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# **Implicit Bias is Not a Fairytale: From the Classroom to the Courtroom: The Connection Between Racial Bias in Early Education and its Impact on Stereotypes and Interactions with the Criminal Justice System**

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Glen M. Vogel\* & Robert Costello\*\*

## INTRODUCTION

Even though great strides have been achieved in the area of racial equality over the last half century, the reality is that people of color, particularly Black Americans, continue to face discrimination across all facets of life and, in particular, face adverse treatment and outcomes in education and in the criminal justice system.<sup>1</sup> A person of color in the United States is more likely to be stopped by the police, searched and

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<sup>1</sup> See Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267 (2012) (citing M. Bertrand & S. Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004)); L. D. Bradford et al., *Stigma and Mental Health in African Americans*, in HEALTH ISSUES IN THE BLACK COMMUNITY 119 (R.L. Braithwaite et al. eds., 2009); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005); C. M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997); C. E. Vontress et al., *Cultural Dysphymia: An Unrecognized Disorder Among African Americans?*, 35(5) J. MULTICULTURAL COUNSELING & DEV. 130 (2007).

arrested, charged with more serious crimes, convicted, and sentenced to longer prison terms than a white person who is believed to have committed the same offense.<sup>2</sup> This inequality in treatment in the criminal justice system is particularly troubling because the United States incarceration system is the largest in the world, with more than 2.3 million people being imprisoned in the United States as of 2020.<sup>3</sup> Some scholars even suggest that the United States' criminal justice system is intentionally and unfairly racially based while masquerading as one of fairness and justice regardless of race.<sup>4</sup> Even if this assertion is untrue, perception is more important than reality and if "someone perceives something to be true, it is more important than if it is in fact true."<sup>5</sup> Meaning, the fact that people believe the justice system is systematically biased is reason for concern, whether it is actually true or not.<sup>6</sup>

The problem of disparate treatment of people of color, however, does not begin with the criminal justice system; rather, it starts with early education. Many scholars believe that very young children, some as young as three-

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<sup>2</sup> Norma Riccucci, *The Ethical and Moral Bases of Social Equity*, in GLOBAL CORRUPTION AND ETHICS MANAGEMENT 119, 121 (Carol L. Jurkiewicz ed., 2020) (citing CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 3 (2017)); see also Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747 (2017) (noting that while criminal courtrooms in the United States continue to be disproportionately filled with defendants who are racial minorities, the concern about the role of race in police stops and in the criminal justice system goes unaddressed).

<sup>3</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/PMH9-92EF>].

<sup>4</sup> Gerald K. Fosten, *Perspectives on Social Inequality, Criminal Justice, and Race in the United States: A Critical Analysis*, 9 J. PAN AFR. STUD. 122, 124 (2016).

<sup>5</sup> Joshua W. Wayser, *An LGBT Jurist's Perspective on the Crisis in the Judicial System*, 21 J. APP. PRAC. & PROCESS 455, 455–56 (2021) (citing IVANKA TRUMP, THE TRUMP CARD: PLAYING TO WIN IN WORK AND LIFE 192 (2009)).

<sup>6</sup> See *id.* at 456.

four-, and five-years-old, understand race<sup>7</sup> and witness differential treatment between races as early as elementary and middle school. Despite this finding, many adults deny that awareness of race and racism can even exist in young children, and this denial creates an opportunity for adults to ignore when children are “actively reproducing in their everyday lives the matters and realities of race and racism.”<sup>8</sup> This conceptualization of children as much less capable than adults in thought or action holds sway in many realms of contemporary thought, such as in social research, educational policies, and the legal system.<sup>9</sup> The problem with this approach is that by neglecting how children learn about racial and ethnic concepts—based on the mistaken belief that children simply do not understand—educators and society tragically neglect an opportunity to disrupt or end the nation’s continuing issue with racism.<sup>10</sup> But it is not just the children’s understanding of race that needs attention. Research has emphasized how racial and ethnic representation affects teachers’ expectations and perceptions of students and that these expectations and perceptions directly affect students’ educational attainment.<sup>11</sup>

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<sup>7</sup> DEBRA VAN AUSDALE & JOE R. FEAGIN, *THE FIRST R: HOW CHILDREN LEARN RACE AND RACISM 2* (2001). This assertion goes against the long-standing belief that children at this age are merely imitators rather than individuals who can understand language and racial concepts. As such, “racist talk and behavior among young children is usually dismissed by adults as being of little consequence and is not taken seriously until children are older.” *See id.* at 3.

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* at 7. The idea of children being incapable of seriously understanding concepts such as racial groups and ethnicity often relies on Piaget’s theories of cognitive development, which states, very simply, that the development of human beings is broken into stages, that children’s systems of thought are fundamentally different than adults, and that children are generally incapable of understanding information in the same way as adults. *Id.* at 6 (citing R.A. SAUNDERS & A.M. BINGHAM-NEWMAN, *PIAGETIAN PERSPECTIVE FOR PRESCHOOLS: A THINKING BOOK FOR TEACHERS* (Prentice Hall 1984)).

<sup>10</sup> *See* VAN AUSDALE & FEAGIN, *supra* note 7, at 10.

<sup>11</sup> Katie Vinopal & Stephen B. Holt, *Rookie Mistakes: The Interplay of Teacher Experience and Racial Representation*, 48 *EDUC. RESEARCHER* 421 (2019); *see also* Thomas S. Dee, *A Teacher like me: Does Race, Ethnicity, or Gender Matter?*, 95 *AM. ECON. REV.* 158 (2005); Seth Gershenson et al., *Who Believes in Me? The Effect of*

Gaps in educational attainment based on race are well documented and these can often occur because of incorrect beliefs or biased expectations by educators.<sup>12</sup> Overall, teachers are more likely to expect white students to complete college compared to Black or Latino/a students.<sup>13</sup> White students are also less likely to have a teacher of a different race/ethnicity, more likely to have a teacher who majored in the subject they are teaching, and tend to have slightly more experienced teachers who have been at the school longer.<sup>14</sup> Finally, white students are much less likely than Black or Latino/a students to attend a majority non-white school (7% versus 51% for Black students and 54% for Latinx students).<sup>15</sup> This lack of diversity in schools can be problematic because schools are a kind of “theatrical stage” where students experiment with or emulate, sometimes unknowingly, stereotypical roles of race that are presented to them in the media and in school.<sup>16</sup> Students, especially in middle and high school, have frequently acquired their understanding of what it means to be a member of their particular race through how they were treated by their teachers and by portrayals in popular media outlets.<sup>17</sup> They then have adopted and reinforced these roles in their own interactions with their peers.<sup>18</sup> This can be unfortunate because one of the roles of educators is to assist their students in processing the racially stereotyping messages they receive from

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*Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. EDUC. 209 (2016).

<sup>12</sup> Seth Gershenson et al., *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. EDUC. at 209 (2016).

<sup>13</sup> Vinopal & Holt, *supra* note 11, at 424.

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> David Childs, *Socially Constructing Race and History: Exploring Black Identity and Popular Culture in Social Studies Classrooms Through Cultural Studies Framework*, 8 J. PAN AFR. STUD. 55, 57 (July 2015).

<sup>17</sup> Nicole Scialabba, *How Implicit Bias Impacts Our Children in Education*, ABA (Oct. 2, 2017), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/fall2017-how-implicit-bias-impacts-our-children-in-education/> [<https://perma.cc/7PPA-BV5K>].

<sup>18</sup> *See* Childs, *supra* note 16, at 57.

popular culture, understand how these messages can negatively impact their lives, and decide how to challenge and overcome these harmful portrayals.<sup>19</sup>

While it is evident that discrimination against people of color begins long before they engage with the legal system, it does raise the question of whether there is a nexus between the experience of implicit or intentional bias in early education and the inequality that is later experienced in the criminal justice system. It is plausible to suggest they do have a relationship because it has been shown that, in many instances, racial bias can arise from an unconscious and fundamental level because of embedded knowledge arising from categorizations, schemas, and stock stories that people acquire and develop from a very young age.<sup>20</sup> That means the biases that young children acquire in school are likely, in many instances, to carry over into adulthood. If that connection is true, then addressing bias in the criminal justice system alone is merely a band-aid against racism if, simultaneously, the bias experienced in the education system is not also rectified.

Part I of this article will briefly discuss the term of implicit bias and its societal impact. Part II will examine the racial and ethnic bias that exists in the educational system and will focus on two legal-based mock-trial programs for middle school children, which provides anecdotal and statistical support for the idea that the implicit bias of teachers and parents exists and impacts students. Part III will examine the historical racial disparities that exist in the criminal justice system. Part IV will show how implicit bias and the development of racial awareness that occurs in early education has a direct impact on the future experiences of these students with the criminal justice system. Finally, in Part V, the article will conclude by looking at ways to reduce or mitigate implicit bias and racial stereotyping in schools and how this can have a positive effect on issues of

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<sup>19</sup> Childs, *supra* note 16, at 57.

<sup>20</sup> See Keene, *supra* note 2, at 756.

racial identity, adult views of race, and the bias that exists in the criminal justice system.

## I. IMPLICIT BIAS

Racism in the United States has “evolved from the blatant ‘Whites Only’ signs of the Jim Crow era to a more diffuse and less obvious forms of racial biases.”<sup>21</sup> While the explicit or intentional bias, based on race, age, gender, ethnicity, religion, sexual orientation, or any other basis, has been long recognized and has been the impetus behind most of the anti-discrimination legislation in the United States,<sup>22</sup> this legislation rarely, if ever, addresses or prevents acts of implicit bias and its negative impacts. Implicit bias has revealed that people’s “seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world,” which include negative stereotypes.<sup>23</sup> Stereotypes are a way of categorizing people based on traits that are perceived as being connected to some specific aspect of their race, religion, sexual orientation, or other characteristic. Stereotypes have developed as a result of the human brain’s need to process information quickly and efficiently.<sup>24</sup> Everyone, even those who believe themselves to be unbiased, possesses attitudes and stereotypes that affect their perceptions of people, which inform their subsequent

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<sup>21</sup> Praatika Prasad, *Implicit Racial Bias in Prosecutorial Summations: Proposing An Integrated Response*, 86 FORDHAM L. REV. 3091, 3093 (May 2018) (noting that everyone possesses unconscious stereotypes about race which shapes their world view and their response to racial stimuli).

<sup>22</sup> NAT’L CRIME VICTIM L. INST., IMPLICIT BIAS AND CRIME VICTIMS: AN OVERVIEW 1 (Mar. 2017), <https://law.lclark.edu/live/files/25186-ncvli-newsletter---implicit-bias-and-crime> [<https://perma.cc/XJ2X-EMS5>].

<sup>23</sup> *See id.* at 1 (quoting Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 278, 280 (2014)).

