"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race

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I. INTRODUCTION

The intersection of race and criminal law and enforcement has recently received considerable attention in US media, academic, and public policy discussions. Media outlets, for example, have extensively covered a series of incidents involving the killing of unarmed black males by law enforcement and private citizens. These cases include the killing of Michael Brown, John Crawford, III, Jordan Davis, Eric Garner, Trayvon Martin, and Tamir Rice.[1] Reports

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1. Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, *Q&A: What Happened in Ferguson?*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html (Michael Brown); Radley Balko, *Mass Shooting Hysteria and the Death of John Crawford*, WASH. POST (Sept. 25, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/09/25/mass-shooting-hysteria-and-the-death-of-john-crawford/; Jack Maddox, *Florida Teen Dead After Row That Began With Loud Music Complaint, Suspect Jailed*, CNN (Sept. 5, 2014), http://www.cnn.com/2012/11/26/us/florida-music-shooting/ (Jordan Davis); Deborah E. Bloom & Jareen Imam, *New York Man*

of racially charged police killings of black men have generated so much media attention that the Associated Press has named these stories the "top news" of 2014.[2]

These incidents have sparked controversy because the assailants have been acquitted, not charged by prosecutors or grand juries, or charged only after sustained public criticism.[3] In many of these incidents, the suspects claimed that they shot the victims in order to defend themselves or others from a perceived threat of harm.[4] Some

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Dies After Chokehold By Police, CNN (Dec. 8, 2014), http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/ (Eric Garner); Michael Pearson & Greg Botelho, *5 Things to Know About the George Zimmerman-Trayvon Martin Saga*, CNN (Feb. 26, 2012), http://www.cnn.com/2013/02/25/justice/florida-zimmerman-5-things/index.html?iid=article_sidebar; Elahe Izadi & Peter Holley, *Video Shows Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/.

2. David Crary, *AP Poll: Police Shooting of Blacks Voted Top Story of 2014*, ASSOCIATED PRESS (Dec. 22, 2014), http://hosted.ap.org/dynamic/stories/Y/YE_TOP_10_STORIES?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT.

3. Meghan Keneally, *Grand Jury Does Not Indict Officer Darren Wilson in Death of Michael Brown*, ABC NEWS (Nov. 24, 2014); Mark Berman, *No Indictments After Police Shoot and Kill Man at an Ohio Walmart; Justice Dept. Launches An Investigation*, WASH. POST (Sept. 24, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/ (John Crawford, III); Eliott C. McLaughlin & John Couwels, *Eric Dunn Found Guilty of First-Degree Murder in Loud-Music Trial*, CNN (Oct. 1, 2014) (white male convicted in a second trial of first-degree murder in killing of Jordan Davis after first jury could not reach a verdict on this charge); J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html; Lizette Alvarez & Cara Buckley, *Zimmerman Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all; Sari Horwitz, *George Zimmerman Charged With Second-Degree Murder in Trayvon Martin Shooting*, WASH. POST (Apr. 11, 2012), http://www.washingtonpost.com/politics/george-zimmerman-to-be-charged-in-trayvon-martin-shooting-law-enforcement-official-says/2012/04/11/gIQAHJ5oAT_story.html (reporting that special prosecutor charged George Zimmerman with second-degree murder in the death of Travon Martin; charges come after case sparked national debate on race and policing and after original prosecutor, who intended to bring case to a grand jury, recused himself).

4. Staff Report, *Darren Wilson Said Fight At Car Justified Use of Force Against Michael Brown*, ST. LOUIS POST-DISPATCH (Nov. 25, 2014), http://www.stltoday.com/news/local/crime-and-courts/darren-wilson-said-fight-at-car-justified-use-of-force/article_95453075-8661-5e47-ae35-94783d620c6e.html; Jerry Kenney, *Community Keeps Calm Despite Questions About Wal-Mart Shooting*, NPR (Sept. 16, 2014), http://www.npr.org/2014/09/16/348709429/community-keeps-calm-despite-questions-about-wal-mart-shooting (reporting police view that shooting of John Crawford, III, justified in order to protect safety of others, even though he was carrying a BB gun that he picked up in the store and which the store sells); Larry Hannan, *Michael Dunn Testifies in His Own Defense; Jury Will Begin Deliberations Wednesday*, FLA.

media and academic commentators, however, contend that the victims' race caused the suspects' fear.[5] In other words, racial stereotypes that depict black men as violent and dangerous, rather than actual threatening behavior, motivated the killers.[6] The racial explanation for these incidents and the failure or difficulty to indict or convict the assailants has divided the public along historical racial lines. According to many public opinion polls, whites tend to believe the killings were justified, while people of color do not.[7]

TIMES UNION (Sept. 20, 2014), http://jacksonville.com/news/crime/2014-09-30/story/michael-dunn-testifies-own-defense-jury-will-begin-deliberations (reporting Michael Dunn's assertion that he shot Jordan Davis because he feared for his own life); J. David Goodman & Michael Wilson, *Officer Daniel Pantaleo Told Grand Jury He Meant No Harm to Eric Garner*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner.html (reporting that officer who killed Eric Garner testified to grand jury that he feared that Garner's resistance would cause the officer and Garner to crash through a glass storefront window); Lizette Alvarez, *In Zimmerman Case, Self-Defense Was Hard to Topple*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all (reporting on George Zimmerman's self-defense argument to justify killing of Trayvon Martin); Abby Phillip, *Cleveland Cop Said He "Had No Choice" But to Shoot 12-Year-Old Tamir Rice, Father Says*, WASH. POST (Dec. 2, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/12/02/cleveland-cop-said-he-had-no-choice-but-to-shoot-12-year-old-tamir-rice-father-says/ (reporting that white officer told his father that he shot and killed black child because he was reaching for a gun, although the gun was fake and officer killed victim within seconds after arriving upon the scene).

5. *See, e.g.*, Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 101, 111 (2013) ("Race likely influenced Zimmerman's perception that Martin posed a threat of criminality, whether Zimmerman was aware of this or not."); Judith Browne Dianis, *Op-ed, Eric Garner Was Killed By More Than Just A Chokehold*, MSNBC (Aug. 5, 2014), http://www.msnbc.com/msnbc/what-killed-eric-garner (arguing that implicit racial biases caused officers to harass and kill Eric Garner); Patricia J. Williams, *Letters from Paris, Madlawprofessor's Weblog*, Dec. 3, 2014, http://madlawprofessor.wordpress.com/2014/12/03/letter-from-paris/ (discussing John Crawford killing and arguing that negative stereotypes of black males likely contributed to his death).

6. *See* Lee, *supra* note 5, at 111; Dianis, *supra* note 5; Williams, *supra* note 5.

7. Deborah Charles, *Big Gap Between Races in U.S. on Trayvon Martin Killing*, REUTERS (Apr. 12, 2012), http://www.reuters.com/article/2012/04/12/us-usa-florida-shooting-poll-idUSBRE83B1BB20120412 (reporting polling data showing that ninety-one percent of blacks, fifty-three percent of Latinos, and 35 percent of whites believe killing of Trayvon Martin was unjustified); PEW RESEARCH CNTR. FOR THE PEOPLE & THE PRESS, *Big Racial Divide over Zimmerman Verdict: Whites Say Too Much Focus on Race, Blacks Disagree*, PEW RESEARCH CNTR. FOR THE PEOPLE & THE PRESS July 22, 2013, *available at* http://www.people-press.org/2013/07/22/big-racial-divide-over-zimmerman-verdict/ (finding dissatisfaction with acquittal of killer of Trayvon Martin among eighty-six percent of blacks, fifty-eight percent of Hispanics, and thirty percent of whites); id. (finding that seventy-eight percent of blacks, forty-seven percent of Hispanics, and twenty-eight percent of whites believe the death of Trayvon Martin "raises important issues about race that need to be discussed"); Pew Research Center for

These incidents and the resulting national conversation surrounding race are critical issues for legal analysis, particularly in light of the well-documented history of racism within criminal law and enforcement in the United States. Historically, many states explicitly discriminated on the basis of race by enacting laws that criminalized conduct only if the individual who engaged in the activity was a person of color.[8] Statutes also allowed for harsher punishment of persons of color than for whites who committed the same crimes.[9] Even when criminal statutes did not contain racial classifications, legal authorities often enforced these laws more vigorously against defendants of color.[10] Furthermore, the rigor of criminal law enforcement also varied depending upon the race of the victim. Generally, white victimhood sparked harsher legal punishment than criminal conduct that harmed persons of color.[11] Allegations of criminal behavior involving white victims and black defendants often led to the harshest punishments, prosecutions marred by gross deprivations of Due Process and Equal Protection, guilt assessed by biased jurors and judges, and, in many instances,

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the People & the Press, Sharp Racial Divisions in Reactions to Brown, Garner Decisions, Dec. 8, 2014, http://www.people-press.org/2014/12/08/sharp-racial-divisions-in-reactions-to-brown-garner-decisions/ (reporting that eighty percent of blacks and twenty-three percent of whites disagree with the grand jury decision not to indict the officer who killed Michael Brown); id. (finding that ninety percent of blacks and forty-seven percent of whites disagree with the grand jury decision not to indict the officer involved in the killing of Eric Garner); *id.* (finding that 64 percent of blacks believe that race was a "major factor" in the grand jury's decision not to indict the killer of Michael Brown, while 60 percent of whites believe that race was "not a factor at all"); *id.* (finding that 62 percent of blacks believe that race was a "major factor" in the grand jury's decision not to indict the officer involved in the killing of Eric Garner, while forty-eight percent of whites believe that race was "not a factor at all").

8. RANDALL KENNEDY, RACE, CRIME AND THE LAW 26 (1998) ("It was a crime . . . for blacks to do all sorts of things deemed to be permissible or admirable when done by others.").

9. Christopher R. Adamson, *Punishment after Slavery: Southern Penal Systems, 1865–1890*, 30 SOCIAL PROBLEMS 555, 555–69 (1983) (discussing racially disparate treatment of white and black offenders).

10. N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1330–41 (2004) (discussing, in the context of black males, how racism and racial stereotypes deprived defendants of due process and equal justice).

11. KENNEDY, *supra* note 8, at 29 ("Deliberately withholding protection against criminality (or conduct that should be deemed criminal) is one of the most destructive forms of oppression that has been visited upon African-Americans.").

summary punishment of the allegedly culpable person of color by lynch mobs—often with the complicity of state governments.[12]

Although facially discriminatory crime and punishment would violate the Constitution today, historical patterns of racist criminal law enforcement continue.[13] Many white Americans believe that they live in a post-racial society.[14] Academic research and other data repeatedly disprove this perception.[15] Racial inequality and racial discrimination remain prominent features of contemporary American society.[16]

Researchers have tried to explain why racism persists in a society with legal and cultural norms that mandate racial egalitarianism. Research on implicit bias, conducted primarily by sociologists and social psychologists, finds that racism persists in the United States because people discriminate due to nonconscious stereotypes

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12. KENNEDY, *supra* note 8, at 30–36 (discussing failure of states to punish white perpetrators of violence against black slaves); Kennedy, *supra* note 8, at 41–49 (discussing severe sanctions for blacks accused of certain crimes against whites).

13. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 274 (2010) (discussing contemporary racial disparities in criminal law and enforcement); Skinner v. Oklahoma, 316 U.S. 536, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.") (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)).

14. *See* Richard P. Eibach & Thomas Keegan, *Free at Last?: Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessments of Racial Progress*, 90 J. PERSONALITY AND SOC. PSYCHOL. 453, 453 (discussing opinion polls showing dramatic difference between black and white opinions regarding the existence of racial discrimination); Elijah Anderson, Duke W. Austin, Craig Lapriece Holloway & Vani S. Kulkarni, *The Legacy of Racial Caste: An Exploratory Ethnography*, 642 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 25, 37 (2012) (summarizing different views whites and blacks hold with respect to the contemporary significance of racism); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 918, 919 n.4 (2009) (citing numerous studies finding dramatic differences among whites and persons of color regarding the ongoing significance of race); Eduardo Bonilla-Silva & David Dietrich, *The Sweet Enchantment of Color-Blind Racism in Obamerica*, 634 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. at 190 ("It has become accepted dogma among whites in the United States that race is no longer a central factor determining the life chances of Americans.").

15. Hazel Rose Markus, Claude M. Steele & Dorothy M. Steele, *Colorblindness as a Barrier to Inclusion: Assimilation and Nonimmigrant Minorities*, 129 DAEDALUS 233, 242 (2000) (discussing the persistence of racial inequality in the contemporary United States).

16. *Id.*

regarding persons of color.[17] This research finds that "implicit" racial stereotypes impact how members of racial groups respond to outsiders.[18] The implicit bias scholars contend that "ingroup" members treat "outgroup" members worse than individuals in their own racial class.[19] Although researchers have made this finding with respect to all racial categories, they have also concluded that members of socially marginal racial groups typically respond more positively to individuals who are privileged by racial hierarchy.[20] For instance, racial minorities favor whites more than whites favor persons of color.[21] Because whites remain the dominant social class in the United States, their ingroup preferences, if acted upon, could cause discriminatory treatment of persons of color even in the absence of conscious bias.[22] If these negative racial stereotypes continue to influence behavior, the implicit bias theory offers a scientific explanation for the pervasiveness of racial discrimination in a society that favors formal racial equality.

Legal scholars and social scientists argue that implicit bias explains strong racial disparities in numerous social contexts that are bound by legal antidiscrimination requirements.[23] These settings include public education,[24] employment,[25] elections and voting,[26] and

17. Many social scientists use "nonconscious" and "unconscious" interchangeably. *See, e.g.*, ANASTASIA EFKLIDES & PLOUSIA MISAILIDI, INTRODUCTION: THE PRESENT AND THE FUTURE IN METACOGNITION, IN TRENDS AND PROSPECTS IN METACOGNITION RESEARCH (Efklides & Plousia eds. 2010) at 2 & n.1; Anthony J. Marcel, *Conscious and Unconscious Perception: An Approach to the Relations between Phenomenal Experience and Perceptual Processes*, 15 COGNITIVE PSYCHOLOGY 238–300 (1983) (using the terms interchangeably throughout article); Lawrence E. Williams, John A. Bargh, Christopher C. Nocera, & Jeremy R. Gray, *The Unconscious Regulation of Emotion: Nonconscious Reappraisal Goals Modulate Emotional Reactivity*, 9 EMOTION 847–54 (2009) (same).

18. *See infra* text accompanying notes 65–80.

19. *See infra* text accompanying note 88.

20. *See infra* text accompanying notes 91–92

21. *See infra* text accompanying notes 89–91.

22. *See infra* text accompanying notes 93–86.

23. *See generally* IMPLICIT BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter ACROSS THE LAW].

24. *See generally* Charles R. Lawrence III, *Unconscious Racism and the Conversation about the Racial Achievement Gap*, *in* ACROSS THE LAW, *supra* note 23, at 115.

25. *See generally* Judge Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, *in* ACROSS THE LAW, *supra* note 23, at 80.

26. Anthony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2010).

criminal law and enforcement.[27] With respect to criminal law and enforcement, many scholars assert that implicit racial bias among police,[28] prosecutors,[29] judges,[30] and jurors[31] shape the experiences of persons of color.

The implicit bias literature links past racial discrimination with similar behavior today. While implicit racial prejudice might explain many contemporary acts of racial discrimination, an exclusive focus on bias-motivated individual conduct obscures the complexity of racism, specifically, that it is an institution of oppression.[32] Race is a social construct.[33] Historically, racial construction depicted whites as free,[34] civilized,[35] and citizens,[36] while persons of color were

27. *See, e.g.*, Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in ACROSS THE LAW, *supra* note 23, at 46; Robert J. Smith & G. Ben Cohen, *Choosing Life or Death (Implicitly)*, in ACROSS THE LAW, *supra* note 23, at 230; R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006).

28. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 429–30 (2007).

29. Kristin Henning, *Criminalizing Normal Adolescent Behavior In Communities Of Color: The Role Of Prosecutors In Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 425–49 (2013).

30. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding pervasive implicit racial bias among judges and modest impact on behavior when racially primed).

31. 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, 190 (2010); 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, 309–10 (2010).

32. *See* Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and the Mechanisms of Disparate Impact*, 41 AM. J. CRIM. L. 91, 100–02 (2013) (contrasting psychological and structural accounts of racism).

33. Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

34. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 164 (1998) (discussing historical legal rulings that define slave status as antithetical to the essence of white racial identity).

35. Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the "Black-White Paradigm,"* 54 RUT. L. REV. 959, 968 (2002) ("As whites have viewed the social world, the racial hierarchy and status continuum run from 'highly civilized' whites to 'uncivilized' blacks. . . .") (citation omitted); Eduardo Bonilla-Silva *"This is a White Country": The Racial Ideology of the Western Nations of the World-System*, 70 SOCIOLOGICAL INQUIRY 188, 191–92 (2000) (listing "civilized" as a racial construct developed historically to distinguish Western and white nations from non-Western nations inhabited by "barbaric" persons of color).

36. *See* Gross, *supra* note 34, at 163 (discussing legal construction of whiteness and concluding that being a "white man" meant being "a citizen, a civic being").

portrayed as savages,[37] violent,[38] promiscuous,[39] slaves,[40] and foreigners.[41] According to implicit bias research, these same constructs impact how many white Americans perceive persons of color today.

The implicit bias research, however, does not take into account the principal motivation for the construction of racial categories—to facilitate and justify group domination.[42] Prior to the Civil Rights Movement, white supremacy denied full citizenship to persons of color and made them inferior in every aspect of American social life.[43] Persons of color routinely experienced private and state violence;[44] received inferior educational opportunities or no

37. Richard Delgado & Jean Stefancic, *Images of the Outside in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1268 (1992) (discussing stereotypes of Native Americans as "savage, barbarous, and half-civilized").

