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# Black, White, & Blue: An Analysis of Implicit Racial Bias & the Fourth Amendment in the Criminal Justice System

Michael A. Baugh  
*Augustana College, Rock Island Illinois*

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***Black, White, & Blue:***  
*An Analysis of Implicit Racial Bias & the Fourth Amendment in the Criminal Justice System*

Mike Baugh  
Political Science Senior Inquiry  
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## ***Introduction***

Just two score and seven years ago, Dr. Martin Luther King, Jr. rose to leadership in a fight for racial justice and civil rights in America. As Dr. King famously remarked from the confines of a jail cell in Birmingham, Alabama, “injustice anywhere is a threat to justice everywhere.”<sup>1</sup> Dr. King’s powerful words hold true today. Controversies, such as the deaths of Michael Brown, Tamir Rice, Freddie Gray, and Eric Garner at the hands of officers tasked to protect them, seems to indicate that while progress has been made since the days of Dr. King, racial prejudice and discrimination remain prevalent in contemporary society. When examining racial disparities in incarceration rates, racial prejudice and discrimination can also be seen to have an impact as well.

Legal scholar and civil rights activist Michelle Alexander published a well-known hypothesis that the Jim Crow-era racial caste system has been renewed in modern society by the criminal justice system, in particular blaming the War on Drugs as the vehicle for “Mass Incarceration”.<sup>2</sup> Pretext stops and consent searches are just two ways in which Fourth Amendment doctrine has increased the amount of discretion police officers have in investigating drug crimes. Jack Glaser, a scholar in the field of Psychology, has demonstrated that law enforcement officers have implicit racial biases that affect how they enforce the law.<sup>3</sup> The combination of increased police discretion and the existence of implicit racial biases is problematic when looking at a system that incarcerates a much greater percentage of Blacks than it does Whites.

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<sup>1</sup> Martin Luther King, Jr., “Letter from Birmingham Jail.” *UC Davis L. Rev.* 26 (1992):

<sup>2</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

<sup>3</sup> Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (New York: Oxford University Press, 2015).

This study will first examine Fourth Amendment doctrine to understand the increased discretion afforded to law enforcement officers. The racial outcomes of the “War on Drugs” and Mass Incarceration in the United States must also be examined to understand the effect of the explosion of incarceration rates on minorities. The issue of implicit racial bias must be brought in to understand, among other major factors, how these racial outcomes have occurred. These steps will enable this study to test the hypothesis that the weakening of the Fourth Amendment and the implicit racial bias of police officers contributes to the disproportionate number of Blacks and other minority groups under the control of the Federal and State Prison Systems.

### ***Hypothesis and Methodology***

This project aims to investigate the role in which implicit bias in policing affects disparities in incarceration. Implicit bias describes the manner in which perceptions and stereotypes affect understanding, decisions, and actions in an unconscious manner. The theory is that police tend to be more suspicious of minority groups and therefore tend to investigate them more. If minority groups are being investigated more then that could explain why they are arrested and sent to prison more. The Fourth Amendment is meant to protect against unreasonable searches and seizures, but since the War on Drugs began in the last quarter of the twentieth century there has been a sharp turn in the legal doctrine that has given police officers more discretion, and in turn, fewer protections for citizens against searches and seizures. If police officers have implicit racial attitudes and more discretion has been given to police due to judicial interpretation of the Fourth Amendment, the working theory is that this can be useful in explaining disparities in incarceration.

A multilayered approach is required to test this hypothesis. First, the existing literature on mass incarceration, racial profiling, and implicit racial bias must be examined. Once an understanding of the literature has been reached, an analysis of the Fourth Amendment is required to better evaluate how police officers have been granted more discretion by the judiciary. From a historical perspective, a discussion of the “War on Drugs” will provide context to the sudden shifts in Supreme Court doctrine in the last quarter of the twentieth century. Understanding the War on Drugs will also help inform the pressure for police officers to investigate and arrest drug criminals. Next, it is important to investigate implicit racial bias. If it can be demonstrated that human beings have racial biases against minority out-groups without consciously being aware of the them, then this research can be applied to police officers as well. The sum of these parts – the Fourth Amendment, the War on Drugs, and implicit bias – will be insightful to understanding the role of race in the American criminal justice system.

### ***Literature Review - Overview***

While the impact of incarceration on minority groups, institutional racism, or implicit racial bias are ideas that are not new in the field of Political Science, each existing piece of literature that follows is missing – or at least does not emphasize – an element that others scholars have written on. In the *New Jim Crow*, Michelle Alexander wrote on the overarching inequalities that persist as a result of the mass incarceration of minorities.<sup>4</sup> She discusses institutional racism and the idea of colorblindness as they relate to the system at large, but Alexander did not deeply examine the role in which the implicit racial biases of policemen contribute to her thesis in *The New Jim Crow*.

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<sup>4</sup> Alexander, *The New Jim Crow*.

Similarly, Jack Glaser wrote a book called *Suspect Race* where he examined the implicit racial biases of policemen and how they can influence the decisions of police officers to pull someone over or not.<sup>5</sup> Glaser falls short of extrapolating his findings to understanding the overarching system of Mass Incarceration, as Michelle Alexander had done with her research four years prior. To better understand where this project fits into the Political Science discipline, existing literature on Mass Incarceration and implicit racial bias must separately be presented and then together can help aid in examining my hypothesis.

### ***Literature Review – Mass Incarceration***

Perhaps the greatest influence on theories and arguments to follow is the groundbreaking book *The New Jim Crow* by Michelle Alexander. The overarching theory presented by Alexander is that the criminal justice system today has the same oppressive effects on people of Color as the Jim Crow laws.<sup>6</sup> She reports on the evolution of injustice and argues that after each major progress in Civil Rights, society produces another means of oppression. After the passage of the Thirteenth Amendment that outlawed the institution of slavery, the Jim Crow segregation laws served as the new racial caste system. In *Plessy v. Ferguson*, the “separate, but equal” doctrine affirmed the Jim Crow segregation laws that took more than a half-century to eliminate. The court later found in *Brown v. Board of Education* that separate was “inherently not equal”.<sup>7</sup> Segregation led to Blacks being seen as second-class citizens. While in hindsight it is

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<sup>5</sup> Glaser, *Suspect Race*.

<sup>6</sup> Alexander, *The New Jim Crow*.

<sup>7</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

easy to see that separate was “inherently not equal”<sup>8</sup>, clearly some felt segregation was the best course of action or the system would not have stood for as long as it did. After the passage of the Civil Rights Act of 1964 that outlawed segregation on the basis of race, Alexander argues that the War on Drugs that began in the late twentieth century was the newest evolution of the racial caste system.

With respect to income and employment, ex-convicts are treated as second-class citizens in the same ways as Black men were under Jim Crow.<sup>9</sup> Once the felony conviction box has been checked on a job application, businesses can – and in many cases do – refuse to offer employment, even if the qualifications match the position they are seeking to fill.<sup>10</sup> Ex-convicts in some states also have statutes in place to bar them from voting. These practices have been affirmed by the Supreme Court not to violate the Equal Protection clause.<sup>11</sup>

Due to the tendency for ex-convicts to struggle finding suitable employment and difficulty adapting to being the “black sheep” of society, they have a higher chance of being “re-incarcerated”. In a study of recidivism patterns for the years 2005-2010, the Bureau of Justice Statistics found that in more at least thirty states three-fourths of all prisoners released will be arrested again within five years of their release date.<sup>12</sup> When referring to the system of “Mass Incarceration”, there can be seen that this is actually a

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<sup>8</sup> Phrase borrowed from *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>9</sup> Carl D Owens Jr., "Social Symbols, Stigma, and the Labor Market Experiences of Former Prisoners." *Journal Of Correctional Education* 60, no. 4 (December 2009): 316-342. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).

<sup>10</sup> Ibid.

<sup>11</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>12</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released In 30 States In 2005: Patterns from 2005-2010*, by Alexia D. Cooper, Mathew R. Durose, and Howard N. Snyder, (District of Columbia, 2014).  
<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4987>.

cycle of incarceration where convicts are arrested, prosecuted, sentenced, incarceration, and released. High recidivism demonstrates that a majority of convicts that are released in many parts of the United States will likely endure the cycle of incarceration again.

