

Systemic Implicit Bias

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Legal discourse on implicit bias has changed the way scholars and citizens think about race in the justice system. Ever-growing scholarship, much of it empirical, has identified, confronted, and sought to address how implicit bias operates in nearly every criminal justice context— especially in policing,¹ prosecuting,² judging,³ and juror decision-making.⁴ This focus on racially fraught

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1. See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002) (using a reaction-time based measure to test how study participants responded in racialized ways to threat situations); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144 (2012) (arguing that the legal test of “reasonable suspicion” is particularly susceptible to implicit bias).
 2. See, e.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (considering a variety of ways that prosecutorial decision-making may be fraught with implicit bias).
 3. See, e.g., Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. (forthcoming 2017) (on file with authors) (finding anti-Asian and anti-Jewish implicit biases among federal and state judges, and considering the results in the context of white-collar criminal sentencing); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (empirically confirming that judge participants harbored implicit racial biases).
 4. See, e.g., Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010) (finding, in an empirical study, that study participants implicitly associated Black with guilty and White with not guilty); Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Impact Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014) (presenting the results of an empirical study on race and the value of human life); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010)

legal processes, and the subsequent search to mitigate or eliminate the operations of implicit bias within each of them, has been an illuminating force not only for those who seek to expose the reality of a biased system, but also for those who recognize that the fairness-driven ideals of the American legal system are not being realized. Thus, it is not surprising that efforts designed to “deal with” implicit bias in the criminal justice system—whether through judicial trainings, jury instructions, or structural safeguards—have become increasingly popular.⁵

Our aim here is to strengthen the existing model of implicit bias by proposing the addition of a new theoretical layer. It is not only processes and people that allow implicit bias to seep into the criminal justice system. We argue that a comprehensive understanding of implicit bias in the criminal justice system requires acknowledging that the theoretical underpinnings of the entire system may now be culturally and cognitively inseparable from implicit bias.

At the heart of this Essay are two of our recent empirical studies. One found that people automatically devalue the lives of Black Americans compared to White Americans.⁶ The other found that core punishment theories have become deeply ingrained with implicit racial bias.⁷ Driven by these studies’ empirical results, and embracing our recommended “zooming out” of implicit bias discourse, we argue for new race-relevant approaches to Eighth Amendment excessiveness jurisprudence, as well as for the development of a more accurate understanding of how policy decisions are made. More specifically, we claim that controversial criminal justice practices, such as capital punishment and ju-

(detailing the results of a study that found that participants’ judgments of evidence varied based upon whether they had been exposed to a photo of a darker- or lighter-skinned perpetrator).

5. For example, the New York District Attorney’s office has engaged outside experts to look for—and suggest ways to mitigate—implicit bias within its own operations and procedures. See Besiki Kutateladze, Whitney Tymas & Mary Crowley, *Race and Prosecution in Manhattan*, VERA INST. OF JUST. 1-2 (2014), <http://archive.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> [<http://perma.cc/4HBG-C7EA>]. More broadly, organizations such as the American Bar Association and the National Center for State Courts have been working to educate judges and lawyers about what they can do to mitigate the effects of implicit bias in the courtroom. See, e.g., *Helping Courts Address Implicit Bias: Resources for Education*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/ibeducation> [<http://perma.cc/Y5UG-NMG3>]; *Joint Statement on Eliminating Bias in the Criminal Justice System*, AM. BAR ASS’N & NAACP LEGAL DEF. & EDUC. FUND (July 2015), http://www.americanbar.org/content/dam/aba/images/abanews/aba-ldf_statement.pdf [<http://perma.cc/E7VC-CN2K>]. Training of judges, including some conducted by the authors of this Essay, are common.
6. See Levinson, Smith & Young, *supra* note 4, at 573.
7. See Robert J. Smith, Justin D. Levinson & Koichi Hioki, *Race and Retribution: An Empirical Study of Racialized Punishment and Implicit Bias in America* (Feb. 29, 2016) (unpublished manuscript) (on file with authors).

venile life without parole, may now be resting on shaky legal ground. Our research demonstrates that the inquiry into categorical excessiveness—a jurisprudence that largely ignores race in its current manifestation—must grapple with systemic implicit bias.