38. A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 535 (relating "myth that black men are particularly prone to rape white women" to legal and social domination of blacks); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 34 (1996) (relating "myth of the black man as a rapist lusting after white women" to legal and social domination of blacks); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 227 (1995) (noting "violently enforced taboo against sexual relations between white women and Black men").

39. *See* Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 950 (1997) ("One of the most prevalent images of slave women was the character of Jezebel, a woman governed by her sexual desires . . . ."); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 784 (1991) ("White society created myths [during slavery] to justify their oppression and exploitation, portraying black women as fecund and promiscuous objects, available to satisfy white male sexual desires.").

40. Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS 251, 256–57 (1992) (arguing that blackness was constructed to "signify" a "master/servant" relationship between whites and blacks).

41. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 114 (2010).

42. Audrey Smedley, *"Race" and the Construction of Human Identity*, 100 AM. ANTHRO. 690, 694 (1999) ("'Race' developed in the minds of some Europeans as a way to rationalize the conquest and brutal treatment of Native American populations, and especially the retention and perpetuation of slavery for imported Africans."); *id.* ("The creation of 'race' and racial ideology imposed on the conquered and enslaved peoples an identity as the lowest status groups in society.").

43. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. 393 (1854) (discussing the complete social, political, and legal domination of blacks by whites).

44. Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889–1918*, 21 LAW & SOC'Y REV. 361 (1987) (discussing anti-black lynching and execution in post-bellum North Carolina); WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE

education at all;[45] were denied the means for economic betterment; did not have political freedoms;[46] were displaced from their lands;[47] and were treated as property for whites to own and subjugate.[48] If historical racism represented the manifestation of prejudice and domination, it is possible that these factors also influence racial discrimination today. The implicit bias literature, however, neglects to consider the subjugating dimensions of racism. Racism does not represent the aggregate behavior of unknowingly prejudiced individuals. Instead, racism is a structure of oppression and group domination.[49]

UNITED STATES, 1848–1928 (2013) (examining the history of lynching of Mexican Americans in the American southwest).

45. GUADALUPE SAN MIGUEL, "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910–1981 (1987); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 134 (2d ed. 2004).

46. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 985 (2008) (citing Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 397 (1985) ("In the South [during the waning years of Reconstruction], state and local governments began to use gerrymandering, poll taxes, literacy tests, 'grandfather clauses,' white primaries, malapportionment, residency requirements, property ownership requirements, fraud, and violence to bring about the total disenfranchisement of Black voters.")).

47. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 12–27 (2005) (discussing the taking of Native American lands by European settlers in the Americas).

48. *Dred Scott*, 60 U.S. at 407 (observing that Europeans had considered blacks "so far inferior . . . that the negro might justly and lawfully be reduced to slavery for his benefit" and that "[h]e was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.").

49. John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796 (2008) ("Structural racism shifts our attention from the single, intra-institutional setting to inter-institutional arrangements and interactions. Efforts to identify causation at a particular moment of decision within a specific domain understate the cumulative impact of discrimination."); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1078 (1998) ("An embedded view of racism adopts the modern characteristics of racism and situates racism not simply as inhering in individuals, but also in culture, institutions, and societal organization. This view of racism would claim that in the United States today, the principal flaw in analyzing racism is the failure to recognize or accept this dynamic, structured, systemic, and contextualized nature of racism."); Kristin E. Henkel, John F. Dovidio & Samuel L. Gaertner, *Institutional Discrimination, Individual Racism, and Hurricane Katrina*, 6 ANALYSES OF SOCIAL ISSUES AND PUB. POL'Y 99, 101 (2006) ("Thus, while the study of prejudice and discrimination focuses on the roles of individuals and interpersonal processes, racism encompasses institutional, social, and cultural processes that serve as an influential backdrop to individual-level perspectives."). While individual biases can contribute to institutional racism, an exclusive focus on individual bias

While implicit bias theory has substantially influenced contemporary legal scholarship regarding racial discrimination, other theories within social psychology could help scholars develop a more nuanced understanding of racial inequality. In particular, scholarship that examines the institutional or systemic nature of racism could complement implicit bias research and its primary focus on individual decision-making.

Among other schools of thought within social psychology literature, "social dominance theory"[50] offers a lot of promise. Social dominance theorists contend that human societies inevitably organize into groups and that these groups are arranged relationally as dominate and subordinate.[51] Powerful groups create social norms that preserve their advantaged status and their access to superior resources, such as safe and clean housing, quality healthcare, wealth, and political power.[52] Subordinate social groups, by contrast, tend only to have access to inferior social resources, including nonperforming schools, unsafe neighborhoods with poor housing stock, low-quality healthcare, and limited political power.[53] Social dominance theorists also argue that privileged groups create "legitimizing myths" that justify the unequal distribution of resources.[54]

Law is an important instrument of social domination. Constitutional law doctrines, for example, make it extremely difficult for persons of color to challenge racial discrimination, but impose few barriers for whites who wish to contest the legality of racial egalitarian remedies.[55] Criminal law and enforcement also help to

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cannot explain the dynamics of racial hierarchy. *See* Henkel et al., at 101 (distinguishing prejudice and institutional racism). Limiting analysis to individual bias also obscures the power differentials that exist among racial groups. *See* Henkel et al., at 101.

50. *See generally* JAMES SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE (1999).

51. *Id.* at 31.

52. *Id.* at 31–32.

53. *Id.*

54. *Id.* at 45–48.

55. *See*, *e.g.*, Reva Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 29–58 (2013) (describing equal protection doctrine as "majority-protective"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113–14, 1134 (1997) (discussing the failure of equal protection doctrine to ameliorate inequality); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, U.

maintain group-based inequality. Blacks and Latinos constitute a disproportionate share of people in the United States who have fallen within the supervision of criminal law and enforcement.[56] This disparate pattern contributes greatly to the unequal status that persons of color occupy in the United States. For instance, racially disparate criminalization forces a disproportionate number of blacks and Latinos to perform unpaid labor;[57] deprives them of the right to vote;[58] severely constricts their ability to find employment upon release;[59] impedes their educational attainment;[60] and often leaves them physically injured and psychologically traumatized.[61] Thus, criminalization in the twenty-first century United States perpetuates many of the same injuries caused by legalized white supremacy in early American history. That the nation now subscribes to formal racial equality does not alter these similarities. Indeed, some social dominance scholars contend that incarceration, just one aspect of criminal law and enforcement, is the most consistent example of group domination in the United States and in most other human societies.[62] Social dominance research, therefore, could strengthen the scholarly analysis of racism within criminal law and enforcement.

ILL. L. REV. 615, 637–81 (2003) (contending that the Court provides the most protection to privileged classes).

56. Tonry, *supra* note 13, at 274 (discussing disparate treatment of Blacks in criminal law and enforcement); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEG. & PUB. POL'Y 821, 824 (2013) (discussing disparate arrest rates of Black and Latino males).

57. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U.L. REV. 870, 891 n.135 (2012) (critiquing coerced labor by inmates).

58. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

59. Christy A. Visher, Sara A. Debus-Sherrill & Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698–712 (2010) (finding that "nonwhite ex-prisoners in this sample had poorer employment outcomes and may have experienced discrimination in their search for jobs after release").

60. David S. Kirk & Robert J. Samson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 54 (2013) ("Our analysis shows that arrest in adolescence hinders the transition to adulthood by undermining pathways to educational attainment.").

61. Jason Schnittkera, Michael Massoglia & Christopher Uggena, *Incarceration and the Health of the African American Community*, 8 DU BOIS REV. 133, 137 (2011).

62. SIDANIUS & PRATTO, *supra* note 50, at 202 ("If, on their first visit to Earth, extraterrestrial beings wanted some quick and easy way to determine which human social groups were dominant and subordinate, they would merely need to determine which groups

This Article contends that implicit bias theory has improved contemporary understanding of the dynamics of individual bias. Implicit bias research has also helped to explain the persistent racial disparities in many areas of public policy, including criminal law and enforcement. Implicit bias theory, however, does not provide the foundation for a comprehensive analysis of racial inequality. Even if implicit racial biases exist pervasively, these biases alone do not explain broad societal tolerance of vast racial inequality. Instead, as social dominance theorists have found, a strong desire among powerful classes to preserve the benefits they receive from stratification leads to collective acceptance of group-based inequality. Because racial inequality within criminal law and enforcement reinforces the vulnerability of persons of color and replicates historical injuries caused by explicitly racist practices, legal theorists whose work analyzes the intersection of criminality and racial subordination could find that social dominance theory allows for a rich discussion of these issues.

This Article proceeds in four principle parts. Part II analyzes the general theory of implicit bias and provides examples of its use in legal scholarship, including debates regarding criminal law and enforcement. Part II also discusses some academic critiques of implicit bias research and responses to those criticisms. Part II concludes by discussing the limitations of using implicit bias in legal analysis. Specifically, by focusing on the unwitting discriminator, implicit bias literature fails to account for the structural dimensions of racism.

Part III encourages legal scholars to consider other social psychology research that could complement the use of implicit bias theory. In particular, social dominance theory, which explains the persistence of group hierarchy across human societies, could help legal scholars to elaborate the role of criminal law and enforcement in facilitating racial subordination.

Part IV draws upon empirical research and specific incidents of violence against black men and demonstrates the shortcomings of legal scholarship that relies exclusively on implicit bias theory to

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were over- and underrepresented in societies' jails, prison cells, dungeons, and chambers of execution.").

explain racial inequality in contemporary criminal law and enforcement. Part IV then argues that legal theorists should utilize implicit bias and social dominance theories in tandem in order to develop more comprehensive explanations of and remedies for racial disparities within criminal law and enforcement.

II. IMPLICIT BIAS AND THE LAW

Legal scholars have increasingly turned to social psychology literature to construct solutions for legal problems.[63] For example, the use of social psychology research has greatly impacted antidiscrimination scholarship.[64] Implicit bias theory is the most-utilized field of social psychology research by contemporary antidiscrimination scholars.

A. Implicit Bias Theory

Implicit bias theory derives from social cognition research. Cognitive and social psychologists have found that "many mental processes function implicitly, or outside conscious attentional focus."[65] Indeed, substantial empirical research demonstrates that human "thoughts, feelings, and actions are shaped by factors residing largely outside conscious awareness, control, and intention."[66]

Cognitive theory suggests that "implicit attitudes" and "implicit stereotypes" exist beyond the awareness and control of individuals.[67] An implicit attitude refers to an unconscious preference for a particular "social object."[68] Social cognition theorists contend that implicit attitudes represent "traces of past experiences" that inform and shape actions and preferences prospectively.[69] Anthony G.

63. Lane et al., *supra* note 28, at 439–42 (discussing use of implicit bias theory to analyze employment discrimination, affirmative action, equal protection, criminal law and enforcement, and judicial bias).

64. *Id.*

65. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947 (2006).

66. Lane et al., *supra* note 28, at 428.

67. Greenwald & Krieger, *supra* note 65, at 948.

68. Lane et al., *supra* note 28, at 429.

69. *Id.*

Greenwald and Linda Hamilton Krieger discuss a few hypothetical scenarios that illuminate the impact of explicit and implicit attitudes on human decision-making. In one example, Greenwald and Krieger contend that some voters might support candidates because they have "favorable beliefs about the candidate."[70] In this situation, a vote for the candidate indicates "explicit" attitudes. Other individuals, however, might support a candidate without knowing anything more "than the candidate's name."[71] Greenwald and Krieger hypothesize that a voter could support the candidate simply because "the candidate's name shares one or more initial letters with the voter's name."[72] The voter, however, is unaware that the candidate's name influenced the decision to support the candidate. Here, the positive vote would indicate an implicit "self-favorable attitude" held by the voter.[73] The voter favors her own name, which implicitly influences her evaluation of the candidate. Greenwald and Krieger also hypothesize that a voter's evaluation of a candidate's spouse or other family member will likely correspond with the feelings the voter has for the candidate.[74] Although the voter might have very little or no information about the candidate's family member, the voter's positive feelings for the candidate implicitly and positively affect the voter's evaluation of the family member.[75]

Another important concept within implicit bias literature is the implicit stereotype, which is a nonconscious "mental association between a social group or category and a trait."[76] Implicit stereotypes can determine how individuals treat members of social groups.[77] In one study, researchers read a series of names and asked participants to indicate whether they believed the individual was a famous person or not.[78] Participants falsely rated male names as famous more often than female names.[79] This outcome could indicate that the

70. Greenwald & Krieger, *supra* note 65, at 948.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 948–49.
75. *Id.* at 949.
76. *Id.*
77. *Id.*
78. *Id.* at 949–50.
79. *Id.*

participants "associate maleness with fame-deserving achievement."[80]

The term implicit bias refers to a behavioral propensity that results from implicit attitudes and stereotypes.[81] The individual's conscious attitudes do not control the choice; instead, nonconscious stereotypes or shortcuts embedded in the human mind cause the individual to evaluate members of different social groups in a disparate manner.[82] Some teachers, for example, might grade students of color more harshly than white students who submit comparable work. Negative racial stereotypes and attitudes might influence the discriminatory grading.[83] Similarly, a property owner might refuse to rent to persons of color due to implicit stereotypes regarding the ability of people of color to pay their bills.[84] Employers could refuse to promote women into managerial positions because of implicit stereotypes that portray men as better leaders than women.[85] All of these actions could occur even if the individual actor outwardly supports racial or gender egalitarianism. In this instance, actions do not reflect conscious beliefs.[86]

Social scientists also distinguish between "ingroup" and "outgroup" bias.[87] People tend to have favorable views of other members of their own social group.[88] By contrast, they hold less positive views regarding outgroup members.[89] The relationship

80. *Id.* at 950.
81. *Id.* at 950–51.
82. *Id.* at 951.
83. *Id.* at 950.
84. *Id.* at 951.
85. *Id.*
86. Lane et al., *supra* note 28, at 429 (observing that implicit preferences "diverge from the consciously reported preferences and beliefs of the same individual").
87. Greenwald & Krieger, *supra* note 65, at 951; Lane et al., *supra* note 28, at 433. Succinctly stated, [i]ngroups are groups to which a person belongs, and outgroups are groups to which a person does not belong. . . ." R. SPEARS, INGROUP-OUTGROUP BIAS, *in* ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 484 (Roy F. Baumeister & Kathleen D. Vohs eds. 2007). The types of groups depend upon the social categories that exist in a given society. These could include "gender, ethnicity, occupation, economic and social position" among others. Id.
88. Lane et al., *supra* note 28, at 435 (stating that "the tendency toward ingroup liking appears strong").
89. *Id.*; Greenwald & Krieger, *supra* note 65, at 952 (asserting that "a positive attitude toward any ingroup necessarily implies a relative negativity toward a complementary outgroup").

between group status and attitudes, however, varies according to the social position of the group. People from more powerful social classes, such as whites and wealthy individuals, tend to have very low opinions of outgroup members.[90] By contrast, people from marginalized social groups do not typically hold the same level of disfavor for outgroup members than persons from dominant classes.[91] Furthermore, members of marginalized social groups tend to disfavor members of their own group in higher rates than people in dominant classes.[92] The negative social construction of the marginalized group likely causes its members to disassociate positive traits from ingroup membership.[93] The ingroup and outgroup nature of bias has serious implications for race relations. Because whites control most of the powerful institutions within the United States, whites' ingroup preferences could deprive persons of color of opportunities for advancement.[94]

B. Measuring Implicit Bias

1. The IAT

Researchers have developed several methods to detect whether implicit racial attitudes and stereotypes impact the way a person behaves. The Implicit Association Test (IAT) is the most well-known

90. Lane et al., *supra* note 28, at 433–34.

91. *Id.*

92. *Id.*

93. *See* Greenwald & Krieger, *supra* note 65, at 959 (suggesting that lack of ingroup preference among blacks could result from the "influence of the United States's pro-European-American culture").

94. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. POL'Y REV. 477, 490 (2007) (observing that there are "strong reasons to believe that implicit bias contributes to a serious social problem that denies opportunities to blacks and other minorities in America"); Greenwald & Krieger, *supra* note 65, at 966 ("In summary, a substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans."); Lane et al., *supra* note 28, at 435–37 (discussing studies that find the IAT a reliable predictor of behavior); Anthony G. Greenwald, Andrew Poehlamn, Eric Luis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III, Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (conducting meta-analysis of implicit bias research and finding the IAT an accurate predictor of discriminatory behavior).

test for assessing the existence of implicit bias.[95] The IAT directs participants to complete two randomly-assigned tasks.[96] For example, the tester could ask participants in the study to press a certain key on a computer keyboard if the image of a black person or a word with a pleasant meaning appears on the screen.[97] By contrast, the individual would press a different key if the image of a white person or a word with an unpleasant meaning appears on the screen.[98] During the second round of testing, the instructions are reversed.[99] The negative words and images of a black person share the same key, as do images of white persons and words with positive meanings.[100] The test theoretically reveals implicit bias if the participant has a more difficult time completing the assigned tasks when the "categories produce cognitive consonance rather than dissonance."[101] In other words, a person with implicit bias for whites would complete the test with greater speed when white faces are linked with positive words.[102]

2. Laboratory Studies

Some implicit bias studies attempt to simulate real-word scenarios, including matters relevant to criminal law and enforcement. "Shooter" studies, for example, ask participants to decide whether or not the image of a male on a computer screen is holding a handgun or some harmless object.[103] If the participant believes the man is holding a handgun, the participant must "shoot"

95. Dermot Barnes-Holmes, Louise Murtagh & Yvonne Barnes-Holmes, *Using The Implicit Association Test And The Implicit Relational Assessment Procedure To Measure Attitudes Toward Meat And Vegetables In Vegetarians And Meat-Eaters*, 60 PSYCHOLOGICAL RECORD 287 (2010) ("The most well established measure of what have been called implicit attitudes is the implicit association test, or IAT.").

96. Greenwald & Krieger, *supra* note 65, at 952.

97. *Id.*

98. *Id.* at 952–53.