Ben Geiger argued firmly against this by taking the stance that ex-convicts should not be treated as a suspect class under Fourteenth Amendment doctrine since the fault for their second-class citizenship is the their own.<sup>13</sup> The Fourteenth Amendment guarantees the equal protection of citizens under the law.<sup>14</sup> If a group is deemed a suspect class then they have Fourteenth Amendment grounds to argue that they are victims of discrimination. Geiger's argument does have some merit. Convicts have a responsibility for the crimes that have been committed, whereas a Black man under Jim Crow did not choose to be Black. Geiger's argument runs into headwinds when factoring in that there is an overrepresentation of Black men in prison when there is not a similar discrepancy in crime rates, particularly for drug users.<sup>15</sup> Because of this disparity, the second-class citizenship of ex-convicts contributes to the impoverishment and deprivation of liberty for an entire racial group, which could be seen to have Fourteenth Amendment significance.

Other scholars before and since Alexander have written on this issue of mass incarceration serving as a racial caste system. Jerome Miller argued that at each level of the criminal justice system there are inequalities that persist. Miller, like Alexander,

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<sup>13</sup> Ben Geiger, "The Case for Treating Ex-Offenders as a Suspect Class." *California Law Review* 94, no. 4 (July 2006): 1191-1242. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).

<sup>14</sup> U.S. Constit. amend XIV.

<sup>15</sup> Alexander, *The New Jim Crow*, 6; Michael Tonry, *Malign Neglect*. (New York: Oxford University Press, 1995), 83; Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (New York: Oxford University Press, 2015), 6.

blamed the Reagan Administration's facilitation of the War on Drugs. Miller was also particularly convincing when analyzing his work on sentencing. Miller argued that even if the proportion of Blacks in prison reflected the reality of drug use demographics, the extreme length of the sentences does not match the severity of the offenses.<sup>16</sup> In his book *Sentencing Matters*, Michael Tonry shared this view that mandatory sentencing laws are not reasonable.<sup>17</sup> Tonry - a well-known critic of the legal system in the U.S. - quoted the Canadian House of Justice Committee on Justice to make a subtle argument about the effectiveness and reasonableness of the American prison system: "if locking up those who violate the law contributes to safer societies, then America should be the safest country in the world."<sup>18</sup>

Each iteration of the racial caste system has increased in complexity and its ability to hide in plain sight.<sup>19</sup> As a whole, the system is not explicitly racist. It is illegal to discriminate on the basis of race under the Civil Rights Act of 1964 and related statutes and legal doctrine. However, the racial outcomes of mass incarceration beg the question: does implicit racism exist?

### ***Literature Review – Implicit Racial Bias***

Research into implicit racial bias has deep roots in the field of psychology, as various studies have been done to prove the existence of racial bias. Jack Glaser has offered the some of most significant contributions to literature by taking those studies and

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<sup>16</sup> Jerome Miller, *Search and Destroy: African American Males in the Criminal Justice System*. (United Kingdom: Cambridge University Press, 1997).

<sup>17</sup> Michael Tonry, *Sentencing Matters*. (New York: Oxford University Press, 1996), 96-7.

<sup>18</sup> Michael Tonry, *Malign Neglect: Race, Crime, & Punishment in America*. (New York: Oxford University Press, 1995).

<sup>19</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010), 69.

putting them into the context of policing. Glaser, a psychologist at the University of California, Berkeley has done extensive research on the topic of racial profiling and the way in which implicit attitudes affects the number of traffic stops. In 2014, he released a book called *Suspect Race: Causes and Consequences of Racial Profiling* where he looks at how day-to-day actions taken by police are influenced by stereotypes, regardless of if these stereotypes are conscious to the officer or not.<sup>20</sup> Glaser also elaborated on the experiences of Arab-Americans in the aftermath of 9/11, particularly when looking at the invasiveness of airport security checks that other racial groups are not subjected to as frequently.<sup>21</sup> In this instance, the profile of the “Al-Qaeda hijacker” serves as a template to arouse suspicion of airport security. Glaser argues and supports the idea that the Black men have the same experience with being profiled as “drug criminals” by the police.

While Glaser looked at the system at large, other scholars have noted the importance of geographical location. As Angela West discussed, Black motorists were stopped more frequently than Whites, but those rates were exponentially higher when the Black motorists were near White communities, where Black motorists are less likely to be found.<sup>22</sup> Another thing Dr. West did in her article was break down the paradigm of traffic stops. She broke down all motorists into two groups: abiders and violators.

Abiders are people that are not breaking traffic laws and should not be stopped at all by the police. Violators are people that are conducting activity that should be a red flag to

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<sup>20</sup> Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (New York: Oxford University Press, 2015), 1.

<sup>21</sup> Ibid, 127-160.

<sup>22</sup> Angela D. West, “Chicken little, three blind men and an elephant, and ‘racial profiling’: A commentary on the collection, analysis, and interpretation of traffic stop data.” *Journal of Forensic Psychology Practice* 3, no. 2 (2003): 63-77. *PsycINFO*, EBSCOhost (accessed October 3, 2015).

policemen, such as speeding, expired license plates, or reckless driving. Violators should be stopped.

	<b>Abiders</b>	<b>Violators</b>
<b>Stopped</b>	<b>Discrimination</b>	<b>How It Should Be</b>
<b>Not Stopped</b>	<b>How It Should Be</b>	<b>Privilege</b>

West alludes to a point that has been illustrated by the above diagram.<sup>23</sup> Research into racial profiling is not meant to make an argument that policemen should not enforce the law or pull people over. However, there is cause for concern if Black abiders are stopped at higher rate, as this would be a case of discrimination. Similarly, if White violators are not stopped at a higher rate then there is also a situation of White privilege. White privilege is the benefit given to White's as a result of racial inequality.<sup>24</sup> Dr. West falls short of making explicit conclusions relating to the data, as her thesis was designed to argue against the methodology of prior studies. Nonetheless, her article is insightful in understanding the paradigm of discrimination and privilege in police decisions over whom to pull over.

### ***Literature Review – Where are we now?***

This paper aims to bridge the gap between the existing research on mass incarceration and implicit bias. There is particular interest in how implicit racial bias, as described by Glaser, can help explain the system of Mass Incarceration that's been documented by Alexander, Miller, Tonry, and other scholars. Alexander, in particular

<sup>23</sup>Angela D. West, "Chicken little, three blind men and an elephant, and 'racial profiling': A commentary on the collection, analysis, and interpretation of traffic stop data." *Journal of Forensic Psychology Practice* 3, no. 2 (2003): 63-77. *PsycINFO*, EBSCOhost (accessed October 3, 2015).

<sup>24</sup>Reihan Salam, "Black and White in Shades of Gray." *National Review* 67, no. 18 (October 5, 2015): 29-31. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).

came close, to bridging this gap by analyzing the Fourth Amendment heavily in her book. She opened the door to discussion on increased discretion, but did not do a good job in portraying that police officers are not always intentionally discriminating against minorities. In this paper, Alexander's discussion on the Fourth Amendment and the "New Jim Crow" will be expanded and explained by invoking the research of Glaser and other psychological scholars to gain a deeper understanding of the sources of America's incarceration problem.

### ***The Fourth Amendment: Case Law***

*"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."*  
- Amendment IV, United States Constitution<sup>25</sup>

The Fourth Amendment was intended to be the tool that protected the privacy of American people from invasive acts perpetrated by government officials. While conducting an investigation for criminal activity, law enforcement under the Fourth Amendment should be required to obtain written permission from a court of law to conduct a search and seize evidence. In reality, this is not always the case. Throughout the past century, the Supreme Court has carved out exceptions to this requirement to make it easier for law enforcement to conduct a search without getting a formal warrant. Many of these cases are seemingly unrelated, but collectively are seen to have given police greater authority in conducting investigations.

One landmark case that changed this understanding unilaterally was *Terry v. Ohio*.<sup>26</sup> *Terry* was decided in 1968 and established the "stop and frisk" rule. Under

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<sup>25</sup> U.S. Constit. amend IV.