Bringing an understanding of systemic implicit bias into the constitutional analysis could lead to the conclusion that some legal practices that make America so punitive and unjust can no longer be constitutionally supported. Furthermore, our research results open new pathways for scholars and reformers considering how to move forward in addressing the most pressing racial issues in criminal justice today: race in policy-making, in policing, in prosecutorial discretion, and in punishment.

In the remainder of this Essay, we first introduce systemic implicit bias. Next, we examine what systemic implicit bias could mean for Eighth Amendment analysis of the death penalty and juvenile life without parole. Finally, we explore how systemic implicit bias could infect a range of policy decisions at the local, state, and national levels.

I. INTRODUCING SYSTEMIC IMPLICIT BIAS

Systemic implicit bias, as we define it, refers to the way automatic racial bias may have become unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories (such as retribution or rehabilitation) and jurisprudential approaches to well-considered constitutional doctrines (such as Eighth Amendment excessiveness analysis). To explain the empirical origins of this concept, we summarize two of our most recent studies about implicit bias in the criminal justice system. These studies were both aimed not just at a specific legal process or principle—though we admit to framing them in this limited way⁸—but more broadly at the question of how implicit bias might infect the core principles embedded in our legal system.

Our first such study sought to examine whether Americans implicitly devalue Black lives relative to White lives. The study involved a diverse pool of 445 citizens in six states.⁹ We tested participants' implicit racial biases, not only on traditional racial stereotypes (such as stereotypes of Black Americans as hos-

8. Indeed, our article about race and the value of human life was entirely framed around the death penalty. See Levinson, Smith & Young, *supra* note 4. Furthermore, even this Essay—by limiting its focus to the criminal justice system—could potentially be considered a narrow frame for the studies we conducted. For a broader look at implicit bias in the legal system, see *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012).

9. See Levinson, Smith & Young, *supra* note 4, at 553.

tile), but also on a new implicit bias measure.¹⁰ The Implicit Association Test (IAT)¹¹ that we created tested people's automatic (non-controlled) associations between race and value of life by requiring participants to group together photographs of White and Black faces with word stimuli representing the concepts of valuable or valueless.¹² For example, participants had to respond rapidly to categorize the photos of Black and White faces along with the words "merit," "worthy," and "valuable," as compared to the words "drain," "expendable," and "waste."¹³ The results of the study indeed confirmed that our sample held significant automatic associations between White Americans and valuable and between Black Americans and worthless.¹⁴

Our second study sought to measure whether Americans' automatic conceptions of punishment have become cognitively inseparable from race.¹⁵ In that study, a diverse sample of 522 American adults completed an IAT that asked them to categorize White and Black faces with the concepts of retribution and mercy.¹⁶ Thus, we created a measure that could test whether people implicitly associate retributive concepts with Blacks and leniency with Whites. The study found that, indeed, participants automatically associated Black faces with the words "revenge," "payback," and "punish," and associated White faces with the words "forgive," "redemption," and "compassion."¹⁷ Furthermore, we found that citizens' implicit racial biases predicted their overall retributiveness: the greater the implicit racial bias they held, the more they supported retribution as an ideal punishment theory.¹⁸

Taken together, our studies illustrate how deeply ingrained cultural forces tend to promote both the undervaluing and over-punishment of Black lives across the justice system. To connect these studies to legal doctrine at a systemic level, we next focus on two ways in which these forces shape criminal law. First, at the level of constitutional law, we explore the implications of systemic racial bias on Eighth Amendment excessive punishment jurisprudence. Second,

10. *See id.* at 556.

