based on the most accurate model of human thought, decisionmaking, and action provided by the sciences—called for by Professors Jerry Kang and Kristen Lane.¹¹⁹ Such a concept is not unprecedented in American jurisprudence: one of the most celebrated Supreme Court decisions in U.S. history, *Brown v. Board of Education*, relied on behavioral realism in overturning the “separate but equal” doctrine; the Supreme Court’s reasoning in that case was based on advancing research in the study of psychology and the effects of segregation on schoolchildren.¹²⁰

The foregoing suggestions by no means constitute an exhaustive list of steps the United States could and should take to begin to address the racial disparities in its criminal justice system. Nevertheless, The Sentencing Project earnestly believes that these steps are firmly within the purview of the United States government and would substantially reduce existing racial disparity while dramatically improving the quality and integrity of the criminal justice system. While many of these steps are admittedly difficult, each one is vital if the United States is to fulfill its obligations to its citizens and the international community.

CONCLUSION

For decades, the United States of America has employed mass incarceration as a convenient answer to inconvenient questions. In doing so, the U.S. government has glossed over the glaring racial inequalities that permeate every aspect of its criminal justice system. The government has both fostered and perpetuated those inequalities in clear violation of its obligations under the International Covenant on Civil and Political Rights as well as other international agreements.

More importantly, however, the proliferation of racial disparities in the U.S. criminal justice system has a real impact on the lives of people of color living in the United States. Behind each statistic lies the face of a young black man whose potential has been cut short by a harsh prison sentence mandated by draconian drug laws. Behind each percentage point lies the face of a Latina child who will only know her parents through

¹¹⁹ See Jerry Kang & Kristen Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 466 (2010).

¹²⁰ 347 U.S. 483, 489 n.4 (1954).

hurried, awkward visits in a prison visitation room. Behind each dataset lies a community of color bereft of hope because its young people have been locked away.

It is the human face—a face of color—of the racial injustice of the United States criminal justice system that is the most compelling reason for reform. It is time for the United States to take affirmative steps to eliminate the racial disparities in its criminal justice system.