99. *Id.* at 953.

100. *Id.*

101. L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359, 1365 (2012).

102. *Id.* at 1365–66.

103. Lane et al., *supra* note 28, at 429–30.

the target by pressing a button.[104] This type of study, which many researchers have conducted, consistently finds that participants—including police officers—shoot unarmed blacks with greater frequency and speed than unarmed whites.[105]

3. Implicit Bias: Implications for Legal Theory

The implicit bias research has many implications for legal scholarship and reform. If, as implicit theorists contend, racially motivated behavior usually stems from nonconscious brain activity, then implicit biases could explain pervasive patterns of discrimination that exist in areas such as employment, education, and criminal law and enforcement. Also, with respect to criminal law and enforcement specifically, the shooter studies might explain why unarmed black males are victims of police offers' use of lethal force. Generally, implicit racial stereotypes that portray persons of color negatively could also lead to more vigorous enforcement of criminal law against them from the stage of policing to sentencing.

Although implicit bias theory provides evidence that racial discrimination within public and private institutions could occur at the nonconscious level and produce measurable racial disparities, current Supreme Court doctrine rigidly applies the discriminatory intent rule. The discriminatory intent rule requires equal plaintiffs to prove that the defendant acted with discriminatory purpose and not just that the law or administration of the law has a discriminatory effect. Court doctrine holds that in equal protection cases, evidence of discriminatory impact is only relevant when it is so stark that only intentional discrimination could explain the outcome.

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104. *Id.*

105. *Id.* ("The data revealed systematic racial bias in shooting, with faster and more accurate responses to unarmed white targets and armed black targets compared with armed white targets and unarmed black targets."); Banks et al., *supra* note 27, at 1174 ("The shooting studies, conducted by several different groups of researchers, all found that shooting behavior differed based on the race of the 'suspect.' One finding was that images of unarmed Black men were more likely to be 'shot' than were images of unarmed White men, a result consistent with the shootings of unarmed Black men that have generated so much controversy." (citations omitted)); Kimberly Barsamian Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup Members*, 14 GROUP PROCESSES & INTERGROUP RELATIONS 569, 577–79 (2010) (finding positive correlation between darker racial phenotypes, negative stereotypes, and decision to shoot).

Implicit bias theory, by contrast, finds that discrimination takes place outside of the conscious intent of the actor. Thus, even if the defendant's conduct is intentional, it still might result from invidious stereotyping of social classes. The discriminatory intent rule, however, makes arguments regarding nonconscious bias irrelevant. Even if the defendant performs a discriminatory act intentionally, such as conducting a stop and frisk of a Latino suspect on the basis of race alone, plaintiff must still demonstrate that the defendant had the specific intent to discriminate on the grounds of some protected category, such as race or national origin.

Legal theorists have argued that implicit bias research severely undermines the legitimacy of the discriminatory intent rule. The rule assumes that discrimination is always a conscious choice. Social psychology research calls this traditional view into question. If courts, as some of them have done, began to utilize implicit bias literature to explain discriminatory effects, their opinions could potentially provide a basis for overruling the discriminatory intent doctrine.

C. Implicit Bias: Critiques and Replies

1. Critique: IAT Does not Predict Actual Behavior

Although the implicit bias literature has greatly impacted social psychology and legal scholarship, critics question whether the research actually explains how people behave.[106] Gregory Mitchell and Philip E. Tetlock wrote a scathing critique of the use of implicit bias studies by antidiscrimination scholars.[107] Mitchell and Tetlock advance four primary critiques of the findings within implicit bias research. They argue that implicit bias researchers: (1) equate implicit stereotypes with a propensity to discriminate unconsciously;[108] (2) dismiss explanations for behavior that conflict with implicit bias

106. *See* Gregory S. Parks, Jeffrey Rachlinski, & Richard Epstein, *Implicit Bias and the 2008 Presidential Election*, 157 U. PA. L. REV. PENNUMBRA 210, 216–20 (2008) (questioning the relevance of implicit bias) (remarks of Richard Epstein).

107. Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023 (2006).

108. *Id.* at 1030.

theory;[109] (3) make flawed conclusions regarding causation, when findings suggest correlation at best;[110] and (4) simply assume that laboratory evidence of implicit bias will inevitably lead to the same results in real-world situations.[111] Together, these critiques essentially make a singular assertion: implicit bias theory does not explain actual behavior.

2. Responses

If accurate, these critiques would seriously weaken the usefulness of implicit bias theory. Several scholars, however, have rebutted Mitchell and Tetlock's criticisms and similar arguments that other researchers have made. Greenwald, Poehlman, Uhlmann, and Banaji, for example, conducted a meta-analysis of 122 studies of implicit bias.[112] These studies involved 184 independent samples and 14,900 subjects. Greenwald et al. found ample support for the predictive value of the IAT after controlling for other factors.[113] Some of the studies Greenwald et al. analyzed found that the IAT predicted racial disparities in hiring, employment evaluations, and medical treatment.[114] Similarly, Lane et al. discuss numerous studies regarding the accuracy of the IAT. These studies confirm that the IAT can predict whether whites will exhibit hostility toward or discomfort around blacks.[115] Other studies have found that people with high race IAT scores are more likely to describe persons of color as hostile, relative to whites, even when persons of color engage in the same conduct or exhibit the same facial expressions as whites.[116] Greenwald and Krieger also discuss research that finds a statistically

109. *Id.* at 1032.
110. *Id.* at 1033.
111. *Id.*
112. *See* Greenwald et al, *supra* note 94.
113. *See generally id. See also* Lane et al., *supra* note 28, at 441 (arguing that the Greenwald et al. study "provides the best response to th[e] predictive validity concern"). For more information regarding the Greenwald et al., see *supra* note 94.
114. *See* Lane et al., *supra* note 28, at 442 (discussing specific studies analyzed in the Greenwald et al. meta-analysis).
115. *Id.*
116. *Id.* at 436.

significant correlation between high ingroup preferences among whites and discriminatory treatment of persons of color.[117]

Samuel Bagenstos has additionally demonstrated that many of Mitchell and Tetlock's criticisms do not rest on science, but upon "a set of unexpressed normative disagreements with implicit bias scholars."[118] Bagenstos, for example, responds to Mitchell and Tetlock's contention that the shooter studies cannot prove racial prejudice because black participants also tended to shoot unarmed black images.[119] This argument fails to appreciate the reality that persons of racial minority groups often have outgroup preferences, due to the stigmatization of their group's racial status.[120] Bagenstos also criticizes Mitchell and Tetlock's dismissal of implicit bias research because implicit attitudes do not always mirror explicit attitudes.[121] This argument, however, actually supports using implicit bias theory in antidiscrimination law. If people who support egalitarian ideals can harbor implicitly racist attitudes, then arguably antidiscrimination law should look beyond conscious intent to consider the discriminatory impact of purportedly race-neutral decisions.[122]

Bagenstos concludes that Mitchell and Tetlock have not identified serious problems with the science of implicit bias. Instead, according

117. *See* Greenwald & Kreiger, *supra* note 65, at 961–62. One study found that whites who have a strong ingroup preference exhibited greater discomfort when they were interviewed by black researchers, relative to white researchers. *See id.* at 961. Other studies have reached similar conclusions. *Id.* at 961–62.

118. Bagenstos, *supra* note 94, at 493.

119. *Id.* at 483 (citing Mitchell & Tetlock, s*upra* note 107, at 1068 n.146).

120. *Id.* ("As a logical matter, it is certainly possible that minority group members may be biased against members of their own group; it is hardly scientific to dismiss the possibility out of hand.").

121. Bagenstos, *supra* note 94, at 482 (citing Mitchell & Tetlock, s*upra* note 107, at 7).

122. *Id.* ("To say that the concept of implicit bias lacks validity because implicit bias does not correlate empirically with explicit prejudice is therefore to assume the very conclusion that implicit bias scholars seek to challenge-that any "real" bias must be reflected in expressed attitudes (or the attitudes that would be expressed if the matter were called to one's attention) (citation omitted)). Some statutory antidiscrimination provisions allow plaintiffs to prove discrimination using discriminatory impact, but the Supreme Court has held that equal protection plaintiffs must prove discriminatory intent, rather than discriminatory impact alone. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?,* 98 GEO. L.J. 967, 993–95 (2010) (discussing differing evidentiary standards applicable in statutory and constitutional antidiscrimination cases).

to Bagenstos, they simply believe that antidiscrimination law should only punish conscious wrongdoing or animus-based behavior.[123] Mitchell and Tetlock, for example, purport to advance "rational" reasons that might cause whites to treat blacks differently than other whites, including that criminality coincides with poverty and, because blacks are disproportionately poor, whites can rationally fear that all blacks are potentially harmful.[124] Notwithstanding the questionable logic of this position,[125] if antidiscrimination law sought to eradicate discriminatory impact rather than discriminatory animus, then the harms caused by such discriminatory conduct would be subject to redress regardless of the perpetrators' conscious intent.[126]

Neurological research has also validated implicit bias theory. Neural imaging studies show that when people who exhibit strong implicit biases view unfamiliar images of blacks, the sectors of the brain that implicitly control fear are activated.[127] Researchers have also found that individuals can resist innate fear responses if higher-level brain activity acknowledges and halts the implicitly biased reaction.[128] Studies have shown that persons who are "highly motivated to control bias" can sever the correlation between implicit bias and discriminatory behavior.[129] Doing so, however, requires

123. *Id.* at 488 (arguing that "what really drives Mitchell and Tetlock's argument is not a scientific disagreement with the implicit bias researchers" but "a normative disagreement about the appropriate scope and target of antidiscrimination law").

124. *Id.* at 486 (citing Mitchell & Tetlock, *supra* note 107, at 1085, 1086).

125. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 411 (1991) (criticizing as unreasonable the assertion that people should fear all blacks because blacks commit a disproportionate amount of crimes).

126. *See* David Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1093 (criticizing animus requirement in antidiscrimination law); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1515 (2d ed. 1988) (advocating an "antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens"). *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. AND PUB. AFF. 107 (1976) (criticizing individualized antidiscrimination theory of equal protection and advocating group-harm model that protects politically powerless groups from harmful state action regardless of the intentions of the defendant).

127. Lane et al., *supra* note 28, at 436.

128. *Id.* at 437.

129. *Id.*

individuals to acknowledge their own implicit racial attitudes and the possible impact these prejudices could have on their behavior.[130]

Although implicit bias theorists rely upon laboratory findings to evaluate human behavior, many social psychologists have replicated the basic findings of this research—that prejudice exists nonconsciously; nonconscious prejudice can cause discriminatory treatment of certain classes; and discrimination due to implicit bias can occur even when the discriminator subscribes to egalitarian principles. Presently, the weight of social science and emerging neurological studies supports the general findings of implicit bias theory. This research provides compelling evidence that racial discrimination remains pervasive in American society and that existing legal remedies that require proof of intentional discrimination are inadequate to address the elusiveness of present-day racial discrimination.

D. Limitation of Implicit Bias Theory

Although the implicit bias literature offers a sophisticated model for analyzing the causes of contemporary racial inequality, this research does not provide a full accounting of racism in the United States. No single theory could address all aspects of such an enormous, complex, and persistent social problem as racism, but the limitations surrounding implicit bias are critical. Implicit bias theorists contend that patterns of discrimination today derive from the same force that caused discrimination in the past: namely, racial prejudice. In the past, however, racial prejudice was explicit; today, it is implicit.

Racial inequality, however, does not represent the aggregate conduct of unconsciously discriminatory people.[131] Historically, the roots of racism extended beyond mere hatred towards or prejudice against persons of color. Race was socially constructed in order to accomplish social domination.[132] Negative and positive stereotypes of

130. *Id.*

131. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1808 (2002) (distinguishing individualized psychological theories of racism from institutional accounts).

132. Smedley, *supra* note 42, at 694 ("'Race' developed in the minds of some Europeans as

persons of color and whites, respectively, provided a cultural justification for the subjugation of nonwhites even as the nation espoused principles of liberty, equality, and justice.[133] Despite the history of racial domination in the United States, implicit bias literature does not analyze racism as a system of subjugation. Instead, implicit bias theorists seek to understand and eliminate individual behavior caused by embedded racial stereotypes.[134] Racism, however, remains a system of domination—justified and caused, in part, by negative racial stereotypes.[135]

III. SOCIAL DOMINANCE THEORY

A. Social Dominance: The Theory

Other social psychology research could complement the implicit bias literature and offer greater insight regarding racism as a system of domination. In particular, social dominance theory, which

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a way to rationalize the conquest and brutal treatment of Native American populations, and especially the retention and perpetuation of slavery for imported Africans. . . . The creation of 'race' and racial ideology imposed on the conquered and enslaved peoples an identity as the lowest status groups in society.").

133. Smedley, *supra* note 42, at 694

134. *See* Lynch, *supra* note 32, at 100–01 (contrasting psychological and structural accounts of racism); Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 373, 383–84 (2007) ("Yet bias—even implicit bias—is too limited a way of capturing the complex mechanisms that produce racial disparity in particular areas. While recent legal commentary has made much use of research from cognitive psychology, cognitive bias fails to address how institutional arrangements and ongoing practices interact with longstanding, persistent patterns of racial inequality.").

135. *See* Powell, *supra* note 49 at 796 ("Structural racism shifts our attention from the single, intra-institutional setting to inter-institutional arrangements and interactions. Efforts to identify causation at a particular moment of decision within a specific domain understate the cumulative impact of discrimination."); Calmore, *supra* note 49, at 1078 ("An embedded view of racism adopts the modern characteristics of racism and situates racism not simply as inhering in individuals, but also in culture, institutions, and societal organization. This view of racism would claim that in the United States today, the principal flaw in analyzing racism is the failure to recognize or accept this dynamic, structured, systemic, and contextualized nature of racism."); Henkel et al., *supra* note 49, 101 ("Thus, while the study of prejudice and discrimination focuses on the roles of individuals and interpersonal processes, racism encompasses institutional, social, and cultural processes that serve as an influential backdrop to individual-level perspectives."). *cf.* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 40 (1987) (advocating "dominance" approach to questions of sex equality);

examines the social dynamics of group hierarchy, could help to illuminate the structural nature of racism. In the groundbreaking work *Social Dominance*, psychologists Jim Sidanius and Felicia Pratto argue that "all human societies tend to be structured as *group-based social hierarchies*."[136] These societies have both dominant and subordinate groups. The distribution of items of social value is highly uneven in hierarchical societies. Dominant groups possess items of "positive social value,"[137] such as "political authority and power, good and plentiful food, splendid homes, the best available health care, wealth, and high social status."[138] By contrast, subordinate groups tend to own resources with "negative social value," including "low power and social status, high-risk and low-status occupations, relatively poor health care, poor food, modest or miserable homes, and severe negative sanctions (e.g., prison and death sentences)."[139]

Sidanius and Pratto argue that group-based societies—particularly those societies that explicitly mandate legal egalitarianism—create "legitimizing myths," or "attitudes, values, beliefs, stereotypes, and ideologies that provide moral and intellectual justification" for group-based inequality.[140] With respect to race, these legitimizing myths can appear as racist or as race-neutral and still accomplish the same goal of social domination.[141] Today, for example, neutral values such as colorblindness can impede the distribution of important social resources to subordinate racial groups, just as explicit racial bigotry historically accomplished the same goal.[142]

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136. SIDANIUS & PRATTO, *supra* note 50, at 31.

137. *Id.*

138. *Id.* at 31–32.

139. *Id.* at 32. Sidanius and Pratto also distinguish group-based from individual-based social hierarchies. In a group-based hierarchy, individuals in dominant groups derive benefits from their membership in the dominant group; in individual-based hierarchy, benefits are earned by individual efforts. This distinction does not mean that dominant group members do not work to obtain positive value. Instead, the distinction emphasizes that individual differences cannot explain the disparity in positive social value held by dominant versus subordinate group members. *Id.*

140. *Id.* at 45. The concept of a legitimizing myth is similar to terms used by other social theorists to explain hierarchy-sustaining ideology. *See id.*

141. *Id.* at 171–75 (finding that opposition to affirmative action, which is perceived as violating principles of equity and individualism, correlates strongly with support of social dominance—when the beneficiaries are black).

142. *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (arguing

Social dominance theory, like implicit bias research, could help to explain why racism persists in contemporary American life. For instance, if a significant number of whites are motivated to preserve their dominant racial status, they could engage in behavior or support policies that negatively impact persons of color and privilege whites.[143] In light of legitimizing myths that justify racial inequality, however, socially-dominant white decision makers need not account for any racial dimensions of their preferences.[144] For example, researchers have noted that merit-based measures that are silent with respect to race, but which disparately burden persons of color, can legitimize unequal access to higher education for people of color.[145] Compounding the issue, race-neutral legal principles, such as states' rights have justified slavery, Jim Crow, and other forms of racial oppression.[146] These principles continue to immunize inegalitarian state policies from judicial invalidation and remediation.[147]

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that contemporary colorblindness doctrine makes any usage of race suspect, thus disabling state efforts to ameliorate racial inequality and justifying unequal distribution of societal resources).

143. SIDANIUS & PRATTO, *supra* note 50, at 45 ("Not only is one's desire for group-based social dominance related to one's social ideologies, but both of these factors help drive group-relevant social policies.").

144. *See* Siegel, *supra* note 142, at 95 ("[T]he conventions of color blindness discourse make it possible for this society to characterize practices that enforce racial stratification as the product of 'race-neutral' and 'nondiscriminatory' principles of social distribution.").