11. The Implicit Association Test is a well-known measure that tests automatically held social attitudes and stereotypes. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464-66 (1998).

12. Levinson, Smith & Young, *supra* note 4, at 556.

13. *Id.* at 556 n.212.

14. *See id.* at 557-59.

15. *See* Smith, Levinson & Hioki, *supra* note 7 (manuscript at 35-46).

16. *See id.* (manuscript at 35, 37-38).

17. *See id.* (manuscript at 43).

18. *See id.* (manuscript at 44-45).

taking a step back, we wrestle with how systemic implicit bias infects the way people frame issues throughout the criminal justice system—distorting policy questions and altering the decisional calculus of the actors in the justice system who wield the most discretionary power.

II. SYSTEMIC IMPLICIT BIAS AND EIGHTH AMENDMENT JURISPRUDENCE

The results of our studies have meaningful implications for Eighth Amendment jurisprudence on cruel and unusual punishments, specifically relating to the supposedly race-irrelevant doctrine of excessiveness. When the U.S. Supreme Court questions whether a punishment is categorically excessive, the Court asks, in part, whether in its own judgment the punishment practice is excessive in relation to the severity of the crime or the class of people subjected to the punishment.¹⁹ For instance, the Court has held that the death penalty is an excessive punishment for non-homicide offenses.²⁰ It has also held that the death penalty cannot be imposed upon juveniles or the intellectually disabled, no matter the severity of the offense,²¹ and that life without parole cannot be imposed upon juveniles who commit non-homicide offenses.²² Traditionally, the racial disparities that remain at the heart of our harshest punishments²³—for example, the death penalty and juvenile life without parole—have not been viewed as part of excessiveness analysis. Instead, racial disparities are treated as relevant to questions about the inconsistency and irrationality of

19. See *Kennedy v. Louisiana*, 554 U.S. 407, 434-41 (2008) (determining that capital punishment is excessive for a person who commits a non-homicide offense); *Roper v. Simmons*, 543 U.S. 551, 568-75 (2005) (concluding that capital punishment is disproportionate for offenders under eighteen); see also Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1173 (2015) (“[B]ecause the death penalty must be reserved for the most egregious offenders, only capital defendants who commit the most heinous offenses *and* those whose personal background and characteristics suggest that they are among the most culpable are eligible for a death sentence.”).

20. *Kennedy*, 554 U.S. at 447.

21. *Roper*, 543 U.S. at 578 (holding that the Eighth Amendment bars imposition of the death penalty on a juvenile); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment bars imposition of the death penalty on an intellectually disabled person).

22. *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the Eighth Amendment bars imposition of a life without parole sentence on a juvenile who commits a non-homicide offense).

23. See, e.g., Meg Beardsley, Sam Kamin, Justin Marceau & Scott Phillips, *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431 (2015) (detailing racial disparities in the Colorado death penalty); John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535 (2016) (detailing racial disparities in juvenile life without parole sentencing).

treating two deserving defendants differently.²⁴ Since 2002, the Court has found a punishment practice unconstitutional six times under the excessiveness framework; *none* of those cases focused significantly on race.²⁵ Yet, our studies—which found that Americans devalue Black lives relative to White lives and associate retribution with Black more than White—illustrate that racial bias has implications for how courts should understand the excessiveness of a punishment.

First, if people on an automatic and unconscious level value White lives more than Black lives, then the enormity of the harm that the crime inflicts upon society inaccurately appears greater when a White life is lost. Thus, a person is erroneously seen as more deserving of harsher punishment for killing a White person because that White life is automatically perceived to have greater