<sup>26</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

*Terry*, the Court ruled that the Fourth Amendment is not violated if the officer stops and frisks a suspect without probable cause to formally arrest. The Court's opinion in *Terry* was rational in regard to the context of the case. John Terry had a weapon and the police officer seized him to secure the weapon. In *Terry*, the Warren Court emphasized the importance of safety. The critiques of *Terry* look more in regard to the repercussions for Fourth Amendment doctrine, as the Court's decision opened to floodgates for more challenges to the warrant requirement.<sup>27</sup> While the ruling of the Court seems rational in the context of the case, the ultimate consequence of *Terry* is that it gave police officers the right to frisk a suspect if they have a "reasonable suspicion" that the person "has committed, is committing, or is about to commit a crime."<sup>28</sup> In his dissent of *Terry*, Justice William O. Douglas articulated:

We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again" and equated the decision to taking a "long step down the totalitarian path."<sup>29</sup>

Many scholars tend to agree with Justice Douglas. Michelle Alexander commented on *Terry* by arguing that the decision modified the common understanding that police cannot stop and search someone without a warrant. Alexander went on to argue that the "...*Terry* decision stands for the proposition that, so long as a police officer has "reasonable articulable suspicion" that someone is engaged in criminal activity and dangerous, it is constitutionally permissible to stop, question, and frisk him

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<sup>27</sup> Thomas B. McAfee, "Setting Us Up for Disaster: The Supreme Court's Decision in *Terry v. Ohio*." *Nev. LJ* 12 (2011): 609.

<sup>28</sup> Alexander, *The New Jim Crow*, 69.

<sup>29</sup> *Terry v. Ohio*, 392 U.S. 1 (1968), Douglas J., dissenting.

or her even in the absence of probable cause.”<sup>30</sup> Since the ruling in 1968, *Terry* has only expanded in scope and Fourth Amendment protections have continued to be distorted.

*Whren v. United States* (1996) established the legality of the pretext traffic stop. *Whren* gave police officers the ability to pull someone over for any traffic violation, regardless of severity, and use it as a pretext to launch an investigation of a separate and unrelated criminal offense they suspect the person may be guilty of. This case is one of the most important precedents to discuss when examining prejudice and discrimination by law enforcement, as it provides law enforcement with plausible deniability to investigate almost anyone at any given time. Most, if not all motorists are guilty of committing at least one minor traffic violation on a given day. The speed limit of 55 miles per hour is frequently treated as a suggestion, as people regularly set the cruise control at 60 miles per hour. Many motorists have objects hanging from the rear-view mirror, such as air fresheners or parking permits, that can be a legal basis in some jurisdictions for a traffic stop. *Whren* gave police officers a tool to pull almost any motorist over at any given time to investigate them for illegal behavior. On the surface, this appears to be in contradiction to the purpose of the Fourth Amendment.

In some respects, *Whren* is an expansion of the decision made in *Terry v. Ohio*. Recall that in *Terry*, police only had to obtain reasonable suspicion to conduct a search of a pedestrian. While *Whren* deals with traffic stops, it eliminates the need for a policeman to have reasonable suspicion to launch an investigation. If a traffic stop is initiated for improper lane usage or overly loud music with the hope of catching someone who is in possession of marijuana or driving under the influence, the cop does not have to justify

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<sup>30</sup> Alexander, *The New Jim Crow*, 69.

his actions beyond the pretext for the stop. While the officer might need “reasonable suspicion” to search the vehicle, in a traffic stop where a misdemeanor traffic violation has provided pretext for the stop it is easier to find a reason to search the vehicle. Perhaps, the scent of marijuana or a smell of alcohol is enough suspicion to be “reasonable”.

Another tool police officers can use once they have pulled someone over – perhaps, by using *Whren* as the precedent for doing so – is to bring in a K-9 unit to sniff the vehicle.<sup>31</sup> This bypasses the need to obtain consent to conduct a “search”. This exception to the warrant requirement has withstood various rulings in the Supreme Court. In 1983, the Court found that a sniff by a police dog does not constitute a “search” under the Fourth Amendment.<sup>32</sup> The argument of the Court being that it is the only thing a dog sniff could potentially reveal is the presence of illegal contraband, whereas a “search” under the Court’s interpretation would expose private belongings to public view. The Court expanded on this in 2005, agreeing with the findings from *United States v. Place* in that a dog sniff is not a true search because one cannot reasonably expect privacy when it comes to illegal drugs.<sup>33</sup> A dog sniff is inherently unique in that it is not intrusive. *Illinois v. Caballes* did add to prior case law by holding that the Fourth Amendment is not violated as long as the traffic stop is not unreasonably prolonged to bring in the K-9 unit to conduct the drug sniff.<sup>34</sup> In Justice Souter’s dissent, he argued against the idea that we should treat police dogs as infallible in a legal sense. He brought into question

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<sup>31</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010), 69.

<sup>32</sup> *United States v. Place*, 462 U.S. 696 (1983).

<sup>33</sup> *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>34</sup> *Ibid.*

the reliability of police dogs in detecting contraband. He argued that an additional search – which he viewed a dog sniff to be – that is not related to the original context of the traffic stop should require reasonable suspicion to conduct.<sup>35</sup> The Court addressed the concept of the reliability of K-9 Units in 2013 by concluding that the certification and training programs that K-9 units participate in are an adequate demonstration of reliability.<sup>36</sup>

*Florida v. Bostik* overturned a Florida Supreme Court ruling that determined that consent searches were unreasonable.<sup>37</sup> In this instance, the police cornered Bostik on a bus and then “asked” him if they could search his bag. The court ruled that Bostik was technically free to leave the bus at any time, and as such, the encounter did not constitute a “seizure”, despite the fact that police officers surrounded the bus. This, like many cases of Fourth Amendment doctrine, are controversial because what might seem like a technicality from a legal sense is not how citizens will view these situations in the moment. With the exception of experts in criminal law and procedure, most citizens would not view this as anything but a seizure. The average citizen would not feel as if they could leave that bus. Justice Marshall included this argument in his dissenting opinion. He argued that the plaintiff was unreasonably seized before he was asked to consent to the search.<sup>38</sup> The lasting significance of *Bostik* is the establishment of the consent search as an exception to the warrant requirement. Police officers frequently use

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<sup>35</sup> *Illinois v. Caballes*, 543 U.S. 405 (2005) (Souter, J., dissenting).

<sup>36</sup> *Florida v. Harris*, 133 S. Ct. 1050 (2013).

<sup>37</sup> *Florida v. Bostik* 501 U.S. 429 (1991)

<sup>38</sup> *Florida v. Bostik* 501 U.S. 429 (1991) (Marshall, J., dissenting).

a traffic stop as a pretext in accordance with *Whren* and then use *Bostik* to ask if they can search the trunk or *Cabelles* to use a K-9 unit to scan the vehicle for contraband.

It is noteworthy that many more cases exist pertaining to the Fourth Amendment doctrine. Those selected amount to a few of the landmarks. To analyze each and every case with Fourth Amendment implications would distract from the greater purpose of this research, but it is important to understand how the Supreme Court has eroded the protections originally implied by the Fourth Amendment and increased police discretion, particularly since the declaration of the War on Drugs.