145. Siegel, *supra* note 142, at 92–93.

146. James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. OF AM. HIST. 493, 504 (1965) (discussing use of states' rights discourse by opponents of the Civil Rights Act of 1875); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 290 (2008) ("Many Southerners argue that the South fought for states' rights rather than to defend slavery. . . ."); Michael Kent Curtis, *The Bill of Rights and the States: An Overview From One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 6, 69 (2009) (discussing states' rights and federalism as justifications for opposing civil rights recognition); Douglas S. Massey, *The Past & Future of American Civil Rights*, 140 DAEDALUS 39 (2011) ("Although the war ostensibly erupted over the issue of "states rights," the true cause was made explicit by the Confederate Constitution, which rejected the principle of "non-disclosure" and made repeated, unambiguous references to slavery in the text."); *id.* ("Confederate Vice President Alexander Stephens affirmed the centrality of slavery to the Southern cause in a speech he delivered in Savannah, Georgia, on March 21, 1861.").

147. Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1326 (2001) (arguing that the Court's protection of state sovereign immunity in the Eleventh Amendment context "deprives private parties of an adequate remedy at law for conceded violations of their rights"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 373–408 (2002) (discussing several contemporary federalism doctrines and

Furthermore, a culture of individualism (however complicated the notion)[148] blunts popular support for social welfare programs that could alleviate the material deprivation of persons of color.[149] Overall, these legitimizing myths make racial domination more tolerable.

B. Social Dominance Orientation

1. Measuring Social Dominance

Sidanius and Pratto use the term "social dominance orientation" ("SDO") to indicate the extent of an individual's commitment to group-based hierarchy.[150] People with a high SDO have a strong "desire [for] group-based inequality and dominance."[151] The level of SDO varies from person to person.[152] In order to measure SDO, Sidanius and Pratto developed several value scales using data drawn from forty-five samples of 18,741 respondents in eleven different countries.[153] These value scales measure intergroup relations and "assess[] orientations toward group domination rather than just toward equality."[154] Sidanius and Pratto found that at least sixteen values shape SDO. The first eight values correlate positively with high SDO; the latter eight values reflect less support for SDO. The positive SDO values, written as thoughts that a high-SDO person might have, include:

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arguing that these precedents negatively impact civil rights plaintiffs and Congress's ability to enact legislative remedies for race and sex discrimination).

148. BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994) (critiquing individualist interpretations of American culture and providing a more complicated view that situates the individual within a communal setting).

149. Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 597 (1996) ("Whatever other reasons whites may have for opposing welfare, their negative views of blacks appear to constitute an important factor in generating that opposition.").

150. SIDANIUS AND PRATTO, *supra* note 50, at 61 ("SDO is defined as a very general individual differences orientation expressing the value that people place on nonegalitarian and hierarchically structured relationships among social groups.").

151. *Id.*

152. *Id.*

153. *Id.* at 62.

154. *Id.*

1. Some groups of people are simply inferior to other groups.

2. In getting what you want, it is sometimes necessary to use force against other groups.

3. It's okay if some groups have more of a chance in life than others.

4. To get ahead in life, it is sometimes necessary to step on other groups.

5. If certain groups stayed in their place, we would have fewer problems.

6. It's probably a good thing that certain groups are at the top and other groups are at the bottom.

7. Inferior groups should stay in their place.

8. Sometimes other groups must be kept in their place.[155]

Sidanius and Pratto then utilized their value scales to compare the relative strength of SDO among various social groups.

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155. *Id.* at 67. The nondominance indicators are less relevant to this paper, but they include:

9. It would be good if groups could be equal.

10. Group equality should be our ideal.

11. All groups should be given an equal chance in life.

12. We should do what we can to equalize conditions for different groups.

13. Increased social equality.

14. We would have fewer problems if we treated people more equally.

15. We should strive to make incomes as equal as possible.

16. No one group should dominate in society.

See id. at 62.

2. Demographics and Policy Preferences of High-SDO Individuals

According to the data collected by Sidanius and Pratto, a high SDO correlates positively with membership in a higher-status social group.[156] Whites, heterosexuals, and men have higher SDOs than blacks, Latinos, gays and lesbians, and women.[157] Although this data shows a strong correlation between group advantage and SDO, it does not necessarily prove causation.[158] Sidanius and Pratto, however, suggest that dominant group members could have higher SDOs because of the high-status they derive from being members of a dominant group in society.[159] Other researchers have made similar findings. Numerous studies, for example, find that subordinates tend to embrace policies that will alter the status quo while dominants typically oppose such measures.[160] Researchers have linked these contrasting orientations with a desire to retain or to acquire social power.[161] Dominants want to preserve their social power, while subordinates contest unequal group power as illegitimate.

With respect to United States data, Sidanius and Pratto find that high-SDO individuals more strongly support "racism, sexism, nationalism, cultural elitism, and patriotism,"[162] as well as "ethnic prejudice"[163] and "political conservatism."[164] High-SDO people also

156. *Id.* at 77.

157. *Id.*

158. *Id.* (stating that the authors "have not thoroughly researched the question of how people acquire different levels of SDO").

159. *Id.*

160. John F. Dovidio et al., *Another view of ''we'': Majority and minority group perspectives on a common ingroup identity*, 18 EUR. REV. SOC. PSYCHOLOGY 296, 311 (2007) ("Furthermore, majority group members often actively resist policies (e.g., affirmative action) that they perceive as promoting social change that threatens their own advantage. In contrast, members of minority groups display greater support for ideologies that de-legitimize hierarchy (e.g., endorsement of human rights, humanitarianism) and see social inequalities as more in need of change.") (citations omitted).

161. Tamar Saguy et al., *Beyond Contact: Intergroup Contact in the Context of Power Relations*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 432, 443 (2008) ("Disadvantaged group members wanted to talk about power differences more than did members of advantaged groups, who preferred primarily to talk about commonalities between the groups. Furthermore, the group-based differences in the desire to address power were generally due to the disadvantaged group members' greater motivation for a change in the status quo.").

162. SIDANIUS & PRATTO, *supra* note 50 at 84.

163. *Id.*

tend to endorse policies that enhance the unequal status of subordinate groups.[165] By contrast, high-SDO individuals are less likely to support policies that ameliorate the unequal status of subordinates.[166] High SDO, for example, correlates with support for "tougher law and order measures" and opposition to women's rights, universal health care, social welfare programs, civil rights policies, and affirmative action.[167]

Social dominance research suggests that implicit bias alone cannot adequately explain the persistence of racial inequality in a colorblind society. A desire for social domination among whites could also negatively impact the social and economic status of persons of color. Accordingly, legal scholars who use social psychology research to examine racial discrimination should move beyond implicit bias literature and consider social dominance scholarship as well.

C. Limitations of Social Dominance Theory as Jurisprudence

Social dominance theory could complement the social science scholarship that currently informs the work of antidiscrimination scholars. This research, however, would likely meet stiff resistance from legal scholars, lawyers, and judges.

The law does not generally recognize implicit bias due to the intent rule and other doctrines that discount evidence of racially disparate impact.[168] Implicit bias, however, sounds less accusatory

164. *Id.* at 85.

165. *Id.* at 88–89.

166. *Id.*

167. *Id.* at 90–91. Legal scholars have not offered criticism of social dominance theory (contrary to the research regarding implicit bias). Furthermore, Sidanius and Pratto have dealt systematically with all of the central critiques of their work. *See, e.g.*, Michael T. Schmitt, et. al., *Psychology Attitudes Toward Group-based Inequality: Social Dominance or Social Identity?* 42 BRIT. J. SOC. PSYCHOL. 161 (2003) (critiquing social dominance theory); Jim Sidanius & Felicia Pratto, *Social Dominance Theory and the Dynamics of Inequality: A Reply to Schmitt, Branscombe, & Kappen and Wilson & Liu*, 42 BRIT. J. SOC. PSYCHOL. 207 (2003) (responding to critiques of social dominance theory). Four other scholars have defended social dominance theory as well. *See, e.g.*, Marc Stewart Wilson & James H. Liu, *Social Dominance Theory Comes of Age, And So Must Change: A Reply to Sidanius & Pratto, and Turner & Reynolds*, 42 BRIT. J. SOC. PSYCHOL. 221 (2003) (prominent critics of social dominance theory defend it against a collection of popular academic critiques).

168. *See* Greenwald & Krieger, *supra* note 65, at 965–67 (advocating use of implicit bias research to provide evidence of discriminatory intent in antidiscrimination litigation).

than social dominance because it does not attribute racial discrimination to the invidious conduct of individual whites. If unconscious prejudices cause discrimination and potentially affect everyone, then legal scholars, lawyers, and judges might view these biases as a compelling social problem.[169] Social dominance theory, by contrast, attributes systemic racial inequality to purposeful efforts by dominant classes to preserve their privileged status.[170] Because most whites believe that racism no longer presents hardships for persons of color,[171] they might resist claims that they possess racial privilege. If whites do not believe they have racial privilege, then they will likely contest the assertion that social dominance motivates their attitudes and actions regarding race.

Social dominance theory could also face resistance among legal scholars, lawyers, and judges because whites tend to believe that group-based identities are inappropriate.[172] Because many whites

169. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists.") (citations omitted).

170. *See supra* notes 121–40.

171. Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 80–81 (2010) (discussing prevailing view among whites that racism no long exists).

172. Whites, for example, typically oppose group-based racial identities and prefer colorblindness and individualism. *See, e.g.*, Maykel Verkuyten, *Ethnic Group Identification and Group Evaluation Among Minority and Majority Groups: Testing the Multiculturalism Hypothesis*, J. PERSONALITY & SOC. PSYCHOL. 121, 134 (2005) (discussing results of a study in the Netherlands that finds greater support for multiculturalism among Turkish minority participants and more support for assimilation among Dutch majority participants); Christopher Wolsko et al., *Considering the Tower of Babel: Correlates of Assimilation and Multiculturalism among Ethnic Minority and Majority Groups in the United States*, 19 SOC. JUST. RES. 277, 301 (2006) (reporting "clear patterns of divergence between the attitudes of whites and ethnic minorities," including greater support among minority groups for multiculturalism relative to whites and lesser support for assimilation); Aneeta Rattan & Nalini Ambady, *Diversity Ideologies and Intergroup Relations: An Examination of Colorblindness and Multiculturalism*, 43 EURO. J. OF SOC. PSYCH. 12, 13–14 (2013) ("The extant research shows that majority group members tend to endorse a colorblind ideology to a greater degree than minority group members."); *id.* at 14 ("Minority group members are less likely to endorse colorblindness than are majority group members. Instead, they tend to endorse multiculturalism."); Victoria C. Plaut et al., *"What About Me?": Perceptions of Exclusion and Whites' Reaction to Multiculturalism*, 101 J. PERSONALITY & SOC. PSYCHOL. 337, 339 (2011) ("Although there are certainly

oppose the mere idea of group-based social identity, they could likely respond negatively to the assertion that whites' group identity facilitates racial domination.

In addition, dominant-group denial of racial privilege could make the legal community hostile to social dominance theory. Because whites typically do not believe that racism imposes substantial burdens upon persons of color,[173] they react with great sensitivity to claims that whites, as a class, possess social privileges and advantages.[174] Convincing whites that they are a socially dominant group would likely face tremendous resistance.

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individual exceptions and wide variation, empirically, dominant racial/ethnic group members such as Whites appear to show less support for multiculturalism than do minorities."); Maykel Verkuyten, *Social Psychology and Multiculturalism*, 1 SOC. & PERSONALITY COMPASS 280, 283 (2007) ("Empirical studies on multicultural attitudes indicate that the general support for multiculturalism is not very strong among majority groups in many Western countries."); Evan P. Apfelbaum et al., *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918, 918 (2008) ("Colorblindness has emerged as a norm endorsed by many Whites and evident across a wide range of domains."); Alison M. Konrad & Frank Linehan, *Race and Sex Differences in Line Managers' Reactions to Equal Employment Opportunity and Affirmative Action Interventions*, 20 GROUP & ORG. MGMT. 409, 424 (1995) (finding that persons of color and white women were more supportive of "identity-conscious" hiring practices than white men and that persons of color were more supportive of such policies than white women); Carey S. Ryan et al., *Multicultural and Colorblind Ideology, Stereotypes, and Ethnocentrism among Black and White Americans*, 10 GROUP PROCESSES & INTERGROUP REL. 617, 623–24 (2007) (reporting results of a study finding that "the tendency to endorse multiculturalism more than colorblindness was greater among Black than White participants"; that "White participants more strongly endorsed a colorblind ideology than did Blacks": and that "Black participants more strongly endorsed a multicultural than a colorblind ideology").

173. Richard P. Eibach & Thomas Keegan, *Free at Last?: Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessments of Racial Progress*, 90 J. PERSONALITY & SOC. PYSCHOL. 453 (2006) (discussing opinion polls showing dramatic difference between black and white opinions regarding the existence of racial discrimination); Elijah Anderson et al., *The Legacy of Racial Caste: An Exploratory Ethnography*, 642 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 37 (2012) (summarizing different views whites and blacks hold with respect to the contemporary significance of racism); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 919 n.4 (2009) (citing numerous studies finding dramatic differences among whites and persons of color regarding the ongoing significance of race).

174. Some research has found that whites exhibit greater racism when they are told that whites possess racial privileges. *See* Nyla R. Branscombe et al., *Racial Attitudes in Response to Thoughts of White Privilege*, 37 EUR. J. SOC. PSYCHOL. 203, 212 (2007) ("Efforts to reduce racism often involve highlighting the existence of racial inequality. For Whites, however, pointing out their privileged position in the social structure represents a challenge to the status of the ingroup—precisely the context that our data suggest will increase racism.").

Social dominance theory could also face challenges in law due to Supreme Court precedent. Currently, the Court generally finds that the Constitution does not protect group rights, particularly when claimants assert claims of racial injustice.[175] The Court has also held that governmental allocation of resources to subordinate groups for remedial purposes must survive the same level of scrutiny as policies that explicitly seek to bolster white supremacy.[176] Furthermore, the Court has not treated as unconstitutional many forms of state action that reinforce the subordinate status of people of color, in part, because it rejects group-based equality claims.[177] Because the Court does not believe that the Equal Protection Clause bars facially neutral laws that strengthen racial inequities, it is highly unlikely that most of the justices would accept the contention that Court precedents contribute to racial inequality.

Finally, legal actors might not accept the premises of social dominance theory because many of them, especially judges, have already responded unfavorably to preexisting scholarship that conceives of racism as a form of hierarchal social relationships, rather than individual prejudice. Critical race theorists, feminists, and other antidiscrimination scholars have struggled to persuade the Court that it should treat the Fourteenth Amendment as a legal prohibition of subjugation, rather than as a bar to any explicit usage of race or sex in public policy.[178] Despite the pervasiveness and sophistication of legal scholarship on antisubordination theories of

175. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 523 (2000) ("All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.").

176. *See, e.g.*, Fisher v. Univ. of Texas, 133 S. Ct. 2411, 2419 (2013) (holding that "judicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'" (citing Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting))); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

177. *See Rice*, 528 U.S. at 495 (rejecting group-based racial remedy on the grounds that it harms whites). *See also* Darren Lenard Hutchinson, "*Unexplainable on Grounds other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 637–81 (discussing Supreme Court doctrines that reinforce subordination).

178. *See* Hutchinson, *supra* note 173, at 615.

equality, the Court has not abandoned its colorblind (and to some extent sex-blind) interpretation of the Constitution.[179]

Application of antisubordination theory would lead to a more rigorous review of policies that harm subjugated groups, regardless of the intent of the state actor,[180] and to a less invasive analysis of policies that seek to ameliorate racial inequality, even if those policies contain racial classifications.[181] Social dominance theory addresses similar concerns as antisubordination scholarship, including the recognition of group hierarchy and the reproduction of unequal social relations through a set of culturally dominant legitimizing myths. Given the similarities between social dominance and antisubordination theories, the Court would likely reject social dominance theories of law.

For all of the foregoing reasons, social dominance theory could face formidable resistance among legal actors. These limitations, however, do not discredit the usefulness of social dominance theory for analyzing the causes of contemporary racial inequality.

IV. IMPLICIT BIAS, SOCIAL DOMINANCE, RACE AND CRIMINALITY

Because the law regulates racial discrimination, implicit bias and social dominance theories have the potential to impact legal analysis in a variety of settings. Indeed, many legal scholars have already utilized implicit bias research to examine the inadequacies of existing civil rights doctrines and to push for legal reform. Social dominance theory, however, has not captured the attention of legal scholars; nonetheless, social dominance theory could also make important contributions to law and policy surrounding race.

This Part examines the usefulness of implicit bias and social dominance theories for analyzing the prevalence of racism in contemporary criminal law and enforcement. Criminal law and enforcement are critical sites for examining racial inequality for several reasons. First, federal and state governments routinely

179. *Fisher*, 133 S. Ct. 2411 at 2418 (discussing precedent finding racial distinctions "suspect" and "odious").

180. Hutchinson, *supra* note 173, at 683–84.

181. *Id.* at 684–85.

exercise their authority to enact criminal law and enforcement measures.[182] Second, historically, criminal law and enforcement contributed greatly to the socially subordinate status of racial minorities.[183] Finally, strong racial disparities persist within criminal law and enforcement.[184] Implicit bias and social dominance research can explain the resilience of these disparities despite legal reforms that mandate formal racial equality.

A. Implicit Bias and Criminal Law

Relying on implicit bias theory, legal scholars have argued that nonconscious racial attitudes and stereotypes negatively affect persons of color throughout every phase of criminal law and enforcement, including interactions with police, the decisionmaking of juries, judges, and prosecutors, and the choices made by legislators.[185] This research links disparate treatment of persons of color within criminal law and enforcement with the pervasiveness of implicit bias.

1. Police

Legal scholars and social scientists have utilized implicit bias research to argue that law enforcement shooting of unarmed black men could stem from racial prejudice, rather than actual threatening behavior by the victim.[186] Other scholars contend that stop and frisk

182. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) ("Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over. I believe these propositions would be accepted by anyone who read an American criminal code, state or federal."); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 86–90 (2004) (discussing legitimacy and law enforcement).