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24. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) (“Apparent discrepancies in sentencing are an inevitable part of our criminal justice system. The [racial] discrepancy indicated by the Baldus study is a far cry from the systemic defects identified in *Furman* Despite these imperfections [in implementing the death penalty], our consistent rule has been that constitutional guarantees are met when the mode for determining guilt or punishment itself has been surrounded with safeguards to make it as fair as possible.”) (citation omitted). In *Furman v. Georgia*, 408 U.S. 238 (1972), a deeply fractured Court held that then-existing death penalty statutes violated the Eighth and Fourteenth Amendments. The dominant theme in the five separate concurrences that formed the majority is that the death penalty was unconstitutional because it was administered in an arbitrary (and perhaps racially discriminatory) manner. Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court affirmed the constitutionality of Georgia’s newly created capital sentencing statute because it provided procedural safeguards designed to eliminate wholly arbitrary sentencing outcomes. Over time, the Court continued to focus on the procedural regulations governing capital punishment as opposed to focusing on whether the outcomes produced were arbitrary and discriminatory. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370-71 (1995). Commentators refer to this focus on procedural regulation of the death penalty as a “super due process” requirement that the Court read into the cruel and unusual punishment clause. See, e.g., Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). A second line of Eighth Amendment cases focus not on policing arbitrary or discriminatory outcomes, or the procedures designed to avoid such outcomes, but instead on whether the punishment is categorically excessive in that it serves no meaningful penological purpose. See, e.g., *Kennedy*, 554 U.S. at 413 (holding that the death penalty is an unconstitutionally disproportionate sentence for rape of a child). In the latter line of cases—those that focus on disproportionality—racial discrimination does not play an important role. As we describe below, this is an important oversight.
25. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (holding that Florida’s threshold requirement for demonstrating intellectual disability using an IQ test score is unconstitutional); *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (holding that the Eighth Amendment prohibits mandatory life without parole sentences for juveniles); *Graham*, 560 U.S. 48; *Kennedy*, 554 U.S. 407; *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

value.²⁶ This disproportionate valuing of White crime victims does not alone tell us whether the death penalty is too much punishment—or, instead, whether the absence of the death penalty for killers of Black victims is too little punishment. Rather, it suggests that the unintentional devaluing of Black lives leads to a racialized calculation of the harm caused and of the necessary government response to address that harm. Thus, when study after study shows a race-of-the-victim effect in death penalty cases,²⁷ it is no longer justifiable to treat those findings as relevant only to anti-arbitrariness goals; instead, one must reckon with questions about the constitutional excessiveness of capital punishment.

Second, if people automatically and disproportionately favor harsh payback over rehabilitation when the defendant is Black,²⁸ the relevance of systemic implicit bias to questions of constitutionally disproportionate punishment—this time in the context of a defendant’s personal culpability—is clear. In the context of juvenile life without parole (JLWOP), for example, the U.S. Supreme Court has held that because children possess less developed cognitive and emotional faculties than adults,²⁹ juveniles must be treated as less deserving of the harshest punishments than adults who commit the same offenses.³⁰ This reasoning led the Court to hold that the Eighth Amendment prohibits JLWOP sentences for non-homicide crimes.³¹ The same reasoning led the Court to hold

26. See, e.g., David C. Baldus et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990-2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 561 (2009) (finding race-of-the-victim effects in Arkansas death sentencing); Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 670-73 (2011) (finding race-of-the-victim effects in East Baton Rouge Parish, Louisiana).

27. See, e.g., DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 9 (1990) (summarizing the empirical studies of Georgia’s post-*Furman* capital sentencing scheme); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1940 (2012); James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 270 (2011); Pierce & Radelet, *supra* note 26, at 670-73; Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119, 2121-23 (2011); John J. Donohue III, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4686 Murders to One Execution* 7 (2011), <http://www.deathpenaltyinfo.org/documents/DonohueCTStudy.pdf> [http://perma.cc/47P3-3SM2].