<sup>24</sup> Renee Nicole Allen & Deshun Harris, *#Social Justice: Combatting Implicit Bias in an Age of Millennials, Colorblindness & Microaggression*, 18 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 14–15 (2018).

actions.<sup>25</sup> These unconscious biases have created a separate category of racism that can result in biased “adjudication, legislation, policing, and education,” such that persons of color end up enduring disadvantages in all facets of their lives.<sup>26</sup> “Many theorists argue that implicit biases persist and are powerful determinants of behavior precisely because people lack personal awareness of them and they can occur despite conscious nonprejudiced attitudes or intentions.”<sup>27</sup> One of the more challenging aspects of implicit bias is that, while it is accepted that implicit bias exists, one scholar has suggested that scientists cannot measure it with any confidence and that the science does not yet exist to do so properly.<sup>28</sup>

While explicit racism is most often easy to see and can be addressed head on, implicit bias is usually less obvious and harder to address because it is “highly contextual and only changes in an enduring way after considerable time, effort, and/or intensity of experience.”<sup>29</sup> Implicit biases require more work to eradicate because they are “built on [a] framework of ingrained attitudes . . . [and are] ‘automatic, unconscious mental processes . . . formed by one’s own life experiences and lurk beneath the surface of the conscious’” and can be a strong motivating factor for decision-making without awareness.<sup>30</sup> It is not uncommon to develop implicit biases at an

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<sup>25</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012).

<sup>26</sup> Praatika Prasad, *Implicit Racial Bias in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3094.

<sup>27</sup> Devine et al., *supra* note 1, at 1267.

<sup>28</sup> Tom Barlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. HIGHER EDUC. (Jan. 5, 2017), [https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/\[https://perma.cc/KZ5Y-NAE6\]](https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/[https://perma.cc/KZ5Y-NAE6]).

<sup>29</sup> Devine et al., *supra* note 1, at 1268. “Mitigating implicit bias requires significant work, so much so that a recent unpublished study evaluating 400 implicit bias change studies over twenty years showed that less than five percent were actually effective in minimizing implicit bias over long periods of time and none had an impact on behavior.” Allen & Harris, *supra* note 24, at 19.

<sup>30</sup> See Allen & Harris, *supra* note 24, at 15 (quoting Nicole Negowetti, *Navigating Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. LEGAL MALPRACTICE ETHICS 278, 285 (2014)).

early age because they are established and reinforced through interactions with parents, teachers, and peers.<sup>31</sup>

## II. RACIAL BIAS IN EARLY EDUCATION

The underrepresentation of teachers of color, along with the implicit biases of educators, can have a significant impact on student confidence and educational outcomes. Education has been called the great equalizer and it can be the springboard out of poverty, classism, and other social ailments.<sup>32</sup> As a result, both public and private entities have developed a variety of initiatives to promote this goal and increase underrepresented groups' access to education.<sup>33</sup> This is particularly true for students of color because race has been increasingly accepted as a social construction that is unconnected to an individual's intellectual, physical, or emotional capacity.<sup>34</sup> Despite this, research has shown that racial and ethnic representation affects teachers' expectations and perceptions of students.<sup>35</sup> In many instances, compared to Black teachers, non-Black teachers have significantly lower expectations of Black students' academic potential, and this expectation gap can directly affect Black students' educational attainment.<sup>36</sup>

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<sup>31</sup> David Childs, *Socially Constructing Race and History: Exploring Black Identity and Popular Culture in Social Studies Classrooms through Cultural Studies Framework*, 8(2) J. PAN AFRICAN STUDIES 55, 56 (July 2015) (stating that “young people can receive negative messages about the world, as well as their own values and ideals from popular culture” and they are exposed to these in their homes, in public, and in their schools).

<sup>32</sup> Ethan P. Fallon, *The Lingering Battleground Between Race and Education*, 60 LOY. L. REV. 727, 734 (2014).

<sup>33</sup> *See id.*

<sup>34</sup> Paul R. Carr & Thomas R. Klassen, *Different Perceptions of Race in Education: Racial Minority and White Teachers*, 22 CAN. J. EDUC. 67, 68 (1997).

<sup>35</sup> *See* Vinopal & Holt, *supra* note 11, at 421 (noting that racial and ethnic representation impacts academic tracking, suspension frequency, parental involvement, attendance records, assignment to gifted programs, and test scores).

<sup>36</sup> *Id.*

What makes this research more alarming is that teachers of color continue to be underrepresented in schools in the United States.<sup>37</sup> This lack of diversity in the front of the classroom is an important issue because teachers' expectations have the power to improve or decay students' actual educational attainment, and if most teachers are non-Black, then Black students often have teachers who have low expectations about their abilities.<sup>38</sup> Recognizing that “[r]acial issues are particularly important in education because schools and teachers play a significant role in children’s socialization,”<sup>39</sup> it is troubling then, that teachers have significantly lower expectations for the educational attainment of socioeconomically disadvantaged and racial minority students.<sup>40</sup>

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<sup>37</sup> See *id.* at 422.

<sup>38</sup> See Vinopal & Holt, *supra* note 11, at 422–23 (citing Thomas S. Dee, *Teachers, Race, and Student Achievement in a Randomized Experiment*, 86 REV. ECON. & STAT. 195–210 (2004)); see also Dee, *supra* note 11; Anna J. Egalite et al., *Representation in the Classroom: The Effect of Own-Race Teachers on Student Achievement*, 45 ECON. EDUC. REV. 44 (2015); Ronald G. Ehrenberg et al., *Do Teachers’ Race, Gender, and Ethnicity Matter? Evidence from the National Educational Longitudinal Study of 1988*, 48 INDUS. & LABOR RELS. REV. 547, 547–61 (1995); Gershenson et al., *supra* note 11, at 209–24; Jason A. Grissom et al., *The “Representative Bureaucracy” in Education: Educator Workforce Diversity, Policy Outputs, and Outcomes for Disadvantaged Students*, 44 EDUC. RESEARCHER 185, 185–92 (2015); Jason A. Grissom et al., *Race, Region, and Representative Bureaucracy*, 69 PUB. ADMIN. REV. 911 (2009); Stephen B. Holt & Seth Gershenson, *The Impact of Teacher Demo-Graphic Representation on Absences and Suspensions*, 47 POL’Y STUD. J. 1063 (2017); Kenneth J. Meier & Joseph Stewart, Jr., *The Impact of Representative Bureaucracies: Educational Systems and Public Policies*, 22 AM. REV. PUB. ADMIN. 157, 157–71 (1992); Jill Nicholson-Crotty et al., *Bureaucratic Representation, Distributional Equity, and Democratic Values in the Administration of Public Programs*, 73 J. POL. 582 (2011); Amine Ouazad, *Assessed by a Teacher like Me: Race, Gender, and Subjective Evaluations*, 9 EDUC. FIN. & POL’Y 334 (2014); Katie Vinopal, *Understanding Individual and Organizational Level Representation: The Case of Oarental Involvement in Schools*, 28 J. PUB. ADMIN. RSCH. & THEORY 1 (2017).

<sup>39</sup> Carr & Klassen, *supra* note 34, at 68.

<sup>40</sup> See Gershenson et al., *supra* note 11, at 210 (citing ULRICH BOSER ET AL., THE POWER OF THE PYGMALION EFFECT: TEACHERS EXPECTATIONS STRONGLY PREDICT COLLEGE COMPLETION (Center for American Progress, 2014)).

Teachers are, undoubtedly, an important influence on the lives and educational development and attitudes of their students.<sup>41</sup> While evidence has shown that students substantially benefit from teachers' optimism about their potential, they can also be disadvantaged when teachers have lower expectations based on that child's race.<sup>42</sup> Researchers have identified three ways in which teacher expectations can affect student outcomes. First, teachers' expectations for their students, based on implicit biases, can affect student outcomes in several ways. The "perception that teachers have low expectations may exacerbate the harmful effects of *stereotype threat*, whereby low expectations either cause emotional responses [such as anxiety or other negative emotional responses] that directly harm performance or cause students to *disidentify* with educational environments."<sup>43</sup> Second, "stigmatized students may modify their expectations, and in turn their behavior, to conform to teachers' negative biases."<sup>44</sup> That is, "teachers' stigmatization of information-poor racial minority students could create a feedback loop that functions like a self-fulfilling prophecy."<sup>45</sup> Finally, in response to their own negative perceptions about or stigmatization of certain students, teachers may modify their own behavior with how they teach, evaluate, and advise them, again leading to poor educational outcomes for stigmatized students.<sup>46</sup>

What makes this all the more troubling is that while the ethnic and minority student populations have been growing, there is still an

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<sup>41</sup> See Gershenson et al., *supra* note 11, at 211.

<sup>42</sup> See Vinopal & Holt, *supra* note 11, at 422; see also Simon Burgess & Ellen Greaves, *Test Scores, Subjective Assessment, and Stereotyping of Ethnic Minorities*, 31 J. LABOR ECON. 535 (2014); Nicholas Papageorge et al., *Teacher Expectations Matter*, 102 REV. ECON. & STAT. 234 (2020).

<sup>43</sup> See Gershenson et al., *supra* note 11, at 211; see also Vinopal & Holt, *supra* note 11, at 422–23.

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

<sup>45</sup> See Gershenson et al., *supra* note 11, at 211.

<sup>46</sup> See Gershenson et al., *supra* note 11 at 211–12, see also Vinopal & Holt, *supra* note 11, at 422–23 (citing R.F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460 (2003)).

underrepresentation of teachers of color.<sup>47</sup> This disparity can have far reaching effects; studies have shown that if a student believes a teacher has low expectations for their performance, this belief can negatively affect that student's expectations for themselves and create anxiety and disidentification from the school environment as well as other negative emotional responses.<sup>48</sup> Moreover, compared to Black teachers, non-Black teachers have significantly lower expectations of Black students' academic potential.<sup>49</sup> Taking the results of these studies to be true, these early biased experiences can have long-term negative effects on the substantive educational outcomes for students of color, which can also translate into more difficulties as those students navigate their teenage years into adulthood.<sup>50</sup> Last, it is not just the teachers' biases about race that impact interactions and expectations in the classroom. Numerous studies show that "white children have consistently been found to prefer their own racial group to any other," even when very young, and perhaps more troubling is that children of color "have been shown to share that preference, sometimes to the point of misidentifying themselves as white."<sup>51</sup>

The following is a brief discussion of two cultural-arts programs that were conducted in over two dozen elementary schools between 2008 and 2017, where it appears that the implicit biases of teachers and parents were revealed in the context of mock trials.

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<sup>47</sup> Vinopal & Holt, *supra* note 11, at 422.

<sup>48</sup> *Id.* at 423.

<sup>49</sup> *Id.*

<sup>50</sup> See Fosten, *supra* note 4, at 131 (pointing out that the "Social Science Research Council's 'The Measure of American 2013-2014' American Human Development Report measuring disparities, found African Americans consistently lagged behind other racial groups in the following human well-being indexes: (1) long and healthy life, (2) access to knowledge, and (3) a decent standard of living").

<sup>51</sup> VAN AUSDALE & FEAGIN, *supra* note 7, at 11 (noting that, based on this, children of color appear to be considered "devalued" by children, even those that are very young or a person of color themselves).