183. *See infra* notes 237–47.

184. *See* Tonry, *supra* note 13, at 274; Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOCIETY REV. 695, 700 (2010) ("In short, 'racism' and 'discrimination' are nowhere in the post–civil rights era, yet punishment and surveillance are increasingly everywhere for blacks and Latinos.").

185. *See infra* notes 186–260.

186. *See* Lane et al., *supra* note 28, at 430; Banks et al., *supra* note 27, at 1174; *See generally* Kahn & Davies, *supra* note 105 (finding that implicit stereotypes of black men as

policies, which disparately affect men of color in many jurisdictions, result from implicit bias.[187] These works have even begun to impact court rulings. In August 2013, for example, a United States District Court issued a landmark ruling when it found that the New York City Police Department's stop and frisk policy discriminated against blacks and Latinos.[188] The court found inexplicable racial disparities in the application of the policy.[189] The court attributed these disparities, in part, to implicit racial stereotypes.[190] Implicit bias theory provided a compelling social context for the court to find that the statistical data evinced racial discrimination. This type of analysis, if embraced by judges, could greatly influence the outcome of antidiscrimination lawsuits when evidence of discriminatory intent is an essential element of the plaintiffs' claims.

2. Juries

Numerous studies analyze the possible influence of implicit racial stereotypes on jurors. Several laboratory tests, for example, indicate that mock jurors describe behavior as threatening or innocuous depending on the race of the potential assailant or victim.[191] In one study, white participants viewed an argument between two people that ended with a shove.[192] The researchers asked participants to state

dangerous increases as participants in study view images of persons with more phenotypically black characteristics, such as dark skin and flat noses).

187. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L. J. 1143, 1155 (2012) (linking race-based stop and frisk encounters with implicit bias).

188. Floyd v. New York, 959 F. Supp. 2d 540 (2013).

189. *Id.* at 589.

190. *Id.* at 580–81 ("Other recent psychological research has shown that unconscious racial bias continues to play an objectively measurable role in many people's decision processes. It would not be surprising if many police officers share the latent biases that pervade our society. If so, such biases could provide a further source of unreliability in officers' rapid, intuitive impressions of whether an individual's movements are furtive and indicate criminality." (citing Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1063 (2006))).

191. Lee, *Race and Self Defense*, *supra* note 125, at 405–06 (discussing study which found that participants were more likely to rate behavior engaged in by blacks as "violent," but were less likely to do so when whites engaged in the same behavior); *Id.* at 406 (discussing study which "found that both Black and White children tended to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites").

192. *Id.* at 405–06.

whether the shove was "violent" or simply "playing around." The results followed a racial pattern that coincides with negative racial stereotypes regarding blacks:

> Duncan found that when the person shoving was a Black person and the person being shoved was White, 75% of the subjects thought the shove constituted "violent" behavior, while only 6% characterized the shove as "playing around." When subjects observed the same events with a White person as the shover and a Black person as the victim, only 17% characterized the White person's shove as "violent," while 42% described the White person's shove as "playing around."[193]

The study demonstrates that the participants' "threshold for labeling an act as violent was significantly lower when subjects viewed a Black person committing the act than when subjects viewed a White person committing the same act."[194] If juries evaluate behavior following similar racial cues, then these biases could influence their verdicts.

Many scholars have, in fact, concluded that persons of color are more vulnerable to guilty verdicts in criminal cases. One study used the IAT to determine whether individual determinations of guilt correlated with race. Justin D. Levinson, Huajian Cai, and Daniele Young tested this hypothesis by administering the IAT to a sample of sixty jury-eligible undergraduate and graduate students.[195] Levinson et al. tested the participants regarding their association of black with "Guilty/Not Guilty" and "Pleasant/Unpleasant" descriptors[196] They also asked the participants a series of questions to measure their self-reported feelings towards whites and blacks.[197] Next, the participants read a story that described an armed robbery and were primed with pictures of dark or lighter-skin perpetrators.[198] The participants also

193. *Id.*
194. *Id.* at 406.
195. *See* Levinson et. al., *Guilty By Implicit Racial Bias*, *supra* note 31, at 201–02.
196. *Id.* at 198–205.
197. *Id.* at 202–03.
198. *Id.* at 203.

viewed a list of evidence from the crime.[199] Finally, the participants were asked to determine whether an individual suspect was guilty or not guilty.[200] The study found that many participants implicitly associated black with guilt and that this association made them more likely to believe that the black robbery suspects were guilty.[201]

This research could give meaning to numerous empirical studies that find defendants of color are more vulnerable to guilty verdicts than white defendants.[202] These studies could also explain why whites might readily accept self-defense arguments of white defendants who have beaten or killed persons of color.[203] Implicit bias research could demonstrate that these patterns are not statistical anomalies. Instead, they result from discriminatory choices that occur due to the pervasiveness of implicit racial bias.

3. Judges

Although judges must decide cases impartially, some research indicates that implicit biases could impact their decisions. Jeffrey Rachlinski, Sheri Lynn Johnson, Andrew Wistrich, and Chris Guthrie gave one hundred and thirty-three judges several tests to measure

199. *Id.*

200. *Id.*

201. *Id.* at 207 (finding that "Participants held implicit associations between Black and Guilty . . . . [T]hese implicit associations were meaningful—they predicted judgments of the probative value of evidence . . . [T]he Guilty/Not Guilty IAT was unrelated to and operated differently than a well established attitude-based IAT . . . . [I]mplicit attitudes of race and guilt are quite different from attitudes of race revealed by using explicit measures . . . .").

202. Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM THE BEHAVIORAL AND BRAIN SCIENCES, 103, 107-08 (2014 (analyzing studies that find overall racial disparity in jury verdicts depending upon the race of the defendant, victim, and jurors); Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 QUARTERLY JOURNAL OF ECONOMICS 1017 (2012) (finding substantially higher conviction rate for black defendants relative to white defendants from all-white juries and that the presence of just one black jury eliminates statistical gap); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOCIETY REV. 69, 75–79 (2011) (discussing numerous studies that find race determines whether juries impose death penalty).

203. *See generally* Cynthia Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (contending that the law of self-defense combined with racism among jurors contributes to acquittals when whites kill people of color).

whether they had implicit racial attitudes.[204] The first test was a standard IAT that required the participants to match positive words with white faces on a computer screen.[205] Next, the participants matched black faces with positive words and white faces with negative words. The researchers found that 87.1 percent of the white judges had implicit preferences for whites, while black judges did not show a preference in either direction.[206]

A second test required the judges to examine three hypothetical cases.[207] In two of the cases, which involved juvenile offenders, the researchers did not disclose the racial background of the defendants.[208] The judges, however, were primed regarding race before they examined the hypothetical cases.[209] In the third case, however, some judges were told explicitly that the defendant was white, while other judges were told that he was black.[210] Contrary to findings in other research (not specific to judges), this study found no significant relationship between white judges' IAT scores and the assessment of guilt among the participants who were primed and those who were not.[211] Judges whose IAT scores favored whites and who were also racially primed with black stereotypes, however, were more likely to assign harsher sentences than the other participants.[212] The third study, which used explicit racial demographics, also showed an insignificant relationship between implicit bias and judicial assessment of guilt[213] with one notable exception: black judges who exhibited a strong positive attitude regarding blacks gave lower sentences to known black defendants.[214]

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204. Rachlinski et al., *supra* note 30, at 1205–08.
205. *Id.* at 1209.
206. *Id.* at 1210.
207. *Id.* at 1211.
208. *Id.*
209. *Id.* The judges were primed regarding race with subliminally shown words associated with blacks. *Id.* at 1213 n.86 (listing the subliminally shown words associated with black people).
210. *Id.* at 1211.
211. *Id.* at 1216.
212. *Id.* at 1217.
213. *Id.* at 1219.
214. *Id.* at 1218.

These results might seem counterintuitive,[215] but the researchers suspect that the finding could demonstrate that when race remains subtle, judges are more likely to act upon implicit racial stereotypes and impose harsher sentences.[216] When judges confront race explicitly, however, they can adjust their decisions to reach egalitarian outcomes.[217] Because this is the only published study that involves use of the IAT with actual judges, it is difficult to draw firm conclusions from the results. Given the abundance of data regarding the impact of implicit racial attitudes and stereotypes upon human behavior, it is rational to believe that some judges make decisions that reflect nonconscious racial bias.[218]

In order to combat the potential impact of implicit biases upon judicial decisionmaking, some organizations have provided literature to judges that explains implicit bias and that offers suggestions to avoid its effects.[219] The extent to which these resources have led to policy reforms or altered the thinking of individual judges remains unclear.

4. Prosecutors

Although no published study discusses the participation of prosecutors in IAT research, some scholars contend that the wide

215. *Id.* at 1216 (stating that the result of the study "contrasts sharply" with other research on implicit bias and guilt assessments).

216. *Id.* at 1223 ("In effect, the subliminal processes triggered unconscious bias, and in just the way that might be expected."). Moreover, the authors believed that when race was made explicit, white judges avoided racial bias because the tried "to compensate for unconscious racial biases in their decisionmaking." *Id.*

217. Rachlinski et al., *supra* note 30, at 1223.

218. Outside of criminal law, a recent empirical study finds that white appeals judges are more likely to reverse black trial court judges than white trial court judges. *See* Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts* (2012) (unpublished paper) (on file with the author's OpenScholar@Harvard page). Other factors limit the value of this study. First, judges only determine guilt when the defendant waives a right to a jury trial. Also, judges have the ability to shape the outcome of cases in many other ways, including rulings on evidence, police conduct, and prosecutorial behavior.

219. *See* Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II & Jennifer K. Elek, Helping Courts Address Implicit Bias: Resources for Education, National Center for State Courts (2012), www.ncsc.org/ibreport; Jerry Kang, Implicit Bias: A Primer for Courts, National Center for State Courts (2009), http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf.

discretion that prosecutors enjoy renders the prosecutorial process highly susceptible to the operation of implicit racial stereotypes.[220] Many of the negative racial stereotypes that affect how individuals perceive persons of color could also influence prosecutorial behavior.[221] Stereotypes of black, Arab, and Latino men as dangerous, for example, could affect how prosecutors assess evidence and, in turn, impact charging decisions, plea bargaining, and sentence recommendations.[222] The Supreme Court, however, has generally insulated prosecutors from most questions regarding their decisions to prosecute—even when the exercise of that discretion leads to strong and arguably inexplicable patterns of racial discrimination.[223] Indeed, findings in some case law strongly suggest the influence of implicit (or explicit) racial bias on prosecutorial decisions. In *McCleskey v. Kemp*,[224] for example, the Supreme Court held that a black defendant failed to establish that the state of Georgia imposed the death penalty in a racially discriminatory manner.[225] A statistical study the defendant presented, however, demonstrated a strong correlation between the race of defendants and victims in decisions to impose the death penalty. Defendants who murdered whites were

220. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795 (2012). Such prosecutorial discretion encompasses the power, *inter alia*, to decide whether or not to file charges, what type of charges to file, whether to seek pretrial detention, jury selection, and the allocation of prosecutorial resources to prosecute crime in that jurisdiction.

221. *Id.* at 805 ("Considered together, over a decade of research on implicit racial bias shows that racial stereotypes can be activated easily and can lead to powerful and biased decision-making. In the case of prosecutorial decision making, there is significant reason to be concerned that implicit biases could similarly lead to discriminatory results.").

222. *See generally* Smith & Levinson, *supra* note 220, at 805.

223. United States v. Armstrong, 517 U.S. 456, 458, 469 (1996) (Although all of the crack cocaine cases for the year before defendant was indicted involved black defendants, the Supreme Court held that defendant Armstrong was not entitled to conduct discovery regarding the prosecutor's decision to charge him because he failed "to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not."). In *Armstrong*, the Court also found that compliance with the discovery request would drain prosecutorial resources that could be utilized for other purposes. *Id.* at 468 ("If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy."). *Id.*

224. McCleskey v. Kemp, 481 U.S. 279 (1987)

225. *Id.* at 292.

more likely to receive a death sentence. Blacks who murdered whites, as did the defendant, had the greatest probability of receiving the death penalty.[226] These disparities likely resulted from discrimination among jurors.

A decision to pursue the death penalty in a given case, however, usually rests within the discretion of the prosecutor.[227] This discretion, as legal scholars have argued, permits racial discrimination to occur.[228] In *McCleskey*, statistical data indicated that prosecutors were much more likely to pursue the death penalty when whites were victims and that the black defendant-white victim combination led to the highest rate of death penalty cases filed by prosecutors.[229] Studies of capital punishment in other states and in the federal system have made similar findings.[230] The Court, however, ruled that because prosecutorial discretion is a fundamental part of American criminal law and enforcement, judges could not force prosecutors to disclose why they chose to pursue a particular punishment in a given case.[231] Although prosecutorial discretion cannot trump the Equal Protection Clause, the inflexible recognition of prosecutorial discretion (and the discriminatory intent rule) makes equal protection an ineffective safeguard against racially biased decisions by prosecutors.[232]

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226. *Id.* at 286–87.

227. Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 314 (2010) ("While state legislatures authorize capital punishment and draft the statutes under which it will be imposed, actual enforcement typically falls to county prosecutors.").

228. *See* Smith & Levinson, *supra* note 220, at 805–22 (analyzing how implicit bias can impact prosecutorial decisions).

229. *McCleskey*, 481 U.S. at 287

230. Hemant Sharma, John M. Scheb II, David J. Houston & Kristin Wagers, *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee after Gregg V. Georgia*, 2 TENNESSEE JOURNAL OF RACE, GENDER, & SOCIAL JUSTICE 1, 4–9 (2013) (discussing numerous studies); Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study Of Implicit Racial Bias On Jury-Eligible Citizens In Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 526–31 (2014) (discussing contemporary racial disparities in capital punishment); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 433–37 (2010) (discussing racial disparities in application of federal death penalty).

231. *McCleskey*, 481 U.S. at 311–12.

232. Lucy Adams, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 394–95 (2005) (describing how the discriminatory intent rule and prosecutorial discretion erect almost insurmountable barriers to defendants who

Prosecutorial decisions impact defendants throughout the process of criminal adjudication, and scholars have found racial disparities in practices that include the severity of the criminal charge, whether to charge or seek an alternative to prosecution, the favorability or harshness of terms in a plea agreement, and the decision to seek statutory penalty enhancements or pursue the death penalty.[233] Implicit bias research could explain why these patterns exist.

5. Legislators

To date, no published studies have applied the IAT to state or federal legislators. Many criminal statutes, however, produce disproportionately negative outcomes for persons of color, which could result from implicit racial bias.[234] The sentencing disparity between crack and powder cocaine, for instance, has received much attention from legal scholars and policy makers.[235] Although Congress recently reduced, though not eliminated, the disparity, the differential punishment schedule for crimes involving these two drugs have led to stark sentencing disparities for whites and persons of color. Convictions for trafficking and possession of crack cocaine have led to lengthy sentences for black and Latino drug offenders, who make up a greater percentage of persons arrested for crack cocaine offenses; on the other hand, convictions for powder cocaine offenses have led to relatively shorter sentences for white drug

seek to challenge a charging decision as a violation of the Equal Protection Clause).

233. *See* Smith & Levinson *supra* note 220, at 805–22.

234. Marc Mauer, *Racial Impact Statements: Changing Policies To Address Disparities*, 23 CRIM. JUST. 16, 17 (2009) (discussing racial impact of sentencing statutes and advocating reforms that would consider these effects before lawmakers vote to enact these policies); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 463 (2010) (discussing harmful racial impact of laws that impose numerous burdens, beyond sentencing, for people convicted of certain crimes); Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQUENCY 56, 56 (2011) (analyzing racial effects of mandatory sentencing and sentencing enhancements).

235. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287 (1995). Initially, the sentencing disparity meant that a ten-year mandatory minimum sentence could be imposed for possession of 50 grams of crack cocaine, instead of 5,000 grams for powder cocaine, and a five-year mandatory minimum sentence for possession of 5 grams of crack cocaine, instead of 500 grams for powder cocaine. *See id.* at 1287.

offenders, who constitute a higher percentage of individuals arrested for powder cocaine offenses.[236]

Furthermore, the targeting by cops and prosecutors of crack cocaine offenses and black and Latino offenders, has led to wide racial disparities in the general enforcement of drug laws.[237] The specific focus by law enforcement officials on crack cocaine offenses compounds the racial effects of the sentencing disparity.[238] The trial-court record in *United States v. Clary*,[239] which sustained an equal protection challenge to the crack and powder cocaine sentencing disparity, indicates that several members of Congress made explicit racially charged references during debates that led to the enactment of the disparate sentencing schedule.[240] Furthermore, the federal crack cocaine legislation was passed during a period of intense media coverage that often used racially coded language.[241] Nevertheless,

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236. *See id.* at 1289 (discussing disparity among blacks); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBLEMS 419, 436 ("In particular, our findings indicate that blacks and Latinos are overrepresented among those arrested for drug possession compared with a variety of measures of drug use. This overrepresentation primarily results from law enforcement's focus on crack users, and especially on black and Latino crack users."). The Fair Sentencing Act, passed in 2010, reduced the crack and powder cocaine sentencing disparity. *See* Pub. L. 111-220, Aug. 3, 2010.

237. *See* Becket et al., *supra* note 236, at 436.

238. Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 131–32 (1994) (discussing severe impact upon blacks and Latinos of mandatory sentences in federal drug laws).

239. United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd* 34 F.3d 709 (8th Cir. 1994).

240. *Id.* at 783–85.

241. The judge summarized the media reporting as follows:

> Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media's attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks. Media accounts of crack-user horror stories appeared daily on every major channel and in every major newspaper. Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were solely responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society. These stereotypical descriptions of drug dealers may be accurate, but not all young black men are drug dealers. The broad brush of uninformed public opinion paints them all as the same.