28. See Smith, Levinson & Hioki, *supra* note 7, at 43.

29. See *Roper*, 543 U.S. at 573-74.

30. See *id.* at 574-75.

31. See *Graham v. Florida*, 560 U.S. 48, 68-69 (2010).

that JLWOP is only appropriate in the rarest of homicides where the juvenile is irreparably corrupted.³²

The implicit retribution bias that we found helps to explain why Black teenagers continue to disproportionately receive life without parole sentences.³³ Specifically, before a decision-maker even begins to wrestle with the difficult question of whether an adolescent is permanently incorrigible—meaning he will never become a different and less dangerous person as he ages and his brain develops—the child’s group membership puts a thumb on the scale for increased punishment over the promise of rehabilitation.³⁴ As with the death penalty, then, racial disparities in JLWOP are questions about excessiveness and not simply about rationality and consistency.

III. SYSTEMIC IMPLICIT BIAS INFECTS POLICY DECISIONS

A robust literature describes how implicit bias seeps into points of discretion such as jury decision-making and the sentencing of defendants.³⁵ There is also a sizable literature on whether core processes thought to promote fairness—including jury selection,³⁶ death-qualification of jurors in capital cases,³⁷

32. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 736, 734 (2016) (clarifying that juvenile life without parole is “disproportionate for the vast majority of juvenile offenders” and may be imposed only on “those rare children whose crimes reflect irreparable corruption”); *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding that the Eighth Amendment prohibits mandatory life without parole sentences for juveniles); *Graham*, 560 U.S. at 72-73.

33. See Mills, Dorn & Hritz, *supra* note 23, at 560-81; *Juvenile Life Without Parole In Philadelphia: A Time for Hope?*, FAIR PUNISHMENT PROJECT 13 (2016), http://fairpunishment.org/wp-content/uploads/2016/03/FPP_JLWOP_philadelphia_r601.pdf [http://perma.cc/7SX4-QGAG].

34. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE, May 23, 2012, at 2.

35. See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (considering the effects of implicit bias at various stages of criminal trials); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (reporting the results of an empirical study that found that mock jurors remembered case facts in racially biased ways); Levinson, Cai & Young, *supra* note 4, at 188 (finding implicit associations between Black and Guilty, and White and Not Guilty); Levinson, Smith & Young, *supra* note 4 (reporting that “death qualified” jurors possessed higher levels of both implicit and explicit anti-Black bias than jurors who would be ineligible to serve on death penalty juries); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (critiquing ways in which to mitigate jurors’ implicit bias prior to trial).

36. See, e.g., Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149 (2010); Roberts, *supra* note 35.

and the presumption of innocence³⁸—are themselves susceptible to implicit bias. Yet, the results of our two studies illuminate how implicit bias taints the framing of legal policy questions earlier in the process than the existing literature would suggest.³⁹ We posit that systemic implicit bias pervades the criminal justice system even at the point when policymakers and citizens consider how to respond to perceived social problems. Most of the discussion about implicit bias is about what happens at trial or during the investigative stop—what happens to a policy in the real world. Yet, before a decision-maker thinks about the specifics of a policy—and long before that policy is put into practice—implicit bias shapes how people intuitively understand what makes a good punishment, how much of that punishment is necessary, and whether human beings deserve that punishment or not. Thus, implicit bias affects people's implicit theories of human nature as they begin to apply those theories to real policy decisions.

Systemic implicit bias can influence how policymakers choose between punitive and preventative frameworks for addressing social problems. For example, should gun violence be addressed through harsher mandatory minimum jail sentences for illegal gun possession? Or is the money that would be spent on increased prison costs better spent on job training, addiction treatment, or mental health care for people identified as being of high risk for either being a perpetrator or a victim of gun violence? If gun violence is envisioned (even without awareness) as a problem that mostly impacts Black citizens, both in terms of its victims and its perpetrators, then systemic implicit bias will likely impact which approach to the problem policymakers adopt. The relative devaluing of Black lives and the disproportionate desire to punish Black people will sway decision-makers toward supporting mandatory minimum jail time instead of programs aimed at treatment and prevention. A vast spectrum of policy decisions can be viewed through this racialized lens. In other words, just as a particular association between Black and weapons or Black and drug crime can lead to policy-specific bias, systemic implicit biases could affect many policy choices.