### *A. The Trial of Goldilocks*

To introduce basic concepts about the legal system and criminal trials to fifth graders, about 19 years ago, the author Glen M. Vogel created a cultural-arts program using a mock trial based on a commonly known fairy tale.<sup>52</sup> The program, *The Trial of Goldilocks*, twisted the story of Goldilocks and the Three Bears beyond the bears' discovery of the curious blonde-haired intruder in their home to a version where Goldilocks gets arrested for trespassing, larceny, and criminal mischief. One additional and important wrinkle that was added to this new version of the story is that the students are told that the Big Bad Wolf entered the bears' home and ate the porridge, stole some money, and destroyed a chair before Goldilocks arrived. Then, after the Wolf left and Goldilocks entered the house, she found it in disarray. Shortly thereafter, the bears arrived home, found Goldilocks still there, and naturally believed she was the person responsible for the crimes. In this version, the Big Bad Wolf is true to his name and Goldilocks is merely a curious trespasser.<sup>53</sup>

The program consists of a structured array of activities, lessons, homework assignments, and games, which spread across six individual visits to the class. At the end, the students in each class conduct a mock trial of Goldilocks who has now been charged with all three crimes. The mock trial is a scripted play wherein the students play all the roles in the case and hold a mock trial of Goldilocks. To determine which role each student will play, the students submit a persuasive essay to their teacher about what part they want to be and why, and then the teacher assigns the various roles. It was at this point those stereotypes and impressions of race started to appear. The particularly disturbing trend that was most noticeable was that Black

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<sup>52</sup> Interview with Glen M. Vogel, creator of the Trial of Goldilocks Program, in Hempstead, N.Y. (Oct. 15, 2017), <https://www.youtube.com/watch?v=SZUDJiCiHng> [<https://perma.cc/3EKW-L9SE>].

<sup>53</sup> Glen M. Vogel, *The Trial of Goldilocks* (June 2003) (unpublished manuscript) (on file with author).

students, particularly Black boys, were assigned the role of the Big Bad Wolf at a much higher rate than their white classmates. This was true even in cases where the teacher was also Black or where there were only one or two students of color in the entire class. After a few years of seeing this pattern, Vogel began collecting data, which extended over a ten-year period. An examination of this data has revealed that while only 11% of the students in all the classes over a ten-year period were Black, a Black student was chosen to play the role of the Big Bad Wolf an astounding 73% of the time.<sup>54</sup> Recall, the Big Bad Wolf is the bad guy in this version of the fairy tale.

Data was collected from 2008 through 2017.<sup>55</sup>

- Over that span, data was collected from 184 classes
- A total of 4,959 students participated in the program in these 184 classes
- 84% (4,195) of the students in these classes were white students
- 5% (241) of the students in these classes were of Asian ethnicity
- 11% (523) of the students in these classes were students of color
- 73% of the time, a Black student was cast as the Wolf

Prior to being assigned the persuasive essay, wherein they had to write which part they wanted and why, the teachers and students discussed that the Big Bad Wolf was the actual perpetrator of the crimes, had a history of criminal behavior, and was generally not to be trusted or believed. Despite

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<sup>54</sup> While not part of this paper, the data collected also revealed that even though Asian students made up about 5% of the classes, they were selected to play the role of an attorney (the most difficult role in the mock trial) an average of 52% of the time. In addition, 65% of the time a white student was chosen for the role of Goldilocks. *See infra* Appendix A: Statistics for the Trial of Goldilocks.

<sup>55</sup> *See infra* Appendix A.

the teachers and the students being aware of this characterization of the Wolf, students of color were cast in the role of the Wolf at an alarmingly disproportional rate than white students.<sup>56</sup> These statistics can be interpreted as revealing that implicit bias and racial stereotypes, along with the representations in popular culture and media portrayals of young Black men and boys as criminals, influenced teachers' perceptions about race.<sup>57</sup> One wrinkle to this assertion is that the children did submit an essay asking to be cast in a specific role. Because of the nature of the program, it being an outside program brought into the school, the author did not have access to the essays to track how frequently children of color self-selected the role of the Big Bad Wolf. However, once the casting trend started to reveal its biased results, the teachers were asked if the child cast in the role of the Wolf requested that part in their essay. More than 83% of the time, the child playing the role of the Wolf asked to play that role. So not only were teachers exhibiting bias in their casting decisions, but the students of color were also biased by self-selecting to play a criminal at an alarming rate.

### *B. Humpty Dumpty Was Pushed*

The Trial of Goldilocks was a popular program for schools to book and, as a result, a second program was developed as a companion to introduce basic concepts about forensic science and the grand jury system to fourth graders. The program, *Humpty Dumpty Was Pushed*, took the well-known nursery rhyme and changed the story to one where Humpty Dumpty doesn't merely fall off a wall; rather, he is pushed by any one of five suspects who all had reasons for wanting Humpty hurt. The suspects are Mack the Hawk, Crictor the Constrictor, Sid the Weasel, Robby the Raccoon, and Humpty's jealous brother Balut Dumpty. Like the *Trial of Goldilocks* program, this program also encompassed five days of classroom instruction, games,

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<sup>56</sup> See *id.*

<sup>57</sup> See generally *supra* Part II.

homework, and activities and culminated in a grand jury proceeding. However, unlike the *Trial of Goldilocks* program where student essays, at least in part, informed the assignment of parts, here, teachers alone decided the assignment of parts based on whatever criteria they decided to employ. Moreover, instead of a mock trial at the end, here, the students were divided into five teams, one for each suspect, who were then responsible for presenting evidence to a grand jury to hopefully get an indictment against the suspect they were responsible for. The grand jury proceeding was conducted in front of the students' parents and grandparents, who were playing the role of grand jurors and would be responsible for casting votes to indict any one or more suspects with the crime of assault. The way the evidence was created, there was an equal likelihood that any one of the five suspects was responsible for pushing Humpty off the wall.

Data was collected from 2013 through 2017.<sup>58</sup>

- Over that span, data was collected from thirty-five classes
- A total of 175 students played the role of a suspect
- Forty-five students playing suspects were students of color
- 130 students playing suspects were white

In this program, the casting of a student of color as a suspect was not the issue; rather, the evidence of implicit biases arose when it came time for the mock grand jury to indict a suspect for the crime of assault. The mock grand jury was composed of the students' parents and/or grandparents. Similar to the *Trial of Goldilocks* program, the adults involved engaged in, at best, implicit bias, and, at worst, outright racism. If a Black child was playing the role of a suspect, they were indicted at a remarkable 89% rate.

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<sup>58</sup> See *infra* Appendix B.

Conversely, when a white student played the role of a suspect, they were only indicted 18% of the time.

In both programs, children of color, particularly Black boys, were either selected by an adult teacher to play a criminal at three-times the rate of white students or indicted by a grand jury consisting of their own parents and grandparents at four-times the rate of their white counterparts. While these statistics are alarming, they are not surprising because “negative racial stereotypes associating African-American men with crime have resulted in deeply engrained and widespread bias against members of this group.”<sup>59</sup> This is true even when the people involved affirmatively reject racism and negative racial stereotypes and believe themselves to be fair and unbiased.<sup>60</sup> What is perhaps more troubling is that “racial disparate treatment of children has rarely been studied by social psychologists.”<sup>61</sup> When it has been studied, studies have revealed that the participants believed Black children as young as ten years old (the age that students participated in these programs) as less innocent than other children. These studies have also revealed that they are also frequently perceived as an average of four-and-a-half years older than their actual age.<sup>62</sup>

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<sup>59</sup> Keene, *supra* note 2, at 751; *see also* Carmela F. Staten, *Race, Arrest and Sentencing as Social Policy*, in GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 5328 (A. Farazmand ed., 2018) (citing Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 528 (2014) (noting that, on average, young Black boys were not afforded the assumption of childhood innocence, were viewed as being over 4 years older than their actual age, and were less likely to be viewed as innocent when suspected of a crime)).

<sup>60</sup> Keene, *supra* note 2, at 751.

<sup>61</sup> Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 526 (2014)

<sup>62</sup> *Id.* at 529, 532, 539–40 (finding that Black boys as young as thirteen and a half were perceived as being adults). The study done by the authors found that Black children were “afforded the privilege of innocence to a lesser extent than children of other races,” that young Black males are “seen as more culpable for their actions than peers of other races,” and that “[B]lack boys are actually misperceived as older relative to peers of other races.” *Id.* at 540.

The data from both programs also creates an additional area of inquiry; that is, whether these experiences might influence the students with respect to their own identity, their views of race, and their views of fellow students with whom they differ, and whether these views create a foundation of beliefs on issues of race that they will carry into adulthood and possible interactions with the criminal justice system.

### III. RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM

“The United States has the highest incarceration rates in the world.”<sup>63</sup> What makes the fact that the United States incarcerates a larger proportion of its population than any other country<sup>64</sup> even more troubling is that when the situation is examined more closely, one finds an enormous and disproportionate impact on people of color.<sup>65</sup> There is statistical evidence to support the proposition that the United States’ criminal justice system applies unequal standards of justice for Black people at just about every stage.<sup>66</sup> This issue has become even more pronounced when one considers that, per the 2015 census, 44.5% of millennials identified as racial or ethnic minorities and this number leaped to 50% for people born after 2000.<sup>67</sup> Furthermore, in police stops, “racial minorities are questioned, handcuffed, and searched at dramatically higher rates than whites are . . . .”<sup>68</sup> The racial bias has been even worse for young Black men. For example, in 1944, George Junius Stinney, a fourteen-year-old Black adolescent from Georgia,

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<sup>63</sup> See Fosten, *supra* note 4, at 127 (citing ACLU, WRITTEN SUBMISSION OF THE CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<https://perma.cc/T85S-A6RX>]).

<sup>64</sup> See Fosten, *supra* note 4, at 127.

<sup>65</sup> Marie Gottschalk, *The Past, Present and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUB. POL’Y 483, 483 (2011).

<sup>66</sup> See Fosten, *supra* note 4, at 128.

<sup>67</sup> Allen & Harris, *supra* note 24, at 4–5 (2018).

<sup>68</sup> Riccucci, *supra* note 2, at 121 (citing CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 3 (2017)).

became the youngest person in the United States to be legally executed—and he was tried without a lawyer, without any eyewitnesses, and without a confession.<sup>69</sup> Stinney is an example of what studies have shown: Black adolescents are viewed as more deserving of adult treatment and as less innocent than similarly situated white adolescents.<sup>70</sup>

*A. The U.S. Criminal Justice System: A System of Mass Incarceration*

From 1980 to 2018, the United States total adult correctional population skyrocketed from about 1.8 million to 6.5 million people.<sup>71</sup> By the middle of 2002, the United States' prison and jail population surpassed two million for the first time,<sup>72</sup> and by 2021, the United States housed 639 prisoners for every 100,000 residents.<sup>73</sup> The United States has over twenty percent of the world's entire prison population, making it the incarceration capital of the world.<sup>74</sup> These figures, as daunting as they are, understate the enormous and disproportionate impact that incarceration has had on certain groups in the United States, particularly people of color. If the upward trend in the prison population continues, one in three Black males and one in six Hispanic males can expect to spend some time in prison during their lifetime.<sup>75</sup>

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<sup>69</sup> See Goff et. al., *supra* note 61, at 527.