Id. at 783 (citations omitted).

every United States Court of Appeals that has decided equal protection claims related to the crack and powder cocaine sentencing disparity have found no constitutional violation.[242]

As several historians have found, however, drug enforcement policies in the United States have often involved race-based decision-making. The association of marijuana with Mexican Americans,[243] heroin and cocaine with blacks,[244] and opiates with Chinese Americans[245] inspired state and federal prohibitions of these drugs. Penalties for marijuana and powder cocaine, however, were reduced as the drugs became more popular among whites.[246] Today, many

242. United States v. Blewett, 746 F.3d 647, 658 (2013) (en banc) (observing that numerous federal courts of appeals have rejected equal protection challenges to crack and powder cocaine sentencing disparity and finding that no precedent weakens these rulings).

243. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970) (arguing that "racial prejudice" against Mexican Americans was "the most prominent" cause of state prohibitions of marijuana in the 1930s).

244. The Harrison Act of 1914, the first federal law to prohibit distribution of cocaine and heroin, was passed on the heels of overblown media accounts depicting heroin-addicted black prostitutes and criminals in the cities. The author of the Act, Representative Francis Harrison, moved to include coca leaves in the bill "since [the leaves] make Coca-Cola and Pepsi-Cola and all those things are sold to Negroes all over the South." The bill appeared to be facing defeat until Dr. Hamilton Wright, the American delegate to the Hague Opium Conference, 1911–1912, submitted an official report in which he warned Congress of the drug crazed blacks in the South whose drug habits "*threaten[ed] to creep into the higher social ranks of the country*. . . ." *Clary*, 846 F. Supp. at 775 (alterations in original) (citations omitted).

245. The District Court in *Clary* discussed the linkage of animus towards the Chinese and the criminalization of opium:

> Media accounts and inaccurate data influenced public opinion about opium smoking. "Ambivalence and outright hostility" toward Chinese coupled with the concern that opium smoking was spreading to the upper classes, provided the foundation for the passage of the 1909 Smoking Opium Exclusion Act. "Yellow Peril" was a term used in the years between the Great Wars to express the fear that the huge population of the Far East posed a military threat to the West. This fear induced an aversion to the opium usage believed to be prevalent in Chinese communities and foisted anti-opium legislation.

Id. (citations omitted).

246. *See id.* ("The social history is clear that so long as cocaine powder was a popular amusement among young, white professionals, law enforcement policy prohibiting cocaine was weakly enforced."); Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 695 (2013) ("Young white users also enjoy their own subset of drug decriminalization: Two of their favorite substances, marijuana and unprescribed attention-deficit medication, are unlawful de jure but condoned de facto." (citing David J. Leonard, *Preventing the Rise of Pothead U.*, CHRON. HIGHER EDUC. (Jan. 2, 2013), http://chronicle.com/blogs/conversation/2013/01/02/preventing-theriseof-pothead-u/)); Steven W. Bender, *Joint Reform?: The Interplay of State,*

states are decriminalizing marijuana, reducing existing criminal penalties, or permitting its use for medical purposes.[247] Also, Congress recently passed legislation that prohibits the use of federal funds to enforce federal anti-marijuana laws in states that have decriminalized the drug for medical or recreational purposes.[248] These legal changes did not occur as a result of mass mobilization by persons of color or antiracist social movement organizations, although advocates of marijuana decriminalization sometimes made appeals to racial justice in their arguments.[249] Generally, the War on Drugs, which began in the 1980s and continues today, has led to disparate outcomes for persons of color in terms of arrests, sentencing, and incarceration.[250]

Implicit racial bias could influence legislative choices in other criminal contexts. Several states and some municipalities, for example, have recently enacted anti-immigrant measures that disparately impact persons of color, particularly Latinos.[251] In

Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs, 6 ALB. GOV'T L. REV. 359, 368–69 (2013) (discussing liberalizing attitudes regarding marijuana when whites became prototypical users); *cf.* Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613–15 (2000) (associating historical criminalization of drugs by linking the substances explicitly or implicitly to persons of color).

247. Evan Horowitz, *In 2014, Many States Experimented With Marijuana Laws*, BOSTON GLOBE (Dec. 26, 2014), http://www.bostonglobe.com/metro/2014/12/26/experimenting-with-drug-laws/jT5HOAUveGaLrGW6FXFI0I/story.html ("Across the country, states have relaxed their drug laws and experimented with new policies that ease penalties for marijuana use or make it available to medical patients.").

248. Russell Berman, *Why Congress Gave in to Medical Marijuana*, THE ATLANTIC (Dec. 17, 2014), http://www.theatlantic.com/politics/archive/2014/12/a-congressional-surrender-in-the-medical-marijuana-fight/383856/ ("The $1 trillion spending bill that passed last week included a provision that blocks the Justice Department from spending any money to enforce a federal ban on growing or selling marijuana in the 23 states that have moved to legalize it for medical use.").

249. This does not mean, however, that racial justice advocates have not participated in debates regarding the decriminalization of marijuana. *See* Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices*, 1993-2013, 49 WAKE FOREST L. REV. 889, 908 (2014) (analyzing racial justice dimension of marijuana legalization debate).

250. *See* Tonry, *supra* note 13, at 274.

251. Sophia J. Wallace, *Papers Please: State-LevelAnti-Immigrant Legislation in the Wake of Arizona's SB 1070*, 129 POLITICAL SCIENCE QUART. 261, 264 (2014) ("The introduction of immigration legislation and initiatives at the state level is not a new phenomenon. However, the frequency and intensity of anti-immigrant legislation has increased."); Samantha Sabo, Susan Shaw, Maia Ingram, Nicolette Teufel-Shone, Scott Carvajal, Jill Guernsey de Zapien, Cecilia Rosales, Flor Redondo, Gina Garcia, & Raquel Rubio-Goldsmith, *Everyday Violence*,

addition, Arab or Arab-appearing men have been subjected to aggressive racial profiling and other misconduct—the result of counter-terrorism practices authorized by Congress.[252] In December 2014, President Obama announced that he would create new guidelines regarding racial profiling for federal law enforcement officers.[253] President Obama made this announcement after weeks of national racial division surrounding the decisions by two grand juries—one in Ferguson, Missouri and the other in Staten Island, New York—not to indict white police officers who killed unarmed black males.[254] Early media reports, however, state that the new federal regulations would permit racial profiling at airports, border crossings and immigration checkpoints.[255] Although current Court doctrine might legitimize racial profiling at the border, airports, and

Structural Racism and Mistreatment at the US-Mexico Border, 109 Social Science & Medicine 66, 67 (2014) (discussing "palpable" effect of anti-immigration laws upon Latinos from 2005-2008); Kara Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-immigrant Laws*, 31 IMMIGR. & NAT'LITY L. REV. 777, 777 (2010) (arguing that "state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship"); Jamie G. Longazel, *Rhetorical Barriers to Mobilizing for Immigrant Rights: White Innocence and Latina/o Abstraction*, 39 LAW & SOCIAL INQUIRY 580, 597 (2014) (finding that political rhetoric supporting local anti-immigrant ordinance "contributed to Latina/o subordination and the maintenance of White dominance"); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 48–66 (2011) (arguing that political debates surrounding passage of Arizona anti-immigrant law led to broader public support for policies that harmed Latinos, including racial profiling, reapeal of birthright citizenship, and measures that threaten Latino voting power).

252. *See* Michael Welch, *Ironies of Social Control and the Criminalization of Immigrants*, 39 CRIME, LAW & SOC. CHANGE 319, 323 (2003) (critiquing counterterrorism and criminalization of immigration policies after 9/11); *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1690–92 (2009) (discussing dehumanization of Guántanamo Bay detainees); Manning Marable, *Racism in a Time of Terror*, 4 SOULS: A CRITICAL J. BLACK POL., CULTURE, AND SOC'Y 1 (2010) (discussing the relationships among racism, US military aggression in the Middle East, and demonization of Arabs and Muslims).

253. Matt Apuzzo & Michael S. Schmidt, *U.S. to Continue Racial, Ethnic Profiling in Border Policy*, N.Y. Times (Dec. 5, 2014), http://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html?_r=2.

254. *Id.* ("The administration is set to release the new rules in the midst of nationwide protests over recent decisions in New York and Ferguson, Mo., not to prosecute white police officers for the deaths of unarmed black men. President Obama and Attorney General Eric H. Holder Jr. have called for calm between law enforcement and minorities.").

255. *Id.* (reporting that "federal agents will still be allowed to consider race and ethnicity when stopping people at airports, border crossings and immigration checkpoints").

immigration checkpoints, enforcement of these policies leads to greater scrutiny and, potentially, harassment of Arabs and Latinos.[256]

Legislatures continue to enact criminal laws that negatively impact persons of color, such as habitual offender statutes and mandatory minimum sentences.[257] Furthermore, the failure of legislatures to pass laws that empower individuals to bring legal actions that challenge racially neutral but racially discriminatory criminal law and enforcement policies ensures that these disparities will persist.[258]

Criminal statutes that disparately impact persons of color could stem from implicit racial attitudes and stereotypes. Implicit racial biases could also limit the capacity of lawmakers to empathize with persons of color.[259] Stereotypes of persons of color as violent and lawbreakers could also influence legislative decision-making.[260]

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256. Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 78 (2004) (contending that following the 9/11 attacks on the World Trade Center "[n]oncitizen Arabs and Muslims were subjected to special scrutiny at airports across the country and a new phrase—"Flying While Arab"—entered the national vocabulary"); *id.* at 74–77 (discussing racial profiling of Latinos by immigration law enforcement and Supreme Court precedent that, to an extent, validates these practices). *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) ("We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente [border] checkpoint on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.").

257. *See, e.g.*, Charles Crawford, *Gender, Race, and Habitual Offender Sentencing in Florida*, 38 CRIMINOLOGY 263 (2000) (finding that race was a statistically significant factor in the imposition of enhanced penalties against black women offenders in Florida); Cyndy Caravelis, Cyndy Caravelis, Ted Chiricos & William Bales, *Static and Dynamic Indicators of Minority Threat in Sentencing Outcomes: A Multi-Level Analysis*, 3 QUANT. CRIMINOLOGY 405 (2011) (finding that blacks and Latinos are significantly more likely to face enhanced sentencing under Florida habitual offender statutes); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. IN CRIME & DELINQ. 427 (2007) (finding Pennsylvania prosecutors more likely to pursue mandatory minimum sentences with Latino defendants).

258. Olatunde C.A. Johnson, *Legislating Racial fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 239–40 (2007) (discussing the failure of Congress to pass the "Racial Justice Act," which would allow defendants in capital cases to challenge the imposition of the death penalty using statistical data confirming racially disparate effects).

259. Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland*, 33 LAW & POL'Y 179, 184 (2011) ("In short, as a result of organizational structures, policies, practices, and routines, empathy is rendered an inappropriate response to "typical," or stereotype-consistent, criminal suspects and defendants.").

260. *See supra* text accompanying notes 173–75 (discussing people of color as dangerous

Future implicit bias research could help demonstrate and provide potential solutions for the negative racial outcomes of criminal statutes. Promising developments, however, have occurred in a few jurisdictions that have implemented reforms. Kentucky and North Carolina, for example, have passed "racial justice acts" that allow capital defendants to challenge their death sentences if they have evidence that the sentence resulted from racial discrimination.[261] Also, Minnesota has passed a law that requires legislators to issue a "racial impact statement" prior to the passage of any new criminal law, including sentencing statutes.[262] This law would force lawmakers to consider and to make public any foreseeable racial disparities that would result from pending legislation.[263]

Although these innovations show promise, the impact of these developments on racial justice remains very small. Indeed, these limited reforms are vulnerable to public and legislative hostility. North Carolina, for example, subsequently repealed its racial justice act after an influx of conservative lawmakers was elected to the state legislature.[264] Also, despite several attempts, Congress has declined to pass a bill that would create a federal cause of action for defendants to challenge racially disparate state or federal death sentences.[265] Clearly, tremendous political and cultural changes must take place before the United States can introduce the necessary reforms to redress racial disparities in criminal law and enforcement.

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stereotype).

261. Seth Kotch, Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010); Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. KY. L. REV. 273 (2010).

262. Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 227–28 (2011) (discussing Minnesota racial impact law).

263. *Id.* at 227–28.

264. Matt Smith, *"Racial Justice Act" Repealed in North Carolina*, CNN (June 21, 2013), http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/ ("The, legislation, known as the Racial Justice Act, allowed condemned convicts to use statistical analysis to argue that race played a role in their sentencing. Republicans who took control of the Legislature in 2010 weakened the law last year, overriding a veto by then-Gov. Bev Perdue, a Democrat. Gov. Pat McCrory, a Republican elected in 2012, followed legislative action and signed its complete repeal Wednesday.").

265. Olatunde, *supra* note 258, at 238–40.

Implicit bias theory could potentially increase support for the enactment of such reforms.

B. Social Dominance and Criminal Law and Enforcement

Although social dominance theory has not greatly impacted legal scholarship, it overlaps, to some extent, with preexisting works of critical theorists. Critical race theorists and feminist theorists, for example, have analyzed racial and gender inequality in structural terms, rather than treating unequal outcomes solely as the product of atomized and individual behavior.[266] Also, several social psychologists have specifically examined the relationship between social dominance, race, and criminal law and enforcement. Their research could bring new insights into legal scholarship and policy.

1. Race and Crime: A History of Domination

Race was constructed to facilitate group domination.[267] In addition, the law played a central role in the subjugation of persons of color.[268] For example, the original Constitution represents a compromise over the issue of African enslavement.[269] The Constitution did not prohibit slavery, and it barred Congress from banning the international slave trade until 1808.[270] Furthermore, the Constitution gave slave states disproportionate representation in Congress because they could count three-fifths of the slave population as residents for purposes of allocating membership in the

266. *See* MACKINNON, *supra* note 135, at 40; Powell, *supra* note 49, at 796; Calmore, *supra* note 49, at 1079.

267. *See* Smedley *supra* note 42, at 694.

268. *See* Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1772 (2001) (observing that social theories of race have "illuminated the role of law and state power in fixing racial hierarchy and institutionalizing racial subordination").

269. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1339 (1987) ("Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths 'that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'").

270. *Id.*

House of Representatives.[271] The disproportionate political power among the slaveholding states helped sustain the legality of slavery.[272]

The Supreme Court's ruling in *Dred Scott v. Sandford*[273] documents the historical usage of state and federal law to subjugate blacks. In this case, Dred Scott, a slave, contended that when he lived with his owner in Illinois, designated by federal law as a free territory, he was emancipated.[274] The Supreme Court, however, held that enslaved blacks were not entitled to assert claims of any kind in federal courts.[275] The Court, nonetheless, reached the merits of the case and held that Congress lacked the authority to prohibit slavery in the United States; doing so constituted a deprivation of private property rights.[276]

The Court discussed numerous statutes in slave-holding and abolitionist states (in addition to attitudes towards blacks in England and other European nations) that discriminated against blacks.[277] The Court held that these laws demonstrated that blacks were not citizens of the United States.[278] The existence of these racist laws also refuted Scott's contention that blacks could pursue judicial remedies in federal or state courts.[279] The Court held that these laws evince the complete domination of all of blacks by whites in the United States, which justifies denying blacks access to redress in federal courts:

> The legislation of the States therefore shows in a manner not to be mistaken the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards, throughout the thirteen States by which that instrument was framed, and it is hardly consistent with the respect due to these States to suppose that they regarded at that time as fellow

271. *Id.* at 1338.
272. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 376 (2001) (repeal of the Three-Fifths Clause by the Fourteenth Amendment was intended to eliminate the South's slave power).
273. 60 U.S. 393 (1856).
274. *Id.* at 452–53.
275. *Id.* at 426–27.
276. *Id.* at 452.
277. *Id.* at 405–17.
278. *Id.* at 426–27.
279. *Id.*

> citizens and members of the sovereignty, a class of beings whom they had thus stigmatized, whom, as we are bound out of respect to the State sovereignties to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation, or, that, when they met in convention to form the Constitution, they looked upon them as a portion of their constituents or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens.[280]

The *Dred Scott* decision justifies the social, political, and economic domination of blacks.

State courts reached similar conclusions. In *Luke v. Florida*,[281] the Florida Supreme Court considered whether Luke, a slave, could face charges of criminal mischief for killing the wandering mules of a neighboring plantation owner at the request of his master.[282] The animals roamed freely and grazed in a garden and other land owned by Luke's master.[283] The court held that because Luke was merely the property of his owner, he could not face criminal liability. In the absence of legislation to the contrary, slaves lacked free will to commit crimes.[284] The court also found that maintaining legal distinctions between blacks (enslaved or not) was necessary to preserve whites' racial domination:

> The perpetuation of [slavery], indeed the common safety of the citizens during its continuance, would seem to require that the superiority of the white or Caucassian [sic] race over the African negro, should be ever demonstrated and preserved so far as the dictates of humanity will allow—*the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of the free white citizens.* And thus there is an obvious propriety

280. *Id.* at 416.
281. 5 Fla. 185 (1853).
282. *Id.* at 190.
283. *Id.*
284. *Id.* at 195–96.

> in visiting their offences with more degrading punishment than is inflicted on the white citizens, while the humanity of the law is demonstrated by securing to them the same forms of law in making defence—a trial by jury—compulsory process for their witnesses—the aid of counsel—and indeed, as full, fair, and impartial a trial, as can or may be claimed by a white person.[285]

This opinion demonstrates that, historically, states utilized criminal law and enforcement to establish white supremacy. And contrary to the reasoning of the Florida Supreme Court, the "dictates of humanity" did not legally bind whites, as the Supreme Court made emphatically clear in *Dred Scott*.[286]

Following the emancipation of slaves, southern states enacted anti-black criminal laws designed to preserve white supremacy. The Black Codes imposed discriminatory criminal punishments upon blacks and typically required them to serve periods of hard labor for criminal activity, including petty crimes, failure to pay debts or perform contracts, and simply for lacking employment.[287] The Black Codes permitted states to extract unpaid labor from black children who were orphaned, born out-of-wedlock, and who lived in a female-headed household. The laws also permitted the use of coerced and unpaid labor from children whose parents were incarcerated or unemployed.[288] The Black Codes labor provisions typically gave preference to the individual's former slave owner.[289] Thus, many freed blacks and their children were compelled to work without pay

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285. *Id.* at 195 (emphasis added).