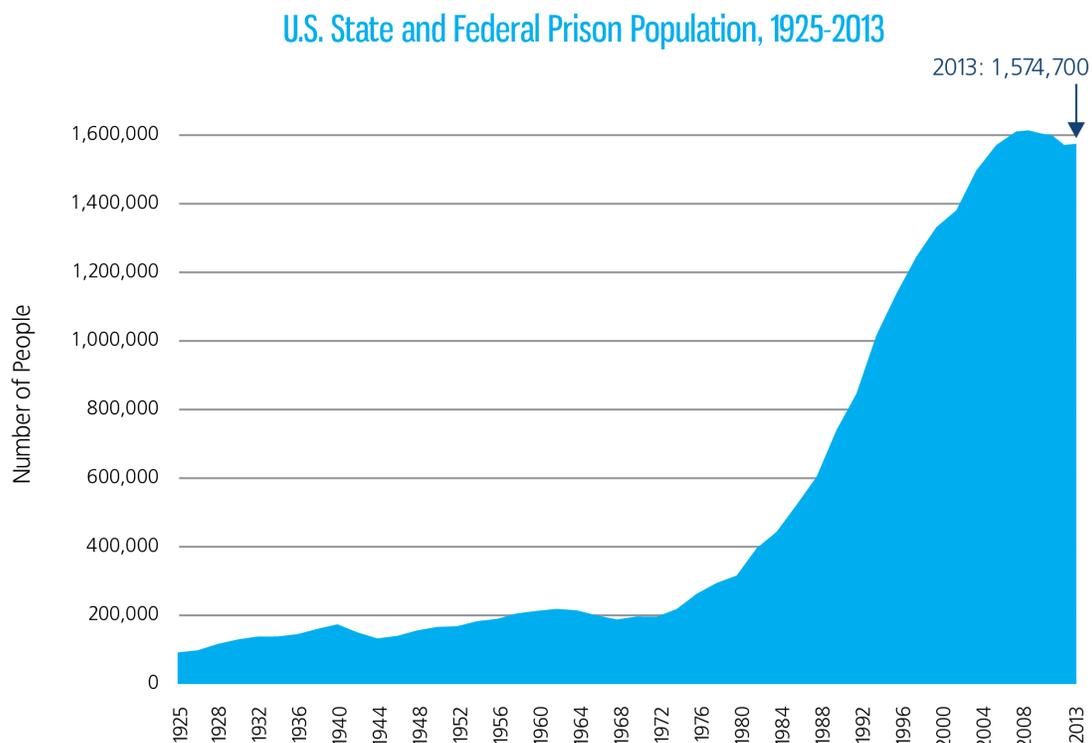
### ***The War on Drugs***

The War on Drugs is a pivotal point in understanding issues of policing. “Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States.”<sup>39</sup> The number of people behind bars for drug related offenses have ballooned 1100% since 1980.<sup>40</sup> The graphic below shows the impact of the War on Drugs on incarceration in the United States. Sharp increases can be seen in the last quarter of the twentieth century, coinciding with increase in policing and prison sentences associated with the War on Drugs.

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<sup>39</sup>Alexander, *The New Jim Crow*, 60.

<sup>40</sup> Marc Mauer and Ryan King, *A 25 Year Quagmire: The “War on Drugs” and Its Impact on American Society* (Washington, DC: The Sentencing Project, 2007), 2.



Source: Bureau of Justice Statistics Prisoners Series.



Richard Nixon declared drug abuse “public enemy number one” on June 17, 1971. In 1970, Congress has passed the Comprehension Drug Abuse Prevention and Control Act and Nixon created the Special Action Office for Drug Abuse Prevention. Contrary to popular belief, the Nixon-era Drug War was centered more on rhetoric and had a heightened focus on treating drug addiction, whereas since Nixon’s resignation the Drug War has focused mostly on law enforcement and incarceration. Nonetheless, Nixon turned the country’s attention to drugs and generated enough perception to convince people that a “War on Drugs” was a necessity. Nixon’s rhetoric made drug policy a politically popular issue that his successors had to address. Even though early Nixon drug policies might have aimed towards treating drug addictions, the popularization of

the anti-drug rhetoric lead to increased pressure for Nixon and his successors to continue escalating the Drug War.

President Nixon also had the responsibility of naming four Supreme Court Justices relatively early in his administration.<sup>41</sup> Chief Justice Earl Warren vacated his chair in 1969. President Johnson had brokered a deal with Associate Justice Abe Fortas to succeed Warren as Chief Justice, but the Senate learned of and later foiled this plan by refusing to confirm him.<sup>42</sup> Fortas, in turn, was later involved in another political scandal that ultimately led to his resignation. Nixon won the election of 1968 and appointed Warren Burger as Chief Justice and Harry Blackmun as Associate Justice. Following the retirement of Justices Harlan and Black in 1971, Nixon was able to appoint Lewis Powell and eventual Chief Justice William Rehnquist to the Court.

This is important to the overall historical context concerning the Fourth Amendment and the War on Drugs. At the same time in which President Nixon is publicly condemning drug use, he also able to appoint four new members –including two men who would serve as Chief Justice for the next thirty-three years - to the Supreme Court. This perhaps could be an explanation for why the case law discussed in the previous section saw the greatest evolution to search and seizure doctrine in the period during and after Nixon’s Presidency.<sup>43</sup>

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<sup>41</sup> “Richard M. Nixon and the Supreme Court,” *The Presidential Timeline*, accessed October 31, 2015, <http://www.presidentialtimeline.org/#/exhibit/37/02>.

<sup>42</sup> Charles M. Cameron, and Jeffrey A. Segal. "The Politics of Scandals: The case of Supreme Court nominations, 1877-1994." In *Annual Meeting of the Midwest Political Science Association, April*, vol. 23, p. 25. 1998.

<sup>43</sup> Thomas Y. Davies, "The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment" Search and Seizure" Doctrine." *The Journal of Criminal Law and Criminology* (2010): 933-1042.

Although Nixon coined the phrase and popularized the issue of drug policy, it was President Ronald Reagan who escalated the Drug War in 1982, a time in which drug use was notably on the decline.<sup>44</sup> Federal funding increased exponentially to finance the policing effort on drug abuse. The anti-drug budget of the federal government doubled in the year 1987 to \$3.9 billion, with a majority of those funds earmarked for law enforcement instead of treatment.<sup>45</sup> On the policy front of the War, Congress and the President passed the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988. These laws are particularly pivotal as they established harsh mandatory sentencing laws. The average sentence for a first time offender is between five and ten years, whereas offenders would only serve around six months in prison for the same offense if it were committed in many of the other parts of the world.<sup>46</sup> These mandatory sentencing laws have resulted in more people behind bars for a longer period of time, and this is even truer for the Black community. A study of 70,000 federal cases found that Blacks were given significantly longer sentences, particularly for drug crimes.<sup>47</sup> This study showed the same results even when eliminating other variables, such as criminal history, that could explain a difference in sentence length.<sup>48</sup>

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<sup>44</sup> Alexander, *The New Jim Crow*, 6; Michael Tonry, *Malign Neglect*. (New York: Oxford University Press, 1995), 83.

<sup>45</sup> Pater Katel, "War on Drugs." *CQ Researcher* 16, no. 21 (June 2, 2006): 481-504. <http://library.cqpress.com/cqresearcher/cqresrre2006060200>.

<sup>46</sup> Alexander, *The New Jim Crow*, 87.

<sup>47</sup> David B Mustard, "Racial, ethnic, and gender disparities in sentencing: Evidence from the US Federal Courts." *Journal of Law and Economics* 44, no. 1 (2001): 285-314.; Glaser, *Suspect Race*, 7.

<sup>48</sup> *Ibid.*

Mandatory sentencing is also problematic when examining the pressure that is put on suspects to enter into plea bargains.<sup>49</sup> By putting such a harsh penalty on guilty verdicts, many suspects plead guilty in exchange for leniency from the prosecutor.<sup>50</sup> This has been shown to conflict with the principle in the United States that the accused should stand trial as an innocent man until proven guilty, as in a lot of cases suspect plead guilty in situations where the prosecutor would not have had enough evidence to be admissible in court.<sup>51</sup>

Even if mandatory sentencing and plea-bargaining were taken out of the equation, there is still a flaw with the United States approach to its perceived drug problem. The demand for illicit drugs is fixed; there will always people willing to buy drugs and the amount of drugs sold on the market is limited by the amount that can be supplied. To reduce the spread and use of illegal drugs, it would be more effective to target the supply of marijuana. “When marijuana has been relatively unavailable, as reflected in high marijuana prices during the late 1980s and early 1990s, young Americans have been less likely to experiment with marijuana.”<sup>52</sup> The following graph depicts where the focus in enforcing drug laws appears to be.