<sup>70</sup> *Id.* at 528–29.

<sup>71</sup> U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS: KEY STATISTICS (2021), <https://bjs.ojp.gov/data/key-statistics> [<https://perma.cc/HG88-BHZL>].

<sup>72</sup> Paige M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2002*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. 1 (Apr. 2003), <https://bjs.ojp.gov/content/pub/pdf/pjim02.pdf> [<https://perma.cc/7B4V-SMTB>].

<sup>73</sup> *Countries with the Most Prisoners per 100,000 of the National Population, as of May 2021*, STATISTA RSCH. DEP'T (June 2021), <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> [<https://perma.cc/EFJ3-CK3V>].

<sup>74</sup> See Roy Walmsley, *World Prison Population List (eighth edition)*, KING'S COLL. LONDON: INT'L CTR. FOR PRISON STUD. (2009), [https://www.prisonpolicy.org/scans/wpp1-8th\\_41.pdf](https://www.prisonpolicy.org/scans/wpp1-8th_41.pdf) [<https://perma.cc/QD4C-42ZH>].

<sup>75</sup> See Gottschalk, *supra* note 65, at 483 (questioning why the U.S. incarceration rate, which was reasonably stable through the 1960s, suddenly skyrocketed despite a stable or decreasing crime rate).

Economically, the growth of this mass incarceration state came at a staggering expense; according to research published in 2020, “the societal costs of incarceration—lost earnings, adverse health effects, and the damage to the families of the incarcerated—are estimated at up to three times the direct costs, bringing the total burden of our criminal justice system to \$1.2 trillion.”<sup>76</sup> It has been estimated that taxpayers paid over ten times more to incarcerate their fellow citizens than they would if those incarcerated were instead placed under supervision in their communities.<sup>77</sup> As a report by the Pew Center on the States asserts, “serious, chronic and violent offenders belong behind bars . . . and the expense of locking them up is justified many times over. But, for hundreds of thousands of lower-level inmates, incarceration costs taxpayers more than it saves in prevented crime.”<sup>78</sup>

Despite the obvious discriminatory impact and significant societal costs, it does not appear that the mass incarceration problem is going away anytime soon. Normalizing for population, imprisonment rates in 2022 ranged from 108 prisoners per one hundred thousand residents in Massachusetts, to 684 of the same units in Louisiana.<sup>79</sup>

The rise in incarceration rates from the late 1900s into the 2000s has undoubtedly affected young Black men from poor areas more than any other demographic. Nearly fifty percent of inmates during this period were Black, over ninety percent were male, and one out of every eight Black men

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<sup>76</sup> Tara Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020) <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/>[<https://perma.cc/X2U6-DMTN>].

<sup>77</sup> PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (Mar. 2009).

<sup>78</sup> *Id.* at 2.

<sup>79</sup> PRISON POPULATION BY STATE 2022, WORLD POPULATION REV., (n.d.); <https://worldpopulationreview.com/state-rankings/prison-population-by-state> [<https://perma.cc/B5AH-UQG5>].

in their late twenties was in prison.<sup>80</sup> The reasons why this demographic was struck the hardest by the ascendancy of the United States' mass incarceration state are complicated and includes a number of factors, including disproportionate rates of law violations, over-policing in urban neighborhoods, and disparity of criminal justice outcomes between races.<sup>81</sup> These factors have all led to Black people being incarcerated at rates over five times as high as white people.<sup>82</sup> But this problem did not arise overnight; rather, it is the result of several decades of failed policies and programs that disproportionately impacted people of color.

*B. The Punishment Imperative, the War on Drugs, and Sentencing Changes*

In 1967, President Lyndon B. Johnson's Crime Commission released an extensive report that offered suggestions on what the government should do about the increasingly pressing issue of crime.<sup>83</sup> Its first proposal was that America should take "action designed to eliminate slums and ghettos . . . We will not have dealt effectively with crime until we have alleviated the conditions that stimulate it."<sup>84</sup> The report's next suggestion was to transfer more resources into the justice system.<sup>85</sup> Its third and final proposal was to foster more creative methods and solutions in the criminal justice system's various branches.<sup>86</sup> The Commission was a response to the more than 250 incidents of urban civil disorder that occurred over the first five summers of

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<sup>80</sup> DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 219 (2004).

<sup>81</sup> TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 121–48 (2007).

<sup>82</sup> *Id.*

<sup>83</sup> *See generally* PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (Feb. 1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf> [<https://perma.cc/9MAJ-Z58S>].

<sup>84</sup> *Id.* at 15.

<sup>85</sup> *Id.*

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

Lyndon B. Johnson's presidency.<sup>87</sup> These violent incidents "swept American cities and resulted in the deaths of more than two hundred [B]lack Americans, thirteen thousand injured civilians and officers, and the destruction of billions of dollars' worth of property."<sup>88</sup> By the close of the 1960s, these uprisings, which were inspired by the presence of exploitative and exclusionary institutions in Black neighborhoods, created "the greatest period of domestic bloodshed the nation had witnessed since the Civil War."<sup>89</sup> This civil unrest had tremendous influence on the focus of Johnson's Great Society programs, including changes to anticrime programs that laid the groundwork for contemporary mass incarceration.<sup>90</sup> Despite the obvious need to make changes in the policies that dealt with poverty and crime, the suggestions of the Crime Commission were not implemented. The infamous police riots followed the next year, and Richard Nixon was elected as a law-and-order president.<sup>91</sup>

As a result, Black men continued to take on the brunt of what criminologists Todd Clear and Natasha Frost termed the "Punishment Imperative," an experience that goes far beyond "mere" incarceration.<sup>92</sup> Scholar Donald Braman documented the experiences of families in Washington, D.C., where three-fourths of Black men experienced prison time.<sup>93</sup> He writes that the incarcerated and their loved ones "are not shameless; they feel the stigma that accompanies not only incarceration but

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<sup>87</sup> Elizabeth Hinton, "A War Within Our Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State, 102 J. AM. HIST. 100, 100 (2015).

<sup>88</sup> *Id.*

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

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

<sup>91</sup> Terence McArdle, *The 'Law And Order' Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/> [<https://perma.cc/EFG5-Q643>].

<sup>92</sup> See generally TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* (NYU Press, 2013).

<sup>93</sup> BRAMAN, *supra* note 80, at 219.

all the other stereotypes that accompany it—fatherlessness, poverty, and often . . . diminished love.”<sup>94</sup> Other scholars have discovered similar unintended consequences of the Punishment Imperative.<sup>95</sup>

This penal grand social experiment took on a different character in the 1980s, emphasizing the War on Drugs more than violent crime. In 1984, Congress’s Sentencing Reform Act<sup>96</sup> set up harsh punishments for any unlawful behavior that involved drugs. Just two years later, the Anti-Drug Abuse Act<sup>97</sup> only intensified such penalties. For example, someone who sold at least five grams of crack cocaine would receive a five-year-minimum prison sentence.<sup>98</sup> Such draconian drug laws were not only passed at the federal level but also in most states.<sup>99</sup> Not all communities were impacted equally by the War on Drugs. As Yale historian David Musto has shown, punishment for drug-related crimes is more brutal for those drugs used by communities of color than for those used by white communities.<sup>100</sup> For example, possession of five grams of crack cocaine—stereotypically consumed by Black people—resulted in the same minimum five-year sentence as possession of one hundred times that amount of powder cocaine—stereotypically consumed by white people.<sup>101</sup>

The 1990s witnessed the Punishment Imperative go back to its roots and concentrate on violent crimes. As violence once again rose sharply,

<sup>94</sup> BRAMAN, *supra* note 80.

<sup>95</sup> CLEAR, *supra* note 81, at 121–48.

<sup>96</sup> Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, & 28 U.S.C. §§ 991–998 (1988).

<sup>97</sup> 21 U.S.C. §§ 841(b) (1986).

<sup>98</sup> *Id.*

<sup>99</sup> *See, e.g.*, DEL. STAT. ANALYSIS CTR., IMPACT OF THE NEW DRUG TRAFFICKING LAW ON THE DELAWARE CRIMINAL JUSTICE SYSTEM (1991).

<sup>100</sup> *See* BRAMAN, *supra* note 80, at 171.

<sup>101</sup> U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at v (Feb. 1995), <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/EXECSUM.pdf> [<https://perma.cc/YY4W-FXKU>].

President Bill Clinton sought to be known as another law-and-order president.<sup>102</sup> Many politicians agreed with both the president and the American people, who once again were subject to intense mass media coverage of rising crime.<sup>103</sup> This time, though, the public cried in outrage over individuals who had already served time in prison yet resorted to old criminal habits once released.<sup>104</sup> Princeton University professor John Dilulio wrote about what would come to be known as “super-predators”<sup>105</sup>—gangs of young, underage adolescents engaging in violent crime. Dilulio riled up the public with phrases such as “an estimated 270,000 more young predators on the streets” and “the youngest, biggest, and baddest generation any society has ever known.”<sup>106</sup> Dilulio’s theory was that there were many reckless adolescents who were eager to engage in violent crimes without remorse.<sup>107</sup> Many legislators created tough-on-crime policies for the youth based on this “super predator theory,” including life-without-parole sentences, capital punishment sentences, life sentences, and the shift to more juveniles being placed in adult prisons.<sup>108</sup> In the years since the theory’s popularization in the 1990s, it has been discovered that Dilulio’s theory was based on faulty statistical analysis.<sup>109</sup> Sadly, this

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<sup>102</sup> Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU Blog (June 4, 2019, 2:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> [https://perma.cc/5U24-ZPKS].

<sup>103</sup> Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 425–26 (2003) (noting that television coverage of crime soared in the 1990s to a point of airing five-times the number of crime stories as they were in the preceding decade).

<sup>104</sup> Julian V. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 AM. BEHAVIORAL SCI. 488, 489 (1996).

<sup>105</sup> John Dilulio, *The Coming of the Super Predators*, WKLY. STANDARD (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [https://perma.cc/7R7W-ZCXN].

<sup>106</sup> *Id.*

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

<sup>108</sup> *The Superpredator Myth, 25 Years Later*, THE EQUAL JUST. INITIATIVE (Apr. 7, 2014) <https://eji.org/news/superpredator-myth-20-years-later/> [https://perma.cc/58J8-7QCU].

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

realization appears to have come too late as national leaders leveraged Dilulio's flawed theory to push their already predetermined tough-on-crime agenda.