286. *Dred Scott*, 60 U.S. at 407 (holding that blacks had "no rights which the white man was bound to respect").

287. *See* Adamson, *supra* note 9, at 559 ("Blacks without visible means of support were obliged by law to hire themselves out during the first 10 days of January. Those without labor contracts or who broke their contracts were prosecuted as vagrants and sentenced to hard labor on local plantations."); Adamson, *supra* note 9, at 560 (discussing hard labor for petty offenses).

288. *See, e.g.*, Karin Zipf, *Reconstructing "Free Woman": African-American Women, Apprenticeship, and Custody Rights during Reconstruction*, 12 JWH 8 (2000) (discussing apprenticeship laws in North Carolina).

289. *Id.* at 9 (observing that North Carolina Black Code "instructed courts not only to apprentice former slave children, but also to give priority to their former masters in contracting the apprenticeship").

for their previous owners.[290] Many other blacks became trapped in sharecropping agreements that required them to perform unpaid labor if they breached the terms of the contract, including by failing to pay the landowner.[291]

The Black Codes gave white plantation owners access to cheap labor following the formal emancipation of slaves.[292] These laws were also implemented to ensure that blacks remained completely subordinate to whites.[293]

To the extent that the Union victory in the Civil War suggested that blacks had attained the same rights and status as whites, the Black Codes clearly disabused this notion. As soon as the nation adopted formal emancipation, states enacted criminal statutes designed to undo the legal recognition of blacks' humanity. The legacy of the Black Codes demonstrates that formal rights contained in legal provisions do not determine whether equal justice exists in a society. The actual experiences of individuals and groups in a society offer more meaningful evidence of equality. Today, despite the formal recognition of equal protection, the law, including criminal law and enforcement, continues to operate in a manner that preserves whites' social dominance.[294]

Although most legal scholarship on race relations during the nineteenth century examines the unequal treatment of blacks, other racial groups experienced subjugation as well. Between the Revolutionary War and the mid-1830s, Native Americans were

290. *Id.* at 11–25 (discussing legal struggle by former slaves to free their children from apprenticeships with their former owners).

291. *See* Adamson, *supra* note 9, at 559 (observing that southern sharecropping became a system of "debt peonage").

292. Adamson, *supra* note 9, at 560 ("Ultimately, the economic mechanisms used to extract a surplus from the landless blacks were buttressed by the criminal justice system. Before resorting to vigilante action, ex-planters and local officials used the penal system to control unruly blacks who withheld their labor.").

293. Adamson, *supra* note 9, at 556 ("Hiring out convicts to planters, mining companies, and railroad contractors on a long-term basis was not designed solely to rid the state of a prison problem. In a real sense, the convict lease system was a functional replacement for slavery; it provided an economic source of cheap labor and a political means to re-establish white supremacy in the South.").

294. *See infra* text accompanying notes 317–58.

violently ejected from their lands in eastern and southern states.[295] In what is now considered one of the most tragic cases of injustice and violence against Native Americans, Georgia passed a statute in 1828 that purported to annex all Cherokee land in the state.[296] The law also forbade the Cherokee from testifying against whites in legal proceedings and purported to nullify all Cherokee laws.[297] This law effectively immunized whites who committed crimes against the Cherokee from prosecution in state courts. Even if Georgia officials wanted to prosecute whites who committed crimes against the Cherokee, the inability of members of the tribe to testify against whites would have made it virtually impossible to convict any white defendant. Consequently, white violence and property crimes against the Cherokee were effectively decriminalized.

After the passage of the statute, some Cherokee decided to leave Georgia voluntarily, but others claimed entitlement to their land pursuant to treaties entered by the United States and the Cherokee Nation that established the Cherokees' rights as a sovereign.[298] In 1832, the Supreme Court held that the Cherokee Nation constituted a sovereign nation. The Court also held that Georgia could not annex Cherokee land because this action violated rights of the Cherokee created by federal statutes and treaties. The Court further held that Georgia acted inappropriately because the state purported to regulate relations with Native American tribes—which is a power the Constitution delegates to Congress exclusively.[299]

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295. Russell Thornton, *Cherokee Population Losses during the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289, 289–90 (1984) ("During this period, the Cherokees were increasingly subjected to invasions of armed men from Georgia, 'forcibly seizing horses and cattle, taking possession of houses from which they had ejected occupants, and assaulting the owners who dared make resistance'; they were all but helpless to retaliate." (quoting JAMES MOONEY, HISTORICAL SKETCH OF THE CHEROKEE 112 (1975)).

296. Thornton, *supra* note 295, at 290.

297. *Id.*

298. Although several suits on this issue were filed, the most famous was *Worcester v. Georgia*, 31 U.S. 515 (1832) (finding that Georgia law that claimed Cherokee homeland violated a treaty between the United States and the Cherokee nation).

299. *See Worcester*, 31 U.S. at 561–62 ("They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guaranty to them all the land within their boundary; solemnly pledge the faith of the United

The recognition of the Cherokees' rights in a judicial opinion, however, meant very little in the absence of a commitment by legal authorities to enforce the ruling. President Andrew Jackson did not enforce the Court's order, and some historians contend that he even mocked the opinion by callously stating that "John Marshall has made his decision, now let him enforce it."[300] The federal government also bargained with several men who were not the "principal" leaders of the Cherokee Nation.[301] In 1835, the United States entered into a new agreement with these members of the Cherokee Nation—the Treaty of New Echota—purportedly on behalf of all Cherokee.[302] This treaty required the Cherokee to give all of their land east of the Mississippi River to the United States in exchange for fifteen million dollars.[303] Cherokee leadership protested the treaty, but, facing deliberate indifference by the United States, white supremacy in Georgia and the federal government, and the splintering of and weariness among members of the tribe, the Cherokee leaders ultimately acquiesced.[304] Most of the Cherokee remained in their territory for three years following the consummation of the treaty.[305] In 1838, however, the United States military launched a campaign of violent ejectment that led to the Trail of Tears.[306] It was now illegal for the Cherokee to remain in their homeland.[307]

The Trail of Tears demonstrates that racism does not consist merely of discrete acts of discrimination against particular individuals. Instead, racism represents the social domination of persons of color by whites. One United States soldier who took part in the removal of the Cherokee Nation memorialized some of the events he witnessed. His observations illuminate the operation of racism as a system of group domination:

States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.").

300. *See* Thornton, *supra* note 295, at 290 (citing MOONEY, *supra* note 295, at 114).
301. Thornton, *supra* note 295, at 290.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*

> Men working in the fields were arrested and driven to the stockades. Women were dragged from their homes by soldiers whose language they could not understand. Children were often separated from their parents and driven into the stockades with the sky for a blanket and the earth for a pillow. And often the old and infirm were prodded with bayonets to hasten them to the stockades.
>
> In one home death had come during the night, a little sad faced child had died and was lying on a bear skin couch and some women were preparing the little body for burial. All were arrested and driven out leaving the child in the cabin. I don't know who buried the body.
>
> In another home was a frail Mother, apparently a widow and three small children, one just a baby. When told that she must go the Mother gathered the children at her feet, prayed an humble prayer in her native tongue, patted the old family dog on the head, told the faithful creature good-bye, with a baby strapped on her back and leading a child with each hand started on her exile. But the task was too great for that frail Mother. A stroke of heart failure relieved her sufferings. She sunk and died with her baby on her back, and her other two children clinging to her hands.[308]

The soldier's narrative vividly demonstrates why legal scholars should resist efforts to analyze racism exclusively as acts of individual prejudice. The federal government, Georgia legislature and courts, and residents of Georgia subordinated all Cherokees. The parties involved in the subordination of the Cherokee were powerful institutions. Collectively, their disregard of the rights and liberties of the Cherokee reduced the tribe to second-class citizens and reinforced the supremacy of whites.

In response to pleas from Cherokee leaders, the United States delayed the initial removal process until the summer.[309] Due to the

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308. *Id.* at 290–91 (quoting John G. Burnett, *The Cherokee Removal Through the Eyes of a Private Soldier*, 3 J. OF CHEROKEE STUD. 180, 183 (1978)).

309. *Id.* at 291.

extreme heat, the Cherokee suffered greatly.[310] Later that year, the Cherokee finally departed from their lands and commenced the long and treacherous journey to land west of the Mississippi River (what is now Oklahoma).[311] The journey proved very costly. Nearly one-fourth of the sixteen thousand individuals who left Georgia died along the way.[312] As the United States expanded westward, Native Americans and Mexicans would experience additional atrocities legitimized by the law.[313]

The illegal—but legally sanctioned—displacement of Native Americans from their lands illustrates that the failure to enforce criminal laws and other protective measures can facilitate racial subjugation. Neither federal nor local authorities protected Native Americans from systematic racial violence and property crimes. The treatment of Native Americans and blacks in southern states demonstrates that legal actors can accomplish subordination through affirmative conduct as well as omission.[314] Unpunished acts of racial violence reminded persons of color that whites had dominion over

310. *Id.*

311. *Id.*; *see also* Leslie Hewes, *The Oklahoma Ozarks as the Land of the Cherokees*, 32 GEOGRAPHICAL REV. 269, 270 (1942) (discussing the removal of Cherokee from southeastern United States to Oklahoma).

312. Thornton, *supra* note 295, at 292–93.

313. *See* CARRIGAN & WEBB, *supra* note 44, at 84–88, 99–102, 131–34; Charles Geisler, *Disowned by the Ownership Society: How Native Americans Lost Their Land*, 79 RURAL SOC. 56, 61 (2014) ("Manifest Destiny, as a lived experience, annihilated Indian people and culture. Somewhere between 2 and 20 million aboriginals in North America in the sixteenth century were reduced to 530,000 individuals by 1900 giving heft to the Euro-American claim that Native homelands were vacant and awaiting homesteader 'improvement.'" (citing Douglas H. Ubelaker, *North American Indian Population Size, A.D. 1500 to 1985*, 77 AM. J. OF PHYSICAL ANTHROPOLOGY 289–94 (1988))).

314. Susan Olzak & Suzanne Shanahan, *Racial Policy and Racial Conflict in the Urban United States*, 1869-1924, 82 SOCIAL FORCES 482, 506 (2003) (contending that if legal policies do not threaten white social dominance then these laws can operate as "legitimation processes that encourage violence against groups stigmatized by reinforcement of the dominant white boundary"); Allen D. Grimshaw, *Interpreting Collective Violence: An Argument for the Importance of Social Structure*, 391 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 9, 10 (1970 (contending that government can take an active role in committing violence against subordinates or a passive role that legitimizes this violence or that reflects a neutral position).

their very lives.[315] Accordingly, the law served as an important instrument of white supremacy.[316]

Criminal law and enforcement facilitated racial subordination historically in several other ways. Many scholars, for example, contend that the racial application of capital punishment replaced lynching in southern states after lynch mobs became intolerable to the rest of the nation.[317] These historical practices demonstrate the relationship between criminal law and enforcement and white supremacy.

2. Racial Subjugation and Criminality Today

Historically, criminal law and enforcement structured racial hierarchy. Negative racial stereotypes of persons of color justified the perpetuation of group domination. Implicit bias theorists contend that these racial stereotypes continue to influence practices within criminal law and enforcement. Social dominance theorists argue that the desire for group domination—which gave rise to these negative racial constructs—remains a substantial factor in American society.

The relationship between social dominance orientation ("SDO") and support for harsh criminal sanctions could demonstrate that

315. *See* James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRITISH J. OF POL. SCI. 269, 277 (1998) ("Lynching became a public spectacle, symbolizing the enforcement component of white supremacy and the Southern wing of the Democratic party. Since lynching enhanced the objectives of social control, and was not a punishable crime in the South, it flourished virtually unchecked by the law or community pressure" (citation omitted)).

316. William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 31 J. OF SOC. HIST. 411, 416 (2003) (analyzing the lynching of Mexicans and Mexican-Americans in the Southwest and finding that "the legal system not only failed to protect Mexicans but served as an instrument of their oppression"); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 24 (2002) (describing death penalty as successor to lynching in the South); Patrick Fisher & Travis Pratt, *Political Culture and the Death Penalty*, 17 CRIM. JUST. POL'Y REV., 48, 52 (2006) (Lynchings began to decline after the turn of the [twentieth] century as court-ordered execution supplanted lynching in the South. The increase of executions in the South can thus be considered to be the result of a movement away from ad hoc mob lynchings to so-called legal lynchings.").

317. *See* Clarke, *supra* note 315, at 285 ("Lynchings peaked in the 1890s with over 1,100 victims in that decade. Then, although numbers continued to be remarkably high, lynchings declined steadily in each subsequent decade. At the same time, capital punishment began a steep ascent as state executioners replaced lynch mobs.");

contemporary criminal law and enforcement operate to sustain racial hierarchy. Social dominance theorists find that persons with high SDO tend to support tough criminal law and enforcement policies.[318] A desire for social dominance among whites could explain why criminal law and enforcement imposes systemic harms upon people of color.

For several other compelling reasons, criminal law and enforcement offer opportunities for social dominance analysis. Persons of color, particularly blacks and Latinos, suffer disproportionately high rates of incarceration.[319] They are more frequently the targets of drug law enforcement than whites.[320] In many jurisdictions they receive longer sentences[321] and discriminatory treatment from prosecutors who offer less favorable terms during plea-bargaining and disproportionately seek sentencing enhancements.[322] Black and Latino offenders are also less likely to receive alternatives to incarceration, such as probation or diversion programs.[323] Moreover, some studies show that jurors are more likely to presume the guilt of persons of color than whites.[324]

Other research finds that white probation and police officers are more likely to conclude that juvenile offenders of color have a higher probability for recidivism than similarly situated whites, and they rate the crimes of juveniles of color more harshly than similar behavior of

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318. Jim Sidanius, Michael Mitchell, Hillary Haley & Carlos David Navarrete, *Support for Harsh Criminal Sanctions and Criminal Justice Beliefs: A Social Dominance Perspective*, 19 SOC. JUST. RES. 433, 445 (2006) ("In other words, the empirical data are consistent with the notion that support for severe criminal sanctions is, at least in part, motivated by the desire to establish and maintain group-based social hierarchy, and is additionally rationalized or justified in terms of moral norms (e.g., retribution). . . and/or causal beliefs (i.e., belief in deterrence).").

319. Tonry, *supra* note 13, at 274.

320. *Id.*

321. *Id.* at 283–85.

322. *See* Smith & Levinson, *supra* note 220, at 805–22 (discussing disparate racial impact of prosecutorial decisions).

323. *See, e.g.*, William D. Bales & Alex R. Piquero, *Racial/Ethnic Differentials in Sentencing to Incarceration*, 29 JUST. Q. 742 (2012) (finding that blacks and Latinos have a greater risk of sentencing to incarceration than whites and that blacks have the greatest risk); Lisa Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 RACE & JUST. 210 (2013) (analyzing state court data and finding that black and Latino male defendants are less likely to receive pretrial diversion compared to similarly situated white defendants).

324. *See generally* sources cited *supra* note 29.

whites.[325] These factors can determine whether or not an individual receives incarceration or a term of probation.

Also, many criminal statutes disproportionately impact persons of color, including mandatory-minimum[326] and habitual sentencing laws,[327] drug laws,[328] and laws that impose collateral consequences upon ex-offenders.[329]

Criminality locks poor persons in economic and social isolation because a criminal record—even without a conviction—can greatly diminish individual opportunity for economic and educational advancement.[330]

The negative consequences of a criminal history compound the exposure of poor persons of color to racial and class vulnerability.[331] The negative experiences of persons of color within criminal law and enforcement worsen their inferior social status.[332] Thus, racial discrimination within criminal law and enforcement is fundamentally

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325. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

326. Ulmer et al., *supra* note 257 (finding prosecutors more likely to pursue mandatory minimum sentences with Latino defendants).

327. *See, e.g.*, Crawford, *supra* note 257; (finding that race was a statistically significant factor in the imposition of enhanced penalties against black women offenders in Florida); Caravelis, Chiricos & Bales, *supra* note 257 and the text accompanying note 257 (finding that blacks and Latinos are significantly more likely to face enhanced sentencing under habitual offender statutes).

328. *See generally* Tonry, *supra* note 13, at 274 (attributing mass incarceration of blacks and Latinos to War on Drugs).

329. *See generally* Pinard, *supra* note 234.

330. *See* Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANNU. REV. SOC. 387 (2010) (discussing the role of incarceration in the enhancement of social and economic inequality); David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOCIOLOGY OF EDUC. 36 (2013) (finding that juvenile arrests impairs educational attainment of the defendants); Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8 (2010) ("Mass incarceration thus deepens disadvantage and forecloses mobility for the most marginal in society. Finally, carceral inequalities are intergenerational, affecting not just those who go to prison and jail but their families and children, too."). Many of these negative effects burden people of color more significantly due to the disproportionate number of persons of color who are incarcerated and the difficulty they experience overcoming these burdens.

331. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 196 (2012) ("Mass incarceration thus perpetuates and deepens pre-existing patterns of racial segregation and isolation, not just by removing people of color from society and putting them in prisons, but by dumping them back into ghettos upon their release.").

332. *Id.* at 190–200 (discussing parallels between contemporary criminal law and enforcement and Jim Crow).

a process of group domination. It solidifies group-based inequality and preserves whites' superior access to important social resources, such as jobs and education. While legal scholars have analyzed the impact of implicit biases upon persons of color within criminal law and enforcement, their research does not provide a comprehensive examination of the social dynamics of racism.[333] The individuated focus of implicit bias theory limits its usefulness for analyzing contemporary racism in the United States.