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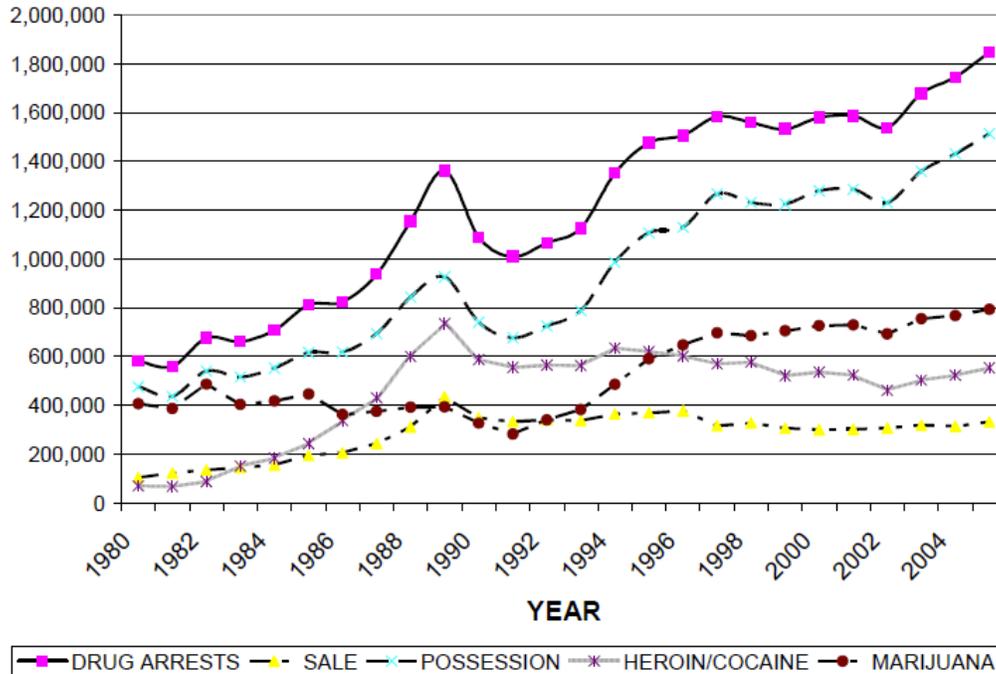
<sup>49</sup> Steve Bogira, *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse*. (New York: Knopf Doubleday, 2005), 335-336.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> William Rhodes, et al. “Illicit Drugs: Price Elasticity of Demand and Supply.” *ABT Associates*, February 2000, accessed October 24, 2015: 7, <http://www.abtassociates.com/reports/20008744845311.pdf>

FIGURE 1  
DRUG ARRESTS, 1980-2005



Source: Marc Mauer and Ryan King, *A 25 Year Quagmire: The "War on Drugs" and Its Impact on American Society* (Washington, DC: The Sentencing Project, 2007), 2.

Notice the difference between the arrests for possession versus the number of arrests for the sale of drugs. In 2005, four out of five drug arrests were for possession versus just one out of five being for sale.<sup>53</sup> This is alarming, as those profiting from and expanding the drug trade are not the ones facing the consequences. This is not to say that possession is not a crime that should be addressed, but when looking at solutions to address the perceived problem it should be seen that cutting off the head of the beast (e.g. the Kingpins and Drug Traffickers) will do more to address the issue of drug abuse than simply going after the small limbs of the beast (e.g. the average American drug user that

<sup>53</sup>Alexander, *The New Jim Crow*, 60.

does not sell or distribute). Low-level drug offenders that do not do harm to anyone but himself or herself are imprisoned, yet those who perpetuate the drug trade continue to reap the benefits.<sup>54</sup>

The War on Drugs did not stop at the conclusion of the Reagan and George H.W. Bush Administrations. President Bill Clinton – the first president to admit to having ingested an illegal drug - took office in the winter of 1993.<sup>55</sup> The issue of drugs was fairly personal for President Clinton. His half-brother Roger Clinton was arrested and served a year in prison for drug trafficking.<sup>56</sup> President Clinton argued against decriminalizing drugs, as in reference to his brother's drug problem was quoted on the campaign trail saying, "if drugs were legal, I don't think he would be alive today."<sup>57</sup>

In spite of his belief that decriminalization was not the best course of action, Clinton realized that his half-brother had benefitted from drug treatment. The ability for Roger to get treated for his drug problem is a privilege perhaps afforded to him on account of being a White man from a powerful political family. Bill Clinton ran on a platform that supported expanding treatment programs.<sup>58</sup> This changed in the latter part of his first year in office. Studies showed that the rate of high school kids smoking marijuana was again going up. To avoid being viewed as "soft on drugs", Clinton's 1994 budget ramped up policing and enforcement as his Republican predecessors had.<sup>59</sup>

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<sup>54</sup> Tonry, *Malign Neglect*, 12.

<sup>55</sup> Pater Katel, "War on Drugs." *CQ Researcher* 16, no. 21 (June 2, 2006): 481-504. <http://library.cqpress.com/cqresearcher/cqresrre2006060200>.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

As a result of this, President Clinton's Director of National Drug Control Policy, more commonly referred to as the "Drug Czar", Lee Brown resigned in 1995. Brown wanted to emphasize treatment over incarceration. The White House and Capital Hill shared a different vision for drug policy that ultimately led to his resignation. In the late 1990s, there was a boom in the use of methamphetamine that further applied pressure on the Clinton administration to target illicit drug users.<sup>60</sup>

As the examination of the War on Drugs has illustrated, the rhetoric of Nixon and policies of Reagan - and later Bush and Clinton - created more demand for police officers to investigate and arrest citizens for drug-related activity. The effects of the War on Drugs are not unilateral. While this thesis is mainly directed at inequalities in policing, it is important to acknowledge that the War on Drugs has eviscerated law and order in the United States. These effects have disproportionately burdened minority groups. As Thurgood Marshall expressed shortly before his death, there is not a "drug exception" to the Bill of Rights.<sup>61</sup>

### ***Minorities & Mass Incarceration***

Without even factoring race into the discussion, the United States leads the world in incarceration. 698 out of every 100,000 U.S. citizens are incarcerated.<sup>62</sup> This is much greater than the incarceration rates in other developed nations around the world. In England and Wales, 148 out of 100,000 are incarcerated.<sup>63</sup> In Canada, 100 out of every

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<sup>60</sup> Ibid.

<sup>61</sup> Alexander, *The New Jim Crow*, 61.

<sup>62</sup> Bruce Western, "Mass Incarceration: Visualized," *The Atlantic* video, 0:39, September 11, 2015. <http://www.theatlantic.com/video/index/404890/prison-inherited-trait/>.

<sup>63</sup> Ibid.

100,000 are behind bars.<sup>64</sup> Without even looking at the racial consequences, its fairly clear that the United States has a tendency to lock up a much higher portion of its citizens when compared to peer nations.

When looking at race, it can be seen that there is a much more significant burden of the United States incarceration problem on people of Color. For every 100,000 Black men in the United States, 2,805 of them are in prison compared to just 466 out of every 100,000 White men.<sup>65</sup> Similarly, the incarceration rate for Latino men is 1,134 out of every 100,000.<sup>66</sup>

According to Human Rights Watch, between eighty and ninety percent of those arrested on drug charges sent to prison in at least seven states are Black.<sup>67</sup> Similarly, Blacks are sent to prison for drug offenses more than twenty times the rate of White men in at least fifteen states at the time of the study in 2000.<sup>68</sup> Research has shown that even though white citizens make up the majority of illegal drug users in the United States, the population of people in prison for drug related crimes is roughly three-fourths Black and Latino.<sup>69</sup> According to another source, Blacks constitute just thirteen percent of the population, but makeup thirty-seven percent of the arrests for drug charges, fifty-five percent of those convicted, and seventy-four percent of all drug offenders sentenced to

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<sup>64</sup> Ibid.

<sup>65</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2013*, by E. Ann Carson, (District of Columbia, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

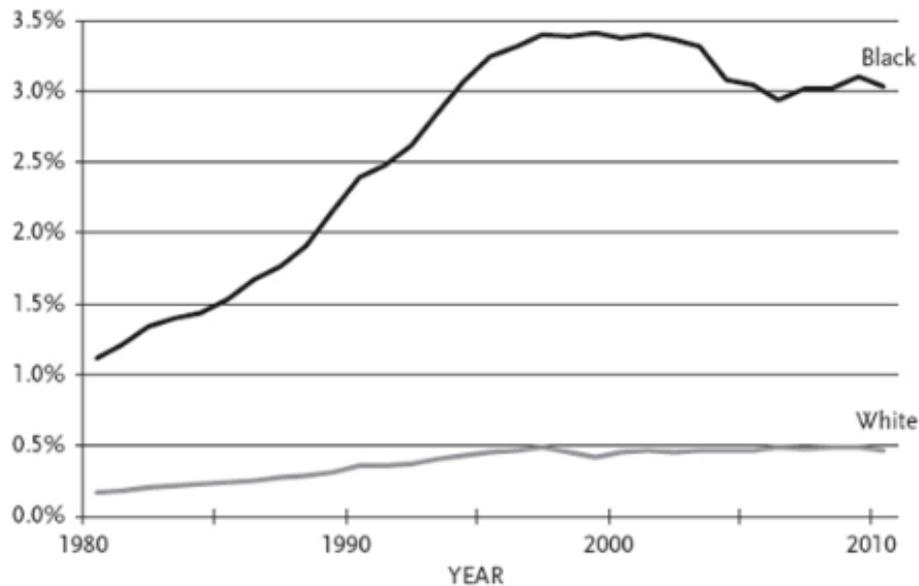
<sup>66</sup> Ibid.