The Punishment Imperative brought drastic modifications to sentencing policy. Before the 1970s, all states subscribed to nonmandatory sentencing standards such that most statutory violations allowed for a judge to impose a wide spectrum of sentence possibilities, thus providing leeway in situations where a defendant appeared to have been somewhat rehabilitated.<sup>110</sup> With the advent of the Punishment Imperative, determinate sentencing became the norm and early release became far more limited.<sup>111</sup> Following the introduction of determinate sentences, states started implementing sentencing guidelines that gave individuals convicted of a felony a restricted spectrum of sentence lengths.<sup>112</sup> These would be predicated on their criminal history, in addition to the current crime for which they were being imprisoned.<sup>113</sup> By the middle of the 1980s, many states had introduced mandatory life sentences for aggravated murder.<sup>114</sup> This has resulted in the number of people serving life sentences quadrupling from 1984 to 2020.<sup>115</sup>

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<sup>110</sup> See generally Clarence Schrag, *Crime and Justice: American Style*, NAT'L INST. OF MENT. HEALTH (1972), <https://files.eric.ed.gov/fulltext/ED067458.pdf> [<https://perma.cc/SW2E-JX3K>].

<sup>111</sup> Doris Layton Mackenzie, *Sentencing and Corrections in the 21<sup>st</sup> Century: Setting the Stage for the Future* 6 (July 2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf> [<https://perma.cc/6ADR-QJD5>].

<sup>112</sup> Charles W. Ostrom, Brian J. Ostrom, and Matthew Kleinman, *Judges and Discrimination, Assessing the Theory and Practice of Criminal Sentencing* 2 (Oct. 28, 2003), <https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf> [<https://perma.cc/TWQ3-BLMF>].

<sup>113</sup> *Id.*

<sup>114</sup> See generally, Ashley Nellis, *The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America*, THE SENT'G PROJECT (Sept. 18, 2013), <https://www.sentencingproject.org/publications/life-goes-on-the-historic-rise-in-life-sentences-in-america/> [<https://perma.cc/P4KY-ARVE>].

<sup>115</sup> *Criminal Justice Facts*, THE SENT'G PROJECT (June 3, 2021), <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/63C7-YQ7U>].

### C. *The Fourth Amendment and the War on Drugs*

The War on Drugs and the jurisprudence on the Fourth Amendment protections against unfettered search and seizure was a shift in law from the protection of constitutional rights to legitimizing policies like stop and frisk and other warrantless searches and can be characterized as the primary components of the Punishment Imperative.<sup>116</sup> Drug crimes made up sixty-six percent of the increase in the federal prison population and over fifty percent of the increase in state prison population between 1985 and 2000.<sup>117</sup> Since the War on Drugs officially began in the 1980s, the number of Americans imprisoned over drug offenses has grown from 40,900 in 1980 to 430,926 by 2019.<sup>118</sup> The War on Drugs is easily the component of the mass incarceration state most responsible for the imprisonment of Black people.<sup>119</sup>

Contrary to popular belief, the War on Drugs was not meant to imprison only higher-ups in the drug economic hierarchy. Most drug charges were for small-time consumers. For example, in 2018, ninety-two percent of marijuana arrests were due to possession, and merely eight percent were for

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<sup>116</sup> See generally John Derek Stern, *The War on Drugs and Jim Crow's the Most Wanted: A Social and Historical Look at Mass Incarceration*, 3 RAMAPO J. L. & SOC'Y 66, 74 (2017) (noting that the filling of prisons through the criminalization of drugs went hand-in-hand with the expanded search and seizure police powers and the erosion of the right to privacy).

<sup>117</sup> MARC MAUER, RACE TO INCARCERATE 33 (rev. ed. 2006).

<sup>118</sup> See THE SENT'G PROJECT, *supra* note 115.

<sup>119</sup> DRUG POLICY ALLIANCE, THE DRUG WAR, MASS INCARCERATION AND RACE 1 (June 2015) [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [<https://perma.cc/ZU62-M7QX>].

selling or manufacturing.<sup>120</sup> Furthermore, most people who are incarcerated in state prisons for drug offenses did not have a violent record.<sup>121</sup>

Exacerbating the situation, the Supreme Court has empowered, rather than restrained, the War on Drugs by overrunning Fourth Amendment protections against police encroachments on citizens' privacy. In one case, Justice Thurgood Marshall dissented from the Court's holding that created a drug-related "special needs" exception to Fourth Amendment probable cause principles and argued that there was "no drug exception" in the Constitution that would permit and end around to the constitutional protections against indiscriminate searches or seizures.<sup>122</sup> By 1991, scholars observed a significant evolution in how citizens and police engaged with each other. As Justice Stevens wrote in his dissenting opinion in *California v. Acevedo*:

In the years [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner . . . decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime.<sup>123</sup>

A fundamental ideal enshrined in the Fourth Amendment was that police could not search a person without a warrant or probable cause.<sup>124</sup> In the 1968 case *Terry v. Ohio*, the Supreme Court took a step in loosening Americans' Fourth Amendment protections.<sup>125</sup> In *Terry*, the Court declared

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<sup>120</sup> John Gramlich, *Four-in-ten U.S. drug arrests in 2018 were for marijuana offenses – mostly possession*, PEW RSCH CTR (Jan. 22, 2020), <https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/> [https://perma.cc/URH7-8TLV].

<sup>121</sup> MARC MAUER & RYAN KING, *THE SENT'G PROJECT, A 25-YEAR QUAGMIRE: THE "WAR ON DRUGS" AND ITS IMPACT ON AMERICAN SOCIETY* 13 (2007).

<sup>122</sup> *Skinner v. Ry. Lab. Exec.'s Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

<sup>123</sup> *California v. Acevedo*, 500 U.S. 565, 600–01 (1991) (Stevens, J., dissenting).

<sup>124</sup> *Skinner v. Ry. Lab. Exec.'s Ass'n*, 489 U.S. at 636.

<sup>125</sup> *See Terry v. Ohio*, 392 U.S. 1 (1968).

that if a police officer merely notices atypical, possibly dangerous conduct, he “is entitled for the protection of himself and others in the area . . . to discover weapons that might be used against the officer.”<sup>126</sup> This new entitlement became the basis for the stop-and-frisk policy.<sup>127</sup> In his dissent, Justice Douglas said that “[granting] police greater power than a magistrate [judge] is to take a long step down the totalitarian path.”<sup>128</sup> In the time since *Terry*, people of color have suffered not only far more unwarranted stops, questioning, and searches than their white counterparts but also significantly more than they had previously encountered.<sup>129</sup>

The Supreme Court even went so far as to relax Fourth Amendment protections in situations where, because of police pressure, defendants “consented” to a search. In *Florida v. Bostick*, Terrance Bostick, a young Black man, had his bags searched on a Greyhound bus.<sup>130</sup> The police decided to search the bus to find anyone who might have been in possession of illegal substances.<sup>131</sup> They had not suspected him of any wrongdoing, but they found a pound of cocaine in his bag and Bostick was subsequently charged with drug trafficking.<sup>132</sup> This was an example of what became a frequent occurrence in the War on Drugs: police scoured buses, interviewed passengers without telling them that they did not have to answer their

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<sup>126</sup> *Id.* at 30.

<sup>127</sup> Esther Jeanette Windmueller, *reasonable Articulable Suspicion – The Demise of Terry v. Ohio and Individualized Suspicion*, 25 UNIV. RICHMOND L. REV. 543, 544 (Spring 1991) (stating that *Terry v. Ohio* was the cornerstone of the stop-an-frisk doctrine).

<sup>128</sup> *Id.* at 38 (Douglas, J., dissenting).

<sup>129</sup> Elizabeth Hinton, *The Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INSTITUTE OF JUSTICE 5-6 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (noting that the number of Black people arrested and incarcerated skyrocketed in the early 1970s with the enactment of the Rockefeller Laws in new and similar laws in other states).

<sup>130</sup> *Florida v. Bostick*, 501 U.S. 429, 431–32 (1991).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 431.

questions, and searched the bus riders' belongings.<sup>133</sup> The Florida Supreme Court declared that the officers who searched Bostick's bag were in violation of the Fourth Amendment: "[T]hese police officers approach every person on board buses and trains . . . and check identification, tickets, ask to search luggage—all in the name of 'voluntary cooperation' with law enforcement."<sup>134</sup> However, the U.S. Supreme Court overruled this decision, stating that because Bostick complied voluntarily, the Fourth Amendment was not violated. The Court also emphasized that such an interpretation would apply to every forthcoming drug sweep.<sup>135</sup>

But what if the person provides "consent" because they are unaware of or uncomfortable saying no to the police? In *Ohio v. Robinette*, an officer pulled Robert Robinette over for speeding.<sup>136</sup> The officer approached his vehicle and demanded that Robinette get out of his car.<sup>137</sup> The officer then asked if Robinette would agree to a search for drugs.<sup>138</sup> The officer found a tiny amount of marijuana and methamphetamine.<sup>139</sup> The Ohio Supreme Court recognized this as a blatant "fishing" exercise on the part of the officer and mandated a "bright-line rule": before they requested consent for searching a citizen's car, all police henceforth had to inform the driver that they may exit the interaction.<sup>140</sup> The U.S. Supreme Court rejected this rule as being "unrealistic."<sup>141</sup> With this ruling, the Fourth Amendment no longer served as a realistic impediment to the War on Drugs.

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<sup>133</sup> *Id.* at 441; *see also* *United States v. Lewis*, 921 F.2d 1294, 1296 (D.C. Cir. 1990); *United States v. Flowers*, 912 F.2d 707, 708 (4th Cir. 1990).

<sup>134</sup> *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989); *see also* *State v. Kerwick*, 512 So. 2d 347, 348–49 (Fla. Dist. Ct. App. 1987).

<sup>135</sup> *Bostick*, 501 U.S. at 433.

<sup>136</sup> *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

<sup>137</sup> *Id.* at 36.

<sup>138</sup> *Id.* at 33.

<sup>139</sup> *Id.* at 36.

<sup>140</sup> *See id.* at 39.

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

In only a few years, the War on Drugs escalated into an almost-literal war. Police departments received money and military equipment specifically to fight the drug war.<sup>142</sup> As written in a Cato Institute report, SWAT teams rapidly formed in nearly all prominent American cities solely to fight the War on Drugs.<sup>143</sup> In 1972, the number of annual paramilitary drug raids in America was in the hundreds, by the 1980s this number increased tenfold, and by 1996 it had reached thirty thousand total.<sup>144</sup> Minneapolis's SWAT team engaged in no-knock warrants only thirty-five times in 1986, but ten years later, they committed over seven hundred drug raids.<sup>145</sup>

Citizens are typically haunted by the terrifying experience of having lived through a SWAT raid. A writer for *Village Voice* said that dozens of Black and Latino victims packed the courtroom and aired tales, one more horrifying than the next, as they described police ransacking their homes, handcuffing children and grandparents, putting guns to their heads, and being verbally (and often physically) abusive.<sup>146</sup> "In many cases, victims had received no follow-up from the police, even to fix busted doors or other physical damage."<sup>147</sup>

In addition to imprisoning and traumatizing minority communities, the War on Drugs had created a near-permanent underclass of citizens who

<sup>142</sup> *Policing and the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/policing> [<https://perma.cc/J6UB-7G59>].