3. Social Dominance Theory and Crime

Social dominance theorists argue that the connections between racial subordination and criminal law and enforcement do not occur coincidentally. In *Social Dominance*, for example, Sidanius and Pratto contend that criminal law and enforcement inherently "function[] to protect and maintain the status, privilege, and power of dominants."[334] Due to economic deprivation, however, persons of color commit a disproportionate number of crimes. Thus, criminality among racial subordinates is "dynamically interconnected" with group domination.[335] Because criminal law and enforcement represent the most coercive relationship between a government and its citizens, dominant groups can use these legal measures to ensure that subordinates remain in an inferior social position.[336]

Social dominance researchers have also found that people with high SDO tend to support very harsh criminal sanctions, such as habitual offender enhancements, the death penalty, and torture.[337] Numerous studies document the racial disparities associated with

333. Michelle Alexander stands out as a strong exception to the tendency of legal scholars to discuss contemporary racism in terms of individual bias. Her work focuses on the structural dimensions of criminal law and enforcement and views contemporary practices as a continuation and reinforcement of white supremacy. *See generally* ALEXANDER, *supra* note 331. Alexander, however, does ground her work in a particularly sociological theory, which distinguishes her work from this Article.

334. SIDANIUS & PRATTO, *supra* note 50, at 205.

335. *Id.*

336. *Id.* at 205–06.

337. Jim Sidanius, Michael Mitchell, Hillary Haley & Carlos David Navarrete, *Support for Harsh Criminal Sanctions and Criminal Justice Beliefs: A Social Dominance Perspective*, 19 SOC. JUST. RES. 433, 445–46 (2006).

these punishments.[338] Social dominance theory could explain why criminal law and enforcement operate to the detriment of persons of color. One particular study, for example, measured the attitudes of Swiss nationals regarding Arab immigrants.[339] The researchers found that high-SDO Swiss individuals, relative to egalitarians, judged Arab immigrant criminals more harshly than Swiss criminals.[340] High-SDO Swiss were also more likely than egalitarians to respond negatively to all Arab immigrants after reading a news report regarding the criminal conduct of a single Arab individual.[341] When high SDO Swiss read reports regarding Swiss offenders, however, they did not form negative opinions regarding all Swiss persons.[342] This research suggests that SDO among whites could contribute to the harsher treatment, relative to whites, of offenders and suspects of color by law enforcement, prosecutors, juries, and judges. The results of these studies suggest that racial discrimination within criminal law and enforcement does not occur simply because prejudiced individuals lack awareness of their biased motivation. Instead, a desire for group domination could also explain why gross racial inequality persists within criminal law and enforcement.

4. Social Dominance Theory, Dehumanization, and Criminal Law and Enforcement

Social dominance theory is closely tied to social psychology literature regarding dehumanization. Social psychologists describe dehumanization as the "denial of full humanness to others."[343] According to some researchers, dehumanization has deeper implications for outgroup mistreatment than prejudice alone.

338. *See*, Smith & Levinson, *supra* note 220. *See also* McCleskey v. Kemp, 481 U.S. 279 (1987) (declining to invalidate the death sentence for a black male inmate despite study documenting racism in the administration of George death penalty statute).

339. Eva G.T. Green, Lotte Thomsen, Jim Sidanius, Christian Staerkle & Polina Potanina, *Reactions to Crime as a Hierarchy Regulating Strategy: The Moderating Role of Social Dominance Orientation*, 22 SOC. JUST. RES. 416 (2009).

340. *Id.* at 430.

341. *Id.*

342. *Id.*

343. Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison, Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 527 (2014).

Dehumanization could more strongly correlate with social dominance than prejudice because dehumanization "is a necessary precondition for culturally and/or state-sanctioned violence"[344] and because "dehumanizing groups morally excludes them, making it permissible to treat people in a way that would be morally objectionable."[345] According to this research, dehumanization is a central component of social domination.[346]

Dehumanization fosters racial subordination by legitimizing harsh punitive measures for racial subordinates who engage in criminality.[347] Dehumanization also blunts the empathy whites might have for racial minorities, which could explain why violent crimes against white victims typically trigger harsher punishments than crimes against persons of color, particularly when the offender is a person of color and the victim is white.[348] Dehumanization of blacks could also explain why many states continue to apply the death penalty, which almost always operates in a racially discriminatory manner.[349]

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344. *Id.* at 527.

345. *Id.*

346. *Id.*; *see also* Gordon Hodson & Kimberly Costello, *Interpersonal Disgust, Ideological Orientations, and Dehumanization as Predictors of Intergoup Control*, 18 PSYCH. SCI. 691, 696 (2009) (linking dehumanization and SDO).

347. Marc Maurer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC. 9, 17–17 (2001) (discussing dehumanization and harsh sentencing and suggesting connection to racism); Andrew Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, AM. J. CRIM. L. 1, 6 (2013) ("But stereotypes of black defendants cast them as violent, unfeeling characters, redolent of the sub-human. Blackness alone does not necessarily trigger a sense of black dangerousness; rather, empathy for white victims, but not for black offenders, triggers heuristics portraying blacks as unworthy and threatening.").

348. Taslitz, *supra* note 347, at 6 (discussing disparate empathy for white victims and black offenders).

349. Craig Haney, *Condemning The Other In Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1576–82 (2004) (advocating that lawyers humanize black capital defendants to overcome negative racial stereotypes). For literature regarding the racial implications of the death penalty, *see* Hemant Sharma, John M. Scheb II, David J. Houston & Kristin Wagers, *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee after Gregg V. Georgia*, 2 TENN. J. OF RACE, GENDER, & SOC. JUST. 1, 4–9 (2013) (discussing numerous studies); Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study Of Implicit Racial Bias On Jury-Eligible Citizens In Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 526–31 (2014) (discussing contemporary racial disparities in capital punishment); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death*

Dehumanization might also fuel widespread acceptance of a pejorative social construct that portrays Latino immigrants or Latinos believed to be immigrants—as "illegal,"[350] a socio-criminal status that reflects disgust and contempt. The dehumanization of undocumented persons includes children; they are "anchors" for citizenship, rather than babies.[351] According to prevailing cultural narratives, Mexican women traffic fetal contraband to the United States because a live birth in the United States presumably will de-illegalize their families.[352] Gangs of unanchored Mexican juveniles enter the country in order to commit crimes, spread disease, and burden localities rather than to seek food, shelter, and subsistence.[353]

Penalty, 85 WASH. L. REV. 425, 433–37 (2010) (discussing racial disparities in application of federal death penalty).

350. *See* Otto Santa Ana, *"Like an Animal I Was treated": Anti-Immigrant Metaphor in US Public Discourse*, 10 DISCOURSE & SOC'Y 191 (1999) (discussing pejorative language to describe Latino immigrants in print media, including use of the term "illegal alien"); Robert Short & Lisa Magaña, *Political Rhetoric, Immigration Attitudes, and Contemporary Prejudice: A Mexican American Dilemma*, 142 J. SOC. PSYCHOL., 701, 702–03 (2002) ("For example, if a Mexican immigrant has come to this country illegally, that person has, by definition, engaged in criminal behavior. Such a label makes it psychologically easier to discriminate against members of that ethnic group because one can do so under the guiding principle of being 'anticrime,' as opposed to 'anti-Mexican' or 'anti-Latino.' In short, this is the Mexican American dilemma: Sharing a phenotype (Latino) with a stigmatized other (illegal Mexican immigrants) renders one susceptible to prejudice and discrimination."); Nicholas De Genova, *The Legal Production Of Mexican/Migrant "Illegality"*, 2 LATINO STUD. 160, 161 (2004) ("In this important sense, migrant 'illegality' is a spatialized social condition that is inseparable from the particular ways that Mexican migrants are likewise racialized as 'illegal aliens' – invasive violators of the law, incorrigible 'foreigners,' subverting the integrity of 'the nation' and its sovereignty from within the space of the US nation-state."); *id.* (arguing that the law has played an "instrumental role in the production of a legally vulnerable undocumented workforce of 'illegal aliens.'").

351. *See* Mary D. Fan, *Post-Racial Proxies: Resurgent State And Local Anti-"Alien" Laws And Unity-Rebuilding Frames For Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 907 (2011) (describing "anchor babies" as a "biologistic metaphor of anxiety over pregnant foreigners illegally entering the United States to implant babies who become birthright citizens able to petition for more foreign relatives to come" (citing Julia Preston, *Citizenship as Birthright Is Challenged on the Right*, N.Y. TIMES, Aug. 7, 2010, at A8)).

352. *Id.*

353. *See, e.g.*, Letter from Phil Gingrey, M.D., Georgia Republican Representative, to Thomas R. Frieden, M.D., M.P.H., Director of Centers of Disease Control and Prevention (July 7, 2014), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/07/Gingrey-Letter-to-CDC-on-Public-Health-Crisis.pdf. Republican Representative Phil Gingrey of Georgia wrote the Center for Disease Control demanding that the agency address the health crisis of undocumented minors from Mexico and Central America who flocked to the United States seeking work during the summer of 2014. *Id.* Gingrey stated that he had heard "reports" of the adolescents carrying "swine flu, dengue fever, possibly Ebola virus and tuberculosis." *Id.*

Mexican men have similar unlawful motives, and their "cantaloupe-sized"[354] calves prove this fact. Illegals come to the United States to do illegal things. This is a narrative of dehumanization—not fact.

Dehumanization also affects Arabs and Muslims through the modern invention of the Arab-Muslim-Terrorist.[355] This construct justifies many racially disparate practices, such as the heavy policing of Arabs, Muslims or people mistaken for Arabs or Muslims; United States militarism in the Middle East; denial of due process to criminal suspects; indefinite detention; drone attacks; and other questionable—if not unconstitutional—practices.[356]

The problems associated with dehumanization existed historically, when explicit racism was culturally acceptable and legally enforced. Many of these same practices and resulting harms persist today—despite the enactment of legal rules that mandate race-neutrality. Implicit bias theory can explain many of the severe racial disparities

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354. *See* Juliet Lapidos, *The Drug Mule-Cantaloupe Crisis*, N.Y. TIMES (July 25, 2013, 5:45 PM), http://takingnote.blogs.nytimes.com/2013/07/25/the-drug-mule-cantaloupe-Crisis/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_r=2. During a 2013 interview and while immigration reform was a burning national issue, Representative Steve King, a Republican from Iowa, said, in reference to undocumented persons: "For every one who's a valedictorian, there's another 100 out there who weigh 130 pounds and they've got calves the size of cantaloupes because they're hauling 75 pounds of marijuana across the desert." *Id.*

355. Muniba Saleem & Craig A. Anderson, *Arabs as Terrorists: Effects of Stereotypes Within Violent Contexts on Attitudes, Perceptions, and Affect*, 3 PSYCHOL. OF VIOLENCE 84, 85 (2013) ("Across [media] outlets, Arabs and Muslims are frequently linked with violence and terrorism, perpetuating the stereotype that Arabs and Muslims are terrorists."); Kineret Guterman, *The Dynamics of Stereotyping: Is a New Image of the Terrorist Evolving in American Popular Culture?*, 25 TERRORISM & POL. VIOLENCE 640, 641 (2013) ("Today, it is almost impossible to bring up terrorism without bringing up Arabs and Muslims. Terrorism, Arabs, and Muslims are confused with each other so often both in the media and in the public mind that they have imperceptibly all begun to be thought of as different manifestations of the same thing.").

356. *See, e.g.*, P. J. Henry, Jim Sidanius, Shana Levin & Felicia Pratto, *Social Dominance Orientation, Authoritarianism, and Support for Intergroup Violence Between the Middle East and America*, 26 POL. PSYCHOL. 569 (2005) (finding that persons with a higher social dominance orientation express greater support for United States militarism in the Middle East); Bart Bonikowski, *Flying While Arab (Or Was It Muslim? Or Middle Eastern?): A Theoretical Analysis of Racial Profiling After September 11th*, 7 DISCOURSE SOC. PRACTICE 315, 321 (2005) (arguing that "racial profiling of Middle Eastern Americans" perpetuates and enforces "a discourse of the monstrous 'Other': the terrorist, the violent Muslim, the crude and savage Arab, the authoritarian subject incapable of self-governance" and it is an extension of "Orientalism . . . which has historically legitimated the [West's] imperial encroachments on the territories of the Middle East"); *see also supra* note 218.

that exist within criminal law and enforcement. Group-based hierarchy, however, remains a central feature of American social relations.[357] Furthermore, the law, including criminal law and enforcement, contribute to the maintenance of racial hierarchy. Accordingly, social dominance theory seems particularly relevant to research regarding racial inequality within contemporary criminal law and enforcement.

C. The Complexity of Racial Inequality

1. Resisting "Either/Or" Dichotomy

Implicit bias theory does not provide a complete accounting of the sociology of racial inequality. Neither does social dominance theory. Because the perpetuation of racial inequality, including within criminal law and enforcement, results from numerous factors, scholars should resist the temptation to present one theory as comprehensive. Olatunde C. A. Johnson's research regarding racial disparities in juvenile justice and other legal institutions counsels against a reductionist analysis of race and crime:

> [M]uch of how race operates and how disparities are generated by particular institutions is knowable. Decades of discrimination have created a social structure that shapes in distinctly racial terms where people live, their access to wealth and social welfare programs, their educational resources, and the networks and social capital that enable employment and

357. Henry A. Walker, *Legitimacy and Inequality*, *in* HANDBOOK OF THE SOCIAL PSYCHOLOGY OF INEQUALITY, 353, 370 (Jane D. McLeod, Edward J. Lawler & Michael Schwalbe eds. 2014) ("Inequality is found at all levels of social organization from dyads to the community of nations."). *See generally* Michael D. Yates, *The Great Inequality*, 10 MONTHLY REV. (2012) (discussing wealth and income inequality), http://monthlyreview.org/2012/03/01/the-great-inequality/; Catherine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011) (discussing substantive gender equality and criticizing law for adopting rules that do not help to ameliorate this form of social hierarchy); DALTON CONLEY, READING CLASS BETWEEN THE LINES (OF THIS VOLUME): A REFLECTION ON WHY WE SHOULD STICK TO FOLK CONCEPTIONS OF CLASS, IN, SOCIAL CLASS: HOW DOES IT WORK, 366 (Annette Lareau & Dalton Conley eds., 2008) (discussing social class hierarchy); Thomas Shapiro, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (discussing convergence of race and poverty and historical forces that shaped poverty among blacks).

> mobility. Much like recent efforts to understand gender- and race-based inequalities as a partial function of workplace structures, racial inequalities across a variety of social and economic areas can be addressed by understanding the specific ways in which government policies and practices interact with this social structure of race.[358]

Johnson's research demonstrates that individual discriminatory practices and the broader social structure in which group-based hierarchies exist should inform contemporary analysis of racial subjugation. Using implicit bias and social dominance theories could lead to the sophisticated analysis of race that Johnson persuasively advocates. Instead of either theory standing independently as *the* comprehensive understanding of racism in the United States, implicit bias and social dominance research should inform analyses of racial injustice.

2. Working in Tandem: Implicit Bias and Social Dominance

Implicit racial biases and SDO among whites contribute to the existence of contemporary racial inequality. The use of implicit bias and social dominance research by legal scholars and social scientists could enhance the quality of academic analysis of racism and potentially lead to the development of effective remedies to ameliorate the conditions of racial inequality. This is not to say that an excellent theory alone can change society. Instead, broad social change can only occur through a combination of social movement mobilization; support for change among elites, including politicians, judges, and corporations; substantial public support; and political opportunities.[359] Nevertheless, the social and political actors who advocate broad social change often frame their agendas around messages that they communicate to constituents, opponents, media,

358. Johnson, *supra* note 258, at 384.

359. Scott Cummings & Douglas LeJaime, *Lawyering For Marriage Equality*, 57 UCLA L. REV. 1235, 1312 (2010) (responding to legal theorists who contend that social movements overly rely upon litigation as a means of social change and describing the "multidimensional advocacy" LGBT social movements utilized to expand support for marriage equality).

and political actors.[360] These frames can draw from academic theories, including principles related to democracy and the Constitution.[361] Social movement actors may integrate implicit bias and social dominance theories within existing frames or create new ways of describing their agendas, in light of these theoretical developments.[362]

Legal scholars who utilize social psychology research to elaborate the influence of race on legal institutions and actors have overwhelmingly chosen implicit bias theory and have neglected social dominance research. Social dominance theory, however, provides a more natural foundation for discussing race as a function of group-based social hierarchy. Implicit bias, on the other hand, is more suitable for analyzing individualized discrimination. The aggregate population of implicitly racially biased individuals could greatly impact the status of persons of color. Nevertheless, social dominance theory can explain why racial hierarchy continues to replicate itself despite dramatic shifts in cultural norms regarding the appropriateness of racial animus.

Furthermore, social dominance theory goes to the heart of why race was initially created. Race was socially constructed to legitimize group-based domination, not simply to justify unconnected acts of discrimination against discrete individuals. Although individual discrimination undoubtedly contributes to racial hierarchy, the absence of social dominance theory in legal scholarship regarding races does not have a readily discernable justification. Ultimately, implicit bias and social dominance research could complement each other and permit a richer analysis of the ways in which law, including criminal law and enforcement, fortifies racial hierarchy.

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360. *See* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. OF SOCIOLOGY 611, 613–14 (2000) (discussing sociological meaning of "framing").

361. *See* David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 Am. SOCIOLOGICAL REV. 464, 469 (1986) (discussing social movement frames that draw from the Constitution and notions of democratic participation).

362. *Id.* at 472–76 (discussing modification or complete transformation of social movement frames).

The remainder of this Article provides specific examples for using implicit bias and social dominance research jointly to inform analysis of racism within criminal law and enforcement