<sup>67</sup> Alexander, *The New Jim Crow*, 98.

<sup>68</sup> Ibid.

<sup>69</sup> Marc Mauer and Ryan S. King, *Schools and Prisons: Fifty Years After Brown v. Board of Education* (Washington, DC: Sentencing Project, 2004), 3; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010), 98.

prison.<sup>70</sup> While thirty-seven percent of arrests might not seem to be an overwhelming statistic, it is considering that Blacks only constitute just thirteen percent of the total population of United States citizens.<sup>71</sup> In the city of Baltimore, fifty-six percent of Blacks living in the city at the time of this study in 1992 were under the control of the criminal justice system (e.g. in prison, on parole or probation, awaiting trial, etc.).<sup>72</sup>



Source: Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling*. (New York, Oxford University Press, 2015), 5

The above graphic illustrates the disparities in incarceration rates since 1980. The vertical axis is demonstrating the percentage of males between the age of 18 and 64 serving a sentencing of one year or greater in federal prison. Prison sentences have increased for White citizens, but only by roughly a quarter of a percentage point since

<sup>70</sup> David A. Harris, “Driving While Black: Racial Profiling on Our Nation’s Highways,” *American Civil Liberties Union* (1999).

<sup>71</sup> U.S. Census Bureau. “State & County QuickFacts, 2013.” <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>72</sup> Jerome Miller, *Search and Destroy: African American Males in the Criminal Justice System*. (United Kingdom: Cambridge University Press, 1997), 7.

1980. Blacks, on the other hand, have seen rapid growth in incarceration rates since 1980, while there is not any evidence of a corresponding increase in illegal drug activity during this time period. In fact, there has been evidence that drug use in the aggregate was on the decline.<sup>73</sup> If drug use is going down, it does not make sense to continue to criminalize the use of drugs.

The demographics of the American prison population are frightening and demonstrate the racial consequences of the War on Drugs. It is now important return to the issue of policing to better understanding the causes of the racial outcomes highlighted above. To better understand how a superficially “fair” system could yield such a disproportionate application of the law, the concept of implicit racial bias must be understood.

### ***Implicit Racial Bias***

*“There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and then look around and see somebody White and feel relieved.”<sup>74</sup>*

*- Reverend and Civil Rights Leader Jesse Jackson*

Implicit racial bias is a very interesting concept that is highlighted in Reverend Jackson’s quotation. Explained broadly, implicit bias is a concept that describes how stereotypes and perceptions affect understanding, decisions, and actions in an unconscious manner. Jesse Jackson is one of the biggest leaders in the civil rights movement and admits that even he has certain biases that are beyond his realm of conscious control. This example helps illustrate that implicit racial biases are a societal

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<sup>73</sup>Michael Tonry, *Malign Neglect*. (New York: Oxford University Press, 1995), 83; Alexander, *The New Jim Crow*, 6.

<sup>74</sup> Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (New York: Oxford University Press, 2015), 70.

issue, not a problem for which only Whites are to blame. Due to American socialization, Black men and women share the same implicit racial attitudes about members of their own race.<sup>75</sup>

One way to think of implicit bias is the iceberg metaphor.<sup>76</sup> The tip of the iceberg is blatant racism. It can be seen from the naked eye and does not hide. This would be the type of racism one might encounter when talking to a stubborn elderly man in the heart of the Deep South. The rest of the iceberg lies underneath the surface and cannot be seen, but it is still just as prevalent as the ice that is above water. The hidden portion of the iceberg is implicit racial bias. Although it cannot easily be seen, implicit racial bias is just as present and influential in the decision-making process.

An important distinction should be made between two different forms of racial profiling. Using race descriptively to help police identify a suspect for a crime that has been committed is not necessarily a bad thing. If a person robs a bank and that person happens to be Black, using race in that investigation's profile is not the type of racial profiling being discussed in this analysis, as race in that instance helps police officers do their jobs. The racial profiling that is suspect is cases where crimes haven't been committed and police are searching for possible criminal activity.<sup>77</sup> Searching for crime is where discretion and the concept of implicit bias factor in, because suspicion is the

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<sup>75</sup> Theodore R. Johnson, "Black-on-Black Racism: The Hazards of Implicit Bias." *The Atlantic*, December 26, 2014, <http://www.theatlantic.com/politics/archive/2014/12/black-on-black-racism-the-hazards-of-implicit-bias/384028>.

<sup>76</sup> Analogy borrowed from Jack Glaser, *Suspect Race*, 69.

<sup>77</sup> "Suspect Race: Causes & Consequences of Racial Profiling (Jack Glaser, Paul Figueroa, Henry E. Brady)," YouTube video, 3:42, posted by "The University of California Television (UCTV), February 1, 2015, <https://www.youtube.com/watch?v=zd26Q3NuPUc>.

gauge police officers use to determine whom to investigate. If one group triggers a higher threshold of suspicion sooner, the concept of implicit bias can assist in explaining why.

Sociologists and psychologists have conducted experiments on implicit racial bias for decades. One tool used in psychology for gauging implicit prejudice and stereotyping is the Implicit Association Test (IAT). IAT's measures the strength of implicit prejudice by comparing automatic association response times to different stimuli.<sup>78</sup> Videos were used to show faces transitioning from hostile to happy faces in a 2003 study conducted by Northwestern University researchers.<sup>79</sup> The researchers found that the faces of Black men were perceived to be hostile sooner and happy later by the subjects.<sup>80</sup> Psychologists link this faster response time to the automatic association based on the implicit memory and mental profile of the subjects. Past experiences and stereotypes help the mind work efficiently in making decisions. This is fairly normal human cognition.<sup>81</sup> IAT studies have demonstrated that in the unconscious effort for the mind to work more efficiently, negative stereotypes about a minority group influences how an individual approaches encounters with all members of that minority group.<sup>82</sup>

Another field where implicit prejudice is well documented is idea of shooter bias. This area of implicit bias has been seeing increasingly more scrutiny in the past half-

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<sup>78</sup> Glaser, *Suspect Race*, 81; Audrey L. Lee, "Unconscious Bias Theory in Employment Discrimination Litigation," *Harvard Civil Rights – Civil Liberties Review* 40 (2005).

<sup>79</sup> Kurt Hugenburg and Galen V. Bodenhausen, "Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat," *Psychological Science*, 14, no. 6 (2003): 640-643

<sup>80</sup> Kurt Hugenburg and Galen V. Bodenhausen, "Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat," *Psychological Science*, 14, no. 6 (2003): 640-643; Glaser, *Suspect Race*, 82.

<sup>81</sup> Glaser, *Suspect Race*, 94

<sup>82</sup> *Ibid*, 82.

decade or so. Shooter bias studies usually follow a similar model. Subjects are shown pictures of white men and Black men that are either carrying a gun or something harmless (e.g. a cell phone or pager). Time and time again these studies show that people not only shoot armed Black men faster, but also shoot unarmed Black men more frequently.<sup>83</sup> These studies are reflective of real life situations as well, including the shooting deaths of young Black men like Trayvon Martin and Michael Brown.

While the scholarly research above has been shown to demonstrate implicit racial bias, mainstream media has also begin to demonstrate the existence of stereotypes that influence behavior as well. In an episode of “What Would You Do?”, the American Broadcasting Company (ABC) hired actors to portray young people trying to steal a bike that was chained to a pole in a public park.<sup>84</sup> The first actor portrayed was a white youth wearing baggy jeans, a t-shirt, and a backwards baseball cap. He tried for more than an hour to break the bike lock: using bolt cutters, a handsaw, and a power saw. In the hidden camera experiment, more than a hundred people walked by this young man trying to steal this bike, but nobody accused him of stealing it. Those who did stop asked if he forgot his key without blatantly accusing him of stealing the bike. Eventually, an elderly couple did ask if he was stealing the bike, but the fact that hundreds of people walked by

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<sup>83</sup> Joshua Correll, et al. “The influence of stereotypes on decisions to shoot.” *European Journal of Social Psychology* 37, no. 6 (November 2007): 1102-1117. *Academic Search Complete*, EBSCOhost (accessed October 3, 2015); Joshua Correll, et al. “The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals.” *Journal of Personality & Social Psychology* 83, no. 6 (December 2002): 1314-1329. *Academic Search Complete*, EBSCOhost (accessed October 3, 2015); Joshua Correll, et al. “Across the Thin Blue Line: Police Officers and Racial Bias in the Decisions to Shoot”, *Journal of Personality & Social Psychology* 92, no. 6 (June 2007): 1006-1023. *Academic Search Complete*, EBSCOhost (accesses October 3, 2015).