<sup>143</sup> See Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <https://www.nytimes.com/1999/03/01/us/soldiers-of-the-drug-war-remain-on-duty.html> [<https://perma.cc/NK56-PVJX>].

<sup>144</sup> Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INST. 11 (2006),

[https://www.cato.org/sites/cato.org/files/pubs/pdf/balko\\_whitepaper\\_2006.pdf](https://www.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf) [<https://perma.cc/K8CG-TYTR>] (citing Peter Kraska, *Researching the Police-Military Blur: Lessons Learned*, POLICE F. 14, no. 3 (2005)).

<sup>145</sup> *Id.* at 11 (citing Britt Robson, *Friendly Fire*, MINNEAPOLIS CITY PAGES (Sept. 17, 1997)).

<sup>146</sup> *Id.* at 49 (referring to Dennis Duggan, *Reliving a Wrong Raid by NYPD*, NEWSDAY (June 4, 2003)).

<sup>147</sup> *Id.* at 49.

faced immense obstacles to climbing the economic ladder. In *Gideon v. Wainwright*, the Supreme Court left funding of legal services for the indigent to state and local authorities.<sup>148</sup> However, because politicians spent resources on tough-on-crime drug war policies, little had been left to grant the poor access to legal representation. About four-fifths of criminal defendants could not afford a lawyer,<sup>149</sup> and yet, public defenders were too overwhelmed with caseloads to provide adequate representation to lower class clients.<sup>150</sup>

#### *D. The Not-so-surprising Results of Bias in the Criminal Justice System*

By 2020, one-third of Black males faced prison sentencing, while only one-seventeenth of white males faced the same.<sup>151</sup> As of 2016, nearly half of all exonerations in the United States were of wrongfully accused Black Americans.<sup>152</sup> Around the same time, only five percent of illegal drug consumers were Black people, and yet this demographic represented nearly thirty percent of drug arrests.<sup>153</sup>

Racial disparities in the criminal justice system exist even amongst youth. Data from 2019 suggests that Black youth are over four times as

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<sup>148</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>149</sup> MARC MAUER & RYAN S. KING, *SCHOOLS AND PRISONS: FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION* 4 (2004), <https://static.prisonpolicy.org/scans/sp/brownvboard.pdf> [https://perma.cc/VW34-Z7KM].

<sup>150</sup> Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25(2) FED. SENTENCING REP. 91 (Dec. 2012) (noting that funding cuts and excessive caseloads force public defenders to choose which clients to represent more zealously and which ones to give a bare-bones representation).

<sup>151</sup> *Criminal Justice Fact Sheet*, NAACP, <http://naacp.org/resources/criminal-justice-fact-sheet> [https://perma.cc/2ULK-T29Q].

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

<sup>153</sup> *Id.*

likely to be sent to juvenile detention centers as their white counterparts.<sup>154</sup> More than four in ten youths placed in detention centers are Black, even though only fifteen percent of all American youths are Black.<sup>155</sup>

These statistics would not be so alarming if the reason were that Black males were more likely to commit crimes than white males, but this is not the case. People of all ethnicities consumed and sold drugs at comparable rates during this period.<sup>156</sup> If anything, white people were *more* likely to sell drugs than racial minorities.<sup>157</sup> For example, in 2000, the National Household Survey on Drug Abuse stated that white teenagers were over thirty-three percent more likely to have sold illicit drugs than their Black counterparts.<sup>158</sup>

If the American criminal justice system explicitly lacked any racial bias, and if Black people and white people engaged in illegal drug activities at similar rates, then it begs the question of why people of color were so disproportionately affected by the War on Drugs than white people. The answer comes from two elements. First, police were given immense powers in deciding who to stop, search, arrest, and accuse of drug crimes.<sup>159</sup> With

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<sup>154</sup> Josh Rovner, *Black Disparities in Youth Incarceration*, THE SENT'G PROJECT (July 15, 2021), <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/> [<https://perma.cc/S3VE-5GTK>].

<sup>155</sup> *See id.* at 20.

<sup>156</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SUMMARY OF FINDINGS FROM THE 2000 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 20 (2001), <https://files.eric.ed.gov/fulltext/ED466907.pdf> [<https://perma.cc/SK5L-5ZFW>]; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (2003), <https://files.eric.ed.gov/fulltext/ED479833.pdf> [<https://perma.cc/3WT8-HZ8G>].

<sup>157</sup> Christopher Ingraham, *White People Are More Likely To Deal Drugs, But Black People Are More Likely To Get Arrested For It*, WASHINGTON POST, (Sept. 30, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/> [<https://perma.cc/C8U8-KFUC>].

<sup>158</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, 1999 71, tbl. G (2000).

<sup>159</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 58–94 (2012).

such freedom, their unconscious racial profiling invariably affected their choice regarding who to stop in the first place, and so it appears that Black people ended up disproportionately on the receiving end of the officers' new powers.<sup>160</sup> Second, the courts refused to entertain any complaints by defendants that, in fact, the criminal justice system *did* act as a racially biased system. Meaning, the burden of proof was placed on the defendant, who had to provide evidence that any racial disparity must have been the result of *intentional* bigotry.<sup>161</sup> The combination of these two elements resulted in a criminal justice system that was clearly racialized yet could not be proven to be so.

Researchers Jimmie Reeves and Richard Campbell showed how the media distorted the public's perception of who, exactly, was smoking cocaine.<sup>162</sup> In the early 1980s, most stories involving the use of cocaine included white Americans, who usually consumed the drug by snorting it in its powdered form.<sup>163</sup> Significantly, these stories included themes of drug treatment, rehabilitation, and recovery. By the mid-1980s, as the War on Drugs escalated, the media shifted their framing to a "siege paradigm," such that the cocaine users were now lower-class minorities and powder cocaine was replaced by crack cocaine. One study of television news between 1990 and 1991 revealed that news stories relied on an "us versus them" framing, with "us" being white America and "them" being Black America.<sup>164</sup>

In the 1987 Supreme Court case *McCleskey v. Kemp*, the Court ruled that racial bias in sentencing could not be questioned without rigorous evidence

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<sup>160</sup> *Id.*

<sup>161</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>162</sup> *See generally* JIMMIE REEVES AND RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY* (1994).

<sup>163</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 102 (2012).

<sup>164</sup> David Jernigan & Lori Dorfman, *Visualizing America's Drug Problems: An Ethnographic Content Analysis of Illegal Drug Stories on the Nightly News*, 23 *CONTEMP. DRUG PROBS.* 169, 188 (1996).

of explicit racist intent, even if some statistical data was suggestive of it.<sup>165</sup> The Court stated that to prove that there had been a discriminatory violation of the Fourteenth Amendment, the defendant would have to prove that the decisionmakers in *his* case acted with discriminatory purpose.<sup>166</sup>

Following another Supreme Court case, *Armstrong v. United States*, the possibility of a defendant proving racism was made even more unlikely.<sup>167</sup> After this case, defendants had to show their evidence of the prosecutor's racism before the case hearing, even though that very evidence could only possibly be made available once the prosecutor released his or her documents.<sup>168</sup> In a third Supreme Court case, *Purkett v. Elm*, the Court declared that prosecutors had the ability to strike any potential juror for any reason as long as it was not supposedly based on race, regardless of how believable.<sup>169</sup> In *Purkett*, the prosecutor gave absurd reasons for striking the Black jurors: "I struck [juror] number twenty-two because of his long hair . . . And juror number twenty-four also had a mustache and goatee type beard . . . And the mustaches and the beards look suspicious to me."<sup>170</sup>

### *E. Consequences of the Criminal Justice System Beyond Imprisonment*

As legal scholar Michelle Alexander explained in *The New Jim Crow*, during the War on Drugs and beyond, a newly-released inmate from prison had barely more rights than a released slave or Black person living under Jim Crow did.<sup>171</sup> Those recently freed from incarceration could be harassed by police under any justification, and they may have been sent back to

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<sup>165</sup> See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>166</sup> *Id.* at 292–93.

<sup>167</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>168</sup> *Id.* at 465.

<sup>169</sup> See *Purkett v. Elm*, 514 U.S. 765 (1995).

<sup>170</sup> *Id.* at 771 n.4 (Stevens, J., dissenting and quoting prosecutor).

<sup>171</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 141 (2012).

prison for the slightest law violation.<sup>172</sup> Furthermore, while the “whites only” signs were a thing of the past, they had been replaced by subtler discriminatory signs: variants of “felons not wanted here” might have been found on job applications, rental contracts, loan applications, and other forms required to engage in American society.<sup>173</sup> In short, a criminal history allowed the exact kinds of discriminatory practices that America had supposedly renounced following the Civil Rights era.

When a criminal defendant stood before a judge, they were told that if they pleaded guilty, they would be considered “unfit” for jury duty for the rest of time<sup>174</sup> and they would lose their right to vote. They would not, however, be told about the impediments they would face *after* imprisonment: societal shame, derision, discrimination, and ostracism. As Jeremy Travis noted, “[i]n this brave new world, punishment for the original offense is no longer enough; one’s debt to society is never paid.”<sup>175</sup> As soon as an American acquired the status of “felon,” they became a second-class citizen for life. Even if a defendant avoided imprisonment by taking a plea deal, they suffered the “real” punishment in their everyday life. The American Bar Association portrayed the life of a minor drug offender as follows:

[The] offender may be sentenced to a term of probation, community service, and court costs . . . he may be ineligible for many federally funded health and welfare benefits, food stamps, public housing, and federal educational assistance . . . If he is convicted of another crime . . . [h]e will not be permitted to enlist in the military, or possess a firearm, or obtain a federal security

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<sup>172</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 138 (2012).

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

<sup>174</sup> Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. UNIV. L. REV. 65, 115–16 n.236 (2003).

<sup>175</sup> JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 73 (2002).

clearance. If a citizen, he may lose the right to vote; if not, he becomes immediately deportable.<sup>176</sup>

Those recently released from incarceration have had a notoriously difficult time gaining employment once released. One study by the Vera Institute discovered that, in the first month after being released, Americans were more focused on finding a job than on any of life's other demands.<sup>177</sup> This is in part due to the criminal justice system itself: according to a survey of state parole agencies, eighty percent of the surveyed jurisdictions *required* those formerly imprisoned to "maintain gainful employment."<sup>178</sup> Should the recently released individuals have failed to meet this challenge, they could have found themselves with even more time behind bars.<sup>179</sup>

Employers discriminated against people with criminal convictions at every turn. A survey revealed that although nine out of ten employers claimed that they would have hired a welfare recipient, only four out of ten would have been open to hiring someone with a felony conviction on their record.<sup>180</sup> A survey of over six hundred California employers showed that while most employers would have hired someone who had a misdemeanor on their record, they were far less willing if the applicant's record included a drug-related, property-related, or violent crime.<sup>181</sup> Even people who were formerly incarcerated who sought self-employment struggled to acquire the

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<sup>176</sup>MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 5 (2011) (quoting American Bar Association, Task Force on Collateral Sanctions, *Introduction, Proposed Standards on Collateral Sanctions and Administrative Disqualification of Convicted Persons*, draft (Jan. 18, 2002)).