37. See, e.g., Levinson, Smith & Young, *supra* note 4, at 559. Death qualification refers to the voir dire process whereby jurors are questioned to determine whether they would be willing to consider both a life sentence and a death sentence. Jurors who would not be willing to consider both options (e.g., one who indicates she would never vote for death) are typically removed from the jury.

38. See Danielle M. Young, Justin D. Levinson & Scott Sinnett, *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, 9 PLOS ONE, Mar. 18, 2014, at 3-4.

39. See Levinson, Smith & Young, *supra* note 4; Smith, Levinson & Hioki, *supra* note 7 (manuscript at 8-15).

Importantly, systemic implicit bias is not limited to policy-making in Congress, the state legislature, the county commission, or the city council. Consider an elected prosecutor who must decide, as an office-wide policy matter, whether to permit the prosecutors in her office to recommend diversionary programs instead of incarceration for non-violent felony drug offenders. Existing research addresses how bias might enter into the process of sentencing in individual cases once the office-wide policy decision has been made. But long before a line prosecutor decides whether a particular defendant is better suited for a diversionary program or incarceration, the elected prosecutor may determine policy in a biased way. If the prosecutor—like Americans generally—devalues the humanity of Black Americans and leans towards punishing the transgressions of Black Americans more harshly, then her implicit biases could influence the policy decisions that bind line prosecutors across all of their cases—again, for example, the ability to seek diversionary programs over incarceration.⁴⁰ This same calculus applies to many actors within the justice system—including police chiefs and sheriffs, county commissioners, city council members, and state legislators—who make the policy decisions that precede the enormous discretionary power that line actors—such as police officers or prosecutors—possess in investigating, interrogating, and prosecuting individual cases.⁴¹

CONCLUSION

Taken broadly, systemic implicit bias illustrates that bias enters into the criminal justice system before a police officer decides to stop and frisk a person, and long before procedural processes like the death qualification of capital juries permit bias to sweep into the trial process. Because, as our empirical studies show, people both possess automatic associations that devalue Black lives relative to White lives and associate Black Americans with a need for punishment, bias enters into the system at the earliest stages—at the time when policy-makers are considering questions of where to police and how aggressively, and why to punish and by how much. For these reasons, systemic implicit bias can influence the policy choices that elected prosecutors, law enforcement chiefs, and legislators make. Moreover, systemic implicit bias illustrates why Eighth Amendment jurisprudence analyzing penal excess must grapple with racial unevenness—specifically, because the disproportionate tendency to punish Black Americans risks that people who otherwise do not deserve a punishment will nonetheless receive it, in some significant part because of racial bias.

40. See Smith & Levinson, *supra* note 2, at 805-22 (considering a range of biases that likely affect such prosecutors).

41. See, e.g., *id.* at 822; Richardson, *supra* note 1, at 1144-46.

Our suggested analysis of race in Eighth Amendment excessiveness jurisprudence will likely lead to the conclusion that certain punishment practices, such as the death penalty and JLWOP, are indeed unconstitutional. Dealing with systemic bias in the policy-making arena requires a somewhat more nuanced response. Due to the danger of systemic implicit bias in policy formulation, we recommend the implementation of a presumption against certain criminal justice policies, including sentencing enhancements, that come on the heels of a racialized history or a recent racialized moral panic. For existing criminal justice policies, when racially disparate application has become apparent, and especially where there is a history of racially divisive rhetoric surrounding the adoption of the policy, public officials should take affirmative steps to root out any disproportionality.⁴²

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42. For instance, a state or federal sentencing commission could recommend a retroactive adoption of lower sentencing ranges. Similarly, a prosecutor could ask her staff to review cases that resulted in long sentences (e.g., for crack cocaine possession), and write letters asking for parole or clemency where appropriate to mitigate the unnecessary harshness.