<sup>84</sup> “Bike Theft,” *What Would You Do?* American Broadcasting Company. (New York: ABCNews, May 6, 2010).

without trying to stop him begs the question: would this have been the case had the subject been Black?

ABC shared in this curiosity. The next actor portrayed was a Black teen, dressed in the same fashion as the white actor. Within minutes, people stopped and accused the young man of stealing the bike. One elderly white in particular got extremely angry and was screaming at the teenager about stealing things that are not his property. This is a textbook example that helps understand implicit bias. Stereotypes and racial attitudes clearly influenced the responses of the people walking through the park. The white teenager was largely given the benefit of the doubt. People assumed he was sawing through the lock because he misplaced his key. The Black teenager was immediately concluded to have been stealing the bike.

“Implicit stereotyping is normal human cognition, and police are normal human beings who have been demonstrated to exhibit spontaneous discriminatory behaviors.”<sup>85</sup> In this passage, Glaser is describing a critical point when analyzing implicit bias in policing. Policemen are human beings, not robots. Psychological research conducted by numerous scholars has demonstrated that humans have stereotypes and biases that influence decision-making, even if those stereotypes and biases are unknown to the person. This does raise concerns when considering that policemen have the ability to put in motion a process to take away ones freedom.

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<sup>85</sup> Glaser, *Suspect Race*, 94.

### *The Criminal Injustice System*

*“If police pay more attention to members of some racial or ethnic groups, then regardless of actual criminality or offending rates, those groups will bear a disproportionate share of sanctions.”<sup>86</sup>*

*- Jack Glaser*

“Equal justice under law” is a phrase engraved in the marble façade of the Supreme Court building in Washington, DC. This phrase exemplifies the ideals of the American criminal justice system. However, the intention of law and the reality of order are not necessarily the same. According to the Bureau of Justice Statistics (BJS), Black drivers were three times as likely as White drivers and twice as likely as Hispanic drivers to get searched during a traffic stop.<sup>87</sup>

Traffic stops, especially those that invoke *Whren* doctrine, are controversial in that the true motivation or intention of the police officers is not clear, and without a breakthrough in mind-reading technology they probably never will be. Recall that under *Whren*, an officer does have legal basis to detain the suspect due to a legitimate traffic offense that has been committed. Due to the nature of a pretext stop, the police officer does have plausible deniability. Some might claim that race was the sole motivation for a particular traffic stop, but there is no way to conceivably measure or gauge the role race played into a particular decision. This limits the ability to provide a concrete answer to this hypothesis.

In spite of this, the facts presented in this essay can be analyzed and through inference can be seen to support this hypothesis. There is scholarly research that reveals

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<sup>86</sup> Ibid, 3.

<sup>87</sup> U.S Department of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic And Street Stops, 2011*, by Mathew Durose and Lynn Langton. (District of Columbia, 2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4779>.

that human beings carry implicit racial biases and attitudes that do have an influence on decision-making. Jack Glaser's contributions to the literature have demonstrated that law enforcement officers are not immune to stereotyping and implicit bias.

The Fourth Amendment protects against unreasonable searches and seizures. Some argue that there is not and should not be a reasonable expectation of privacy if a law is being broken. This argument is valid at a micro-societal level, but not when looking at the system as a whole. Studies have shown that Blacks do not use Drug paraphernalia more than Whites, but are exponentially more likely to be imprisoned for the offense.<sup>88</sup> The issue is not necessarily one of arguing the guilt or innocence of the minorities that are stopped, but rather if the law is not being enforced equally between difference racial groups then that is a cause of concern.

Similarly, the Fourth Amendment is not being discussed from the perspective of the individual traffic stops. I am not trying to assert that the people in jail do not belong in jail. Every person that uses, possess, or sells contraband is aware of the legal consequences of getting caught. The reason the Fourth Amendment is important for this discussion is because *Terry*, *Whren*, *Bostik*, *Caballes*, and other Fourth Amendment cases not explicitly referenced in this paper all have one thing in common: they increased the amount of discretion given to police officers. Pre-text traffic stops, K-9 dog sniffs, "asking" for consent, and frisking suspects are all ways in which police have more authority and discretion. By carving out exceptions to the requirement of the Fourth Amendment that a warrant be attained for a search and/or seizure, the Supreme Court has in turn put more authority and control in the hands of policemen.

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<sup>88</sup> Alexander, *The New Jim Crow*, 98.

By taking the preceding two concepts – police are susceptible to implicit bias and the police have more discretion – policing can be seen as a contributing factor to the disparities in incarceration. This cause and effect proclamation is better understood when looking first at the effect. Drug usage rates are the same across racial lines, but minorities are exponentially more likely to be in prison on drug charges.<sup>89</sup> Tracing backwards through the different rungs of the criminal justice system, the process ultimately begins with the decision by a police officer to investigate someone. With the knowledge that the system incarcerates a disproportionate amount of Blacks, the initial encounters between a suspect and the police can be seen to be contributory because police have a large amount of authority in launching a drug investigation without the need for a warrant. Also, policemen are human beings that have been documented to have an implicit bias against minority groups.

Despite this research, many still argue that policemen are not irrational for allowing racial stereotypes to influence their investigations of drug crime. As former LAPD Chief Bernard Parks – a Black man - once argued in 1999 in response to a question about racial profiling:

It's not the fault of the police when they stop minority males or put them in jail.

It's the fault of the minority males for committing the crime. In my mind, it is not a great revelation that if officers are looking for drug criminal activity they're going to look at the kind of people who are listed on the crime reports.<sup>90</sup>

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<sup>89</sup> Tonry, *Malign Neglect*, 49.

<sup>90</sup> Jeffrey Goldberg, "The color of suspicion," *New York Times*, June 20, 1999, accessed October 11, 2015; Glaser, *Suspect Race*, 96.

Many citizens share this viewpoint that statistics on crime should be used to help inform police investigations. The problem with the “crime reports”, as Parks described, is that crime data is not a reliable measure for determining the effectiveness or fairness of police tactics. Blacks *are* arrested more for these crimes, which contributes to the stereotype that Black people abuse drugs more frequently. The stereotype that drug use and trafficking is a Black crime will continue to perpetuate as long as Blacks continue to be disproportionately targeted by the police.

***Black, White, & Blue***

*“...The White sheets have been replaced by police uniforms worn by a chosen few with the power to put in motion the process of taking away one’s freedom.”<sup>91</sup>*

*- Steven Holbert and Lisa Rose*

This assertion by Steve Holbert and Lisa Rose echoes the findings of this inquiry, but not the sentiment. Claiming that the police officer in 2015 is the equivalent of a Klansman during Jim Crow is rather misguided on the surface, as all police officers are not blatant racists. While exceptions certainly exist, most would like to think that police officers do not set out to unjustly apply the law. In the process of proving that implicit bias affects policing, Jack Glaser also concluded that police officers should not be stigmatized as racists.<sup>92</sup> A distinction should be made between holding beliefs and endorsing them. If a person endorses a belief by being consciously aware and continuing to act upon them, then they can be viewed as a “racist”.<sup>93</sup> The underlying point by Holbert and Rose does, however, have merit when analyzing the system at large. This

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<sup>91</sup> Steve Holbert & Lisa Rose, *The Color of Guilt & Innocence*. (San Ramon: Page Marque Press, 2004), 95.

<sup>92</sup> Glaser, *Suspect Race*, 186.

<sup>93</sup> *Ibid.*

reality is a reflection of the colorblind caste system, as explained in great detail by Michelle Alexander in *The New Jim Crow*.