<sup>177</sup>MARTHA NELSON ET AL., *THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY* (1999).

<sup>178</sup>MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 145 (2012).

<sup>179</sup>MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 146 (2012).

<sup>180</sup>HARRY HOLZER ET AL., *WILL EMPLOYERS HIRE EX-OFFENDERS? EMPLOYER PREFERENCES, BACKGROUND CHECKS, AND THEIR DETERMINANTS* 14 (2002).

<sup>181</sup>Employers Group Research Services, *Employment of Ex-Offenders: A Survey of Employers' Policies and Practices*, SAN FRANCISCO: SF WORKS (Apr. 12, 2002).

necessary licensing they would have needed to pursue particular career paths.<sup>182</sup> Black people with felony convictions, in particular, were most hampered in finding post-prison employment.<sup>183</sup> The social stigma of having a criminal past disproportionately harmed the Black community, and Black men who had spent time in prison were least likely to be hired of any group in America.<sup>184</sup>

Whether intentionally discriminatory or not, the “marginalization of one race by the unfair application of laws governing the access (and denial thereof) of democratic freedoms and notions of liberty” creates a racial democracy rather than the constitutional republic the United States ascribes to be.<sup>185</sup> Historically, the “African American community’s distrust of the criminal justice system had largely been confined to the sentiments of the African American community.”<sup>186</sup> More recently, with the deaths of Michael Brown, Eric Garner, Botham Jean, Philando Castile, Stephon Clark, George Floyd, and other men and women of color who were either in the custody of law enforcement or were the victims of violence at the hands of a law enforcement officer, the distrust of police has broadened and has resulted in both peaceful and violent protests supported by people of all ethnicities and colors.

#### IV. RACE IN THE CLASSROOM

Scholars have recognized that teachers play an important role in shaping how a student perceives themselves educationally and socially.<sup>187</sup> However, teachers are not the only influence. Scholars have found that middle and

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<sup>182</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 146 (2012).

<sup>183</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 146 (2012).

<sup>184</sup> HARRY HOLZER & ROBERT LALONDE, *JOB STABILITY AND JOB CHANGE AMONG YOUNG UNSKILLED WORKERS* (David Card & Rebecca Blank eds., 1999).

<sup>185</sup> Fosten, *supra* note 4, at 124.

<sup>186</sup> *Id.* at 132.

<sup>187</sup> Gershenson et al., *supra* note 11, at 209.

high school students, especially Black students, often get their ideas about their own race from popular media; they then adopt these ideas as their own.<sup>188</sup> In one study, the author “expressed the important role that parents and teachers play in helping youth process the messages they receive from media and popular culture.”<sup>189</sup> That same scholar posits that, upon a review of the work of many popular musical artists, the Black identity appears to be associated with significant negative attributes such as “violence, misogyny, materialism, and violence” and that one of the roles of a teacher is to “challenge these negative notions of Blackness portrayed in the media.”<sup>190</sup> One way to mitigate these negative images is to point out the many contributions Black Americans have made, including: distinguished post-secondary educational institutions, a rich religious heritage, the birth of jazz music, innovative and compelling art and literature, and advances in science, among others.<sup>191</sup>

It is also important to eradicate the false narrative that young children do not understand race and racism. Once most young children recognize the importance of racial and ethnic distinctions as meaningful concepts, they begin to reconstruct them into substantial intellectual and interactional devices of their own making.<sup>192</sup> Children, like all human beings, actively shape, blend, and synthesize elements of the preexisting patterns found

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<sup>188</sup> See Childs, *supra* note 16, at 57.

<sup>189</sup> *Id.* at 59.

<sup>190</sup> *Id.* at 60. The author discusses how racially charged media images dating back to the negative caricatures in cartoons have not abated and some semblance can still be found in today’s contemporary music videos, films, television shows, advertising, and news media.

<sup>191</sup> *Id.* at 61.

<sup>192</sup> See VAN AUSDALE & FEAGIN, *supra* note 7, at 22. Oddly, social scientists have found that white children have consistently been found to prefer their own racial group to any other, and they do so from a young age. More surprising is that many Black children have shared that same preference, sometimes to the point of even misidentifying themselves as white. Even at this early stage, darker-skinned children are regarded as devalued members of society by its youngest members, even when those members are dark-skinned themselves. See *id.* at 11.

around them—in families, other social settings, and the mass media.<sup>193</sup> “Activities that start as external and detached become part of the child’s internal makeup through mental and actual reconstruction of the activity over time, incorporating and re-creating social events in a long series of developmental steps.”<sup>194</sup> Similarly, “children’s participation in a broad array of cultural and societal activities enables them to learn the social tools available for their own learning efforts.”<sup>195</sup> Educators can help guide and influence the discussion of race in the classroom by understanding the “circuit of culture.” The news and media have perpetuated the image that Black males are violent and, through certain outlets, they have made this image believable.<sup>196</sup> Moreover, teachers and administrators may view the manifestations of these cultural images—clothing brands, hairstyles, style of dress—as representing misbehavior or worse, criminality, while their students are merely expressing their individuality or copying what they believe members of their race should be wearing.<sup>197</sup> The term “circuit of culture” refers to the domains of representation, identity, production, consumption, and regulation.<sup>198</sup> Understanding these domains, and then helping students to process the racially charged messages they receive in popular culture and mass media, can help challenge or even change the negative constructions of race. However, what if educators, sometimes unconsciously, exacerbate the flawed and discriminatory constructions? When this happens, it can lead to longer-term negative self-images for students of color that can be carried over into adulthood.

This is one reason the data collected in the two cultural-arts programs is disconcerting. While there was no evidence of racist or discriminatory intent on the part of the adults involved in the programs, the data from the

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<sup>193</sup> *Id.* at 20.

<sup>194</sup> *Id.* at 19.

<sup>195</sup> *Id.*

<sup>196</sup> See Childs, *supra* note 16, at 64–65.

<sup>197</sup> See *id.*

<sup>198</sup> *Id.*

*Trial of Goldilocks* and *Humpty Dumpty Was Pushed* programs seem to support the argument that

individuals who express little overt prejudice – and indeed may consider racial prejudice morally wrong – may still respond on a gut level to racially biased stereotypes . . . The automatic activation of implicit negative stereotypes – especially those conjuring images of black criminality and violence – may have profound and enduring effects on social judgment and people’s lives.<sup>199</sup>

The harmful immediate effects of implicit bias are often difficult to ascertain on an individual basis because this kind of negative stimuli impacts everyone differently. However, there is no doubt that, over time, these biases have a significant role in the child’s development of self and can have long lasting and negative consequences. It is not hyperbole then to say that stereotypes can literally have life-or-death consequences.<sup>200</sup>

## V. ADDRESSING BIAS IN EARLY EDUCATION AND THE CRIMINAL LAW<sup>201</sup> SYSTEM

An argument can be made that there is a connection between what appears to be implicit bias during the educational programs discussed above and the bias that exists in the criminal justice system. Over the course of the ten-year period that data was collected for the *Trial of Goldilocks* program, 75% of the time a Black student was selected to play the villain, the Big Bad Wolf, even though students of color made up only 11% of the class

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<sup>199</sup> Riccucci, *supra* note 2, at 121 (quoting CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 43–44 (2017)).

<sup>200</sup> *See id.* (citing CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 43–44 (2017)).

<sup>201</sup> It is incorrect to use the term criminal justice system when historically the system has administered separate and unequal standards of justice for Black people through unequal treatment at every stage in the system. *See* Gerald K. Fosten, *Perspectives on Social Inequality, Criminal Justice, and Race in the United States: A Critical Analysis*, 9(9) J. PAN AFRICAN STUDIES 122, 128 (Nov. 2016).

population. Similarly, over the five-year period that data was collected for the *Humpty Dumpty Was Pushed* program, a staggering 89% of the time that a child of color played the role of a suspect they were indicted, while their white counterparts were indicted only 18% of the time, even though the evidence against them was identical.

Looking at the current statistics in the American criminal justice system, by 2020, one out of every three Black males (33%) versus one out of every seventeen white males (6%) faced prison sentencing.<sup>202</sup> Based on this data, one could argue that the biases created or bolstered in early education carry through to adulthood and subsequent interactions with the United States criminal justice system. While incidents of implicit bias occurred more frequently in the education programs than what current incarceration rate statistics indicate, the difference can be the result of several factors, including anti-racist educational efforts; maturity; personal experience with persons of different races/ethnicities; the difference in degree of severity of the situations (school mock trials versus reality of actual prison); and other environmental and cultural factors that support tolerance and anti-racist behavior. Even though the degree of bias seems to abate between early school experiences and later interactions with the criminal justice system, there is still an unacceptable degree of racial bias in both areas. Moreover, because racial bias is evident in elementary education, merely creating and implementing strategies to address biases in the criminal justice system alone would be akin to closing the door after the horse has left the barn. To address the criminal justice system biases properly and more effectively, society must simultaneously work to eradicate these biases when they first appear in early education. Below are some suggestions for addressing the biases in the criminal legal system.

First, educators need to realize and acknowledge that, like everyone else, they have biases, fears, and anxieties about race and that they need to take a

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<sup>202</sup> See NAACP, *supra* note 151.

deeper look at how they can avoid allowing these to impact how they view and interact with their students. This includes recognizing that they can benefit from education on issues of race, specifically implicit bias.<sup>203</sup> Second, educators can take affirmative steps to ensure that all students feel valued and are treated equally. This requires an honest assessment about classroom management and includes a deep dive into their curriculum and lesson plans to make sure that they are acknowledging the vast and significant contributions of people of color. By “affirming the personal identity, dignity, and cultural wealth of students of color throughout instruction, classroom routines, and behavioral management . . . [teachers] can facilitate an inclusive, engaging, and equitable learning environment . . . .”<sup>204</sup> Third, educators need to be prepared for dialogues about race and how to respond to bias when it rears its ugly head, which it will. If teachers and related adults neglect how children learn about race and ethnicity, they neglect some of the reproduction processes that undergird the nation’s continuing issues with discrimination.<sup>205</sup>

When the wounded child hears negative language, experiences exclusion or avoidance, and must remain alert to combating rejection and negative stereotypes for long periods – and eventually a lifetime – the damage assumes critical significance, for the child as an individual, for her or his family and community, and for the larger society.<sup>206</sup>

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<sup>203</sup> This suggestion is tricky because some studies have shown that anti-discrimination “training” programs often have the reverse effect and can lead to damaged relationships, resentment, and disharmony in the workplace. See Joanne Lipman, *How Diversity Training Infuriates Men and Fails Women*, TIME (Jan. 25, 2018, 6:27 AM), <https://time.com/5118035/diversity-training-infuriates-men-fails-women/> [<https://perma.cc/D86S-H77W>].

<sup>204</sup> Larissa M. Gaias et al., *Examining Teachers’ Classroom Management Profiles: Incorporating a Focus on Culturally Responsive Practice*, 76 J. SCH. PSYCH. 124, 125 (2019).

<sup>205</sup> VAN AUSDALE & FEAGIN, *supra* note 7, at 10.

<sup>206</sup> *Id.* at 9.

Fourth, schools need to provide opportunities for educators to acknowledge and challenge their own cultural conditioning, inherited biases, and fears about other racial groups.<sup>207</sup> Providing these opportunities can free a teacher from the constant guardedness and vigilance in denying or avoiding discussions about racism, sexism, and other biases; provide a model of truthfulness, openness, and honesty to students on the issue of race; and encourage other students to approach the topic with honesty. Teachers can help their students recognize the social, political, and economic forces that create injustice in education, the legal system, and society. Teachers can also discuss strategies to address these forces.<sup>208</sup> Finally, merely employing in-service training or anecdotal classroom experiences are not sufficient to truly understand biases; rather, educators need to experience and engage in a dialogue with people who differ in race, culture, and ethnicity, and to do so in real-life settings and situations such as minority communities or integrated neighborhoods.<sup>209</sup>

Addressing implicit bias in early education is only a start. The United States has a long and painful relationship with racism and other biases. To effectively attack the problem, educators and administrators need to simultaneously address implicit biases on myriad of fronts. One of the fronts is the criminal legal system, which has become a biased program of mass incarceration. The biggest challenge to addressing bias in the criminal legal system is that it has a wide array of participants who operate, for the most part, independently. There are separate federal and state systems with no consistency in sentencing. Sometimes the punishment is draconian mandatory incarceration terms and in other situations, where there is discretion, biases appear. In addition, the separate drug courts need to start

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<sup>207</sup> Derald Wing Sue et al., *Racial Microaggressions and Difficult Dialogues on Race in the Classroom*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 183, 189 (2009).

<sup>208</sup> Kara Michelle Viesca et al., *When Claiming to Teach for Social Justice is Not Enough: Majoritarian Stories of Race, Difference, and Meritocracy*, 4 BERKLEY REV. EDUC. 97, 116 (2013).

<sup>209</sup> See Wing Sue et al., *supra* note 207, at 189.

looking at those criminalized for drug use as persons who may be suffering with addiction; to view it as a public health issue, not a criminal one. A national task force should be created to examine individuals with felony convictions to see which ones can regain their rights and eliminate their disenfranchised and diminished ability to participate in life as second-class citizens.

This is just a start, and the process will be daunting when one considers that there are close to 1,000,000 people who have a connection to the prison system, including police officers, judges, district attorneys, court personnel, juries, administrators, legislators, private prison companies, state and federal government officials, and post release administrators.<sup>210</sup> Another area of reform should be the educational requirements for police officers. Research has shown that police officers with at least two years of higher education are less likely to receive misconduct complaints and use force as a first option. Despite this, most United States law enforcement agencies hire recruits with only a high school education.<sup>211</sup> A 2017 national survey of 958 police agencies found that 30.2 percent of police officers had a four-year college degree and only 51.8 percent had a two-year degree.<sup>212</sup> A similar study from 2003 found that only eight percent of United States police agencies required some college at all.<sup>213</sup> This means that most police departments around the country are staffed primarily with officers who have, at best, a high school diploma.<sup>214</sup> Two of the counterarguments to

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<sup>210</sup> See Fosten, *supra* note 4, at 126.

<sup>211</sup> C. Ronald Kimberling, *College for Cops? Studies Show it Helps Their Behavior, Stress Levels*, THE HILL (June 24, 2020, 8:00 AM), <https://thehill.com/opinion/criminal-justice/504075-college-for-cops-studies-show-it-helps-their-behavior-stress-levels?rl=1> [<https://perma.cc/MT5B-AEQM>].

<sup>212</sup> Christine Gardiner, *How Educated Should Police Be?*, NAT'L POLICING INST. (Oct. 6, 2017), <https://www.policinginstitute.org/onpolicing/how-educated-should-police-be/> [<https://perma.cc/7G8A-ZU42>].

<sup>213</sup> See Kimberling, *supra* note 211.

<sup>214</sup> What is even more troubling is that approximately seventeen percent of United States police agencies do not even require a high school diploma. *See id.*

requiring a police officer to complete a post-secondary education are that (1) this could have a discriminatory effect against minorities; and (2) police academies allegedly provide sufficient training for an officer to effectively do their job.<sup>215</sup> While the first point has merit, the second argument loses steam when one considers that many other careers require significantly more hours of training than most police academies. For example, police officers in California receive 664 hours of training while cosmetologists are required to have 1,600 hours of training to be licensed.<sup>216</sup> Similarly, in Florida, police officers are required to complete 770 hours of academy training while interior designers need 1,769 hours, after completing a four-year college degree, to be licensed.<sup>217</sup>

While a post-secondary education is not the only solution to the bias in law enforcement, a Florida study reviewing the disciplinary cases against police officers found that seventy-five percent of cases were against officers with only a high school education and only eleven percent were against officers with four-year degrees.<sup>218</sup> This seems to support the position that a more educated police force will result in less misconduct, including racial bias, on the part of police officers. To address the concern over access to higher education and its possible discriminatory impact, police departments should, in instances in which requiring a two or four-year degree is not practicable, enhance the length and content of their academies to hopefully achieve the same outcome: a more educated police department.

Moreover, the post-secondary education required, whether at a university or an internal police academy, should include courses in psychology,

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<sup>215</sup> Wayne C. Johnston & Sutham Cheurprakobkit, *Educating Our Police: Perceptions of Police Administrators regarding the Utility of a College Education, Police Academy Training and Preferences for Courses for Officers*, 4(3) INT'L J. OF POLICE SCI. & MGMT. 182, 184 (2002) (noting that the vagaries of college programs and limited budgets in smaller or rural police departments are just two obstacles to a universal requirement of a college degree for police officers).

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.*

sociology of race and ethnicity, interpersonal communication and negotiation skills, and criminology. There are many organizations and studies being done to look at ways to improve policing. One of the more well-known entities in this arena is the Policing Project at NYU, where researchers have focused on three essential components: transparency, engagement, and formal structures.<sup>219</sup> Transparency refers to the idea that “police must be transparent about their policies and practices so that the public can provide meaningful and informed input.”<sup>220</sup> Engagement means there “must be robust, direct engagement between police and community members” and that this “requires more than just conversation or social interaction: It means police and community working collaboratively to ensure that policing truly reflects community priorities and values.”<sup>221</sup> Finally, formal structures refers to police commissions or inspectors general who can “help address some of the shortcomings of direct police-community engagement. These entities can conduct comprehensive reviews, identify problem areas, propose changes, help facilitate public input on a more ongoing basis, and collaborate directly with policing agency leadership.”<sup>222</sup>

The Policing Project also focuses on the issues associated with law enforcement’s use of technology and ways to reimagine public safety. As they aptly point out,

Many people think of a police response when they hear “public safety.” But this conception is too narrow. Public safety means ensuring communities—especially historically marginalized communities—have the resources to address critical social problems, such as access to housing, food security, transportation,

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<sup>219</sup> See THE POLICING PROJECT, <https://www.policingproject.org/> [<https://perma.cc/3HAS-YTEJ>].

<sup>220</sup> See *Front-End Voice in Policing*, THE POLICING PROJECT, <https://www.policingproject.org/front-end-landing> [<https://perma.cc/Y27K-LMSB>].

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

<sup>222</sup> *Id.*

and healthcare, in an effective and humane way. It means empowering those communities to participate in shaping what public safety looks like. And it means minimizing whenever possible the harms that often accompany policing—such as uses of force and arrests.<sup>223</sup>

Ultimately, society needs to examine not only how policing occurs in this country but what needs to change in the system to help eradicate the historical and ongoing injustices. In doing so, prevention should be the focus instead of exhausting most efforts on after-the-fact corrections. We as a society cannot continue to rely solely on courts and the police to determine how we are policed as a society; rather, it is incumbent upon all of us to make sure that the protections of the Constitution are being applied without regard to race, nationality, or other protected categories. Ultimately, society needs to pull back the curtain and acknowledge that these biases exist, that they have devastating and life-long repercussions, and that their continued existence undermines the promise of equality guaranteed in the Constitution. In the immortal words of Frederick Douglass, the “Constitution knows no man by the color of his skin” and therefore we should not allow race to be the measure of anyone’s constitutional rights.<sup>224</sup>

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<sup>223</sup> *Reimagining Public Safety*, THE POLICING PROJECT, <https://www.policingproject.org/rps-landing> [<https://perma.cc/3D62-D6RA>].

<sup>224</sup> Frederick Douglass, *Our Composite Nationality*, in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 94 (Nicholas Buccola ed., 2016).

**Appendix A – Statistics for the Trial of Goldilocks**

School Year	Total Number of Students	Students of Color	Number of Students of Color Who Were Cast as the Wolf	Asian Students	Percent of Population That Were Students of Color	Percent of Population That Were Asian Students	White Students	Percent of Population That Were White Students
2008	468	55	12	19	0.12	0.04	394	0.84
2009	512	53	14	23	0.10	0.04	436	0.85
2010	505	57	14	21	0.11	0.04	427	0.85
2011	487	46	11	23	0.09	0.05	418	0.86
2012	453	49	11	25	0.11	0.06	379	0.84
2013	533	61	15	25	0.11	0.05	447	0.84
2014	471	49	11	28	0.10	0.06	394	0.84
2015	500	55	10	24	0.11	0.05	421	0.84
2016	514	40	13	26	0.08	0.05	448	0.87
2017	516	58	13	27	0.11	0.05	431	0.84
Total	4959	523	124	241	0.11	0.05	4195	0.85

School Year	% That Black Student Was the Big Bad Wolf	% That Asian Student Was an Attorney	% That White Student Was Goldilocks	Number of Classes
2008	0.75	0.58	0.74	19
2009	0.74	0.52	0.52	21
2010	0.82	0.48	0.75	20
2011	0.61	0.39	0.62	21
2012	0.79	0.48	0.63	19
2013	0.83	0.48	0.62	21
2014	0.69	0.5	0.75	20
2015	0.67	0.54	0.6	20
2016	0.65	0.5	0.57	21
2017	0.72	0.71	0.71	21
Total	0.73	0.52	0.65	203

**Appendix B – Statistics for Humpty Dumpty Was Pushed**

<b>Total Number of Times a Black Student Played One of the Defendants</b>	<b>Total Number of Times a Black Student Was Indicted</b>	<b>Rate of Indictments of Black Students</b>
<b>45</b>	<b>40</b>	<b>89%</b>
<b>Total Number of Times a Non-Black Student Played One of the Defendants</b>	<b>Total Number of Times a Non-Black Student Was Indicted</b>	<b>Rate of Indictments of Non-Black Students</b>
<b>130</b>	<b>23</b>	<b>18%</b>