The great tragedy is that society has become colorblind.<sup>94</sup> Race is a topic that makes many feel uncomfortable. Many think the election of Barack Obama to the Presidency has launched a period of post-race. People have a hard time separating isolated incidents of Black men and women reaching positions of power and influence from the reality that great inequality still exists in America today. White men and women reject the notion of White privilege, and are curious why minorities from low-income communities “*don’t just work hard and apply themselves, like I did*”. President Obama articulated in *The Audacity of Hope*:

Rightly or wrongly, white guilt has largely exhausted itself in America; even the most fair-minded of whites, those who would genuinely like to see racial inequality ended...tend to push back against...race-specific claims based on the history of race discrimination in this country.”<sup>95</sup>

Obviously issues mentioned and discussed above remain a small cog in a large machine of inequalities in American society today. There are great societal inequalities – or, at least, advantages of being White - that some refuse to acknowledge. Since a White person has to meet a much higher threshold of suspiciousness in order to get pulled over by the police, they are not near as likely to be sitting in a jail cell for drugs. The overwhelming inequality in the criminal justice system adds to the perception that *Blacks commit more crimes*. This public perception then influences the implicit racial bias of police officers towards members of the minority community. The implicit racial bias of

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<sup>94</sup> Alexander, *The New Jim Crow*, 6.

<sup>95</sup> Barack Obama, *The Audacity of Hope* (New York: Crown Publishers, 2006), 247.

law enforcement officers impacts how they exercise the great discretion that has been afforded them by the judiciary. This in turn contributes to the Mass Incarceration of Blacks. This then furthers stereotypes. The vicious cycle continues. While its difficult to argue that Blacks today are no better off than they were at the height of the Civil Rights movement in the 1960s, the racial implications of the War on Drugs, the weakening of the Fourth Amendment, and explosion in incarceration rates indicates that work still needs to be done to realize the dream Dr. King set forth on the steps of the Lincoln Memorial.<sup>96</sup>

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<sup>96</sup> Martin Luther King, "I Have a Dream" (speech, Civil Rights March in Washington, DC, August 28, 1963).

## Bibliography

- Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press, 2010.
- “Bike Theft.” *What Would You Do?* American Broadcasting Company. New York: ABCNews, May 6, 2010.
- Bogira, Steve. *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse*. New York: Knopf Doubleday, 2005.
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- Cameron, Charles M., and Jeffrey A. Segal. "The politics of scandals: The case of Supreme Court nominations, 1877-1994." In *Annual Meeting of the Midwest Political Science Association*, April, vol. 23, p. 25. 1998.
- Correll, Joshua, Bernadette Park, Charles M. Judd, and Bernd Wittenbrink. “The influence of stereotypes on decisions to shoot.” *European Journal of Social Psychology* 37, no. 6 (November 2007): 1102-1117. *Academic Search Complete*, EBSCOhost (accessed October 3, 2015)
- Correll, Joshua, Bernadette Park, and Charles M. Judd. “The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals.” *Journal of Personality & Social Psychology* 83, no. 6 (December 2002): 1314-1329. *Academic Search Complete*, EBSCOhost (accessed October 3, 2015)
- Correll, Joshua, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler, and Tracee Keese. “Across the Thin Blue Line: Police Officers and Racial Bias in the Decisions to Shoot”, *Journal of Personality & Social Psychology* 92, no. 6 (June 2007): 1006-1023. *Academic Search Complete*, EBSCOhost (accesses October 3, 2015).
- Davies, Thomas Y. "The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment" Search and Seizure" Doctrine." *The Journal of Criminal Law and Criminology* (2010): 933-1042.
- Florida v. Bostik 501 U.S. 429 (1991).
- Geiger, Ben. "The Case for Treating Ex-Offenders as a Suspect Class." *California Law Review* 94, no. 4 (July 2006): 1191-1242. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).
- Glaser, Jack. *Suspect Race: Causes and Consequences of Racial Profiling*. New York: Oxford University Press, 2015.

- Goldberg, Jeffrey. "The Color of Suspicion," *New York Times*, June 20, 1999, accessed October 11, 2015.
- Harris, David A. "Driving While Black: Racial Profiling on Our Nation's Highways," *American Civil Liberties Union*, 1999.
- Hugenburg, Kurt, and Galen V. Bodenhausen, "Facing Predjudice: Implicit Prejudice and the Perception of Facial Threat," *Psychological Science*, 14, no. 6 (2003): 640-643.
- Holbert Steve, and Lisa Rose. *The Color of Guilt & Innocence*. San Ramon: Page Marque Press, 2004.
- Illinois v. Caballes*, 543 U.S. 405 (2005).
- Johnson, Theodore R., "Black-on-Black Racism: The Hazards of Implicit Bias." *The Atlantic*, December 26, 2014, <http://www.theatlantic.com/politics/archive/2014/12/black-on-black-racism-the-hazards-of-implicit-bias/384028>.
- Katel, Peter. "War on Drugs." *CQ Researcher* 16, no. 21 (June 2, 2006): 481-504. <http://library.cqpress.com/cqresearcher/cqresrre2006060200>
- King, Martin Luther. "I Have a Dream." Speech. Civil Rights March in Washington, DC, August 28, 1963.
- King Jr., Martin Luther, "Letter from Birmingham Jail." *UC Davis L. Rev.* 26 (1992): 835.
- Mauer Marc, and Ryan King, *A 25 Year Quagmire: The "War on Drugs" and Its Impact on American Society*. Washington, DC: The Sentencing Project, 2007.
- Mauer, Marc and Ryan S. King, *Schools and Prisons: Fifty Years After Brown v. Board of Education*. Washington, DC: Sentencing Project, 2004.
- McAfee, Thomas B. "Setting Us Up for Disaster: The Supreme Court's Decision in Terry v. Ohio." *Nev. LJ* 12 (2011): 609.
- Miller, Jerome. *Search and Destroy: African American Males in the Criminal Justice System*. United Kingdom: Cambridge University Press, 1997.
- Obama, Barack. *The Audacity of Hope*. New York: Crown Publishers, 2006.
- Owens Jr., Carl D. "Social Symbols, Stigma, and the Labor Market Experiences of Former Prisoners." *Journal Of Correctional Education* 60, no. 4 (December

- 2009): 316-342. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).
- Rhodes, William, Patrick Johnston, Song Han, Quentin McMullen, and Lynee Hozik. "Illicit Drugs: Price Elasticity of Demand and Supply." *ABT Associates*, February 2000, accessed October 24, 2015: 7, <http://www.abtassociates.com/reports/20008744845311.pdf>
- "Richard M. Nixon and the Supreme Court," *The Presidential Timeline*, accessed October 31, 2015, <http://www.presidentialtimeline.org/#/exhibit/37/02>.
- Richardson v. Ramirez*, 418 U.S. 24 (1974).
- Salam, Reihan. "Black and White in Shades of Gray." *National Review* 67, no. 18 (October 5, 2015): 29-31. *Academic Search Complete*, EBSCOhost (accessed October 24, 2015).
- "Suspect Race: Causes & Consequences of Racial Profiling (Jack Glaser, Paul Figueroa, Henry E. Brady)," YouTube video, 3:42, posted by "The University of California Television (UCTV), February 1, 2015, <https://www.youtube.com/watch?v=zd26Q3NuPUc>.
- Terry v. Ohio*, 392 U.S. 1 (1968).
- Tonry, Michael. *Malign Neglect: Race, Crime, & Punishment in America*. New York: Oxford University Press, 1995.
- Tonry, Michael. *Punishing Race: A Continuing American Dilemma*. New York: Oxford University Press, 2011.
- Tonry, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.
- United States v. Place*, 462 U.S. 696 (1983).
- U.S. Census Bureau. "State & County QuickFacts, 2013." <http://quickfacts.census.gov/qfd/states/00000.html>.
- U.S. Department of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic And Street Stops, 2011*, by Mathew Durose and Lynn Langton. (District of Columbia, 2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4779>.
- U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2013*, by E. Ann Carson, (District of Columbia, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

- U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released In 30 States In 2005: Patterns from 2005-2010*, by Alexia D. Cooper, Mathew R. Durose, and Howard N. Snyder, (District of Columbia, 2014). <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4987>.
- West, Angela D. "Chicken little, three blind men and an elephant, and 'racial profiling': A commentary on the collection, analysis, and interpretation of traffic stop data." *Journal of Forensic Psychology Practice* 3, no. 2 (2003): 63-77. *PsycINFO*, EBSCOhost (accessed October 3, 2015). *Whren v. United States*, 517 U.S. 806 (1996).
- Western, Bruce. "Mass Incarceration: Visualized," *The Atlantic* video, 0:39, September 11, 2015. <http://www.theatlantic.com/video/index/404890/prison-inherited-trait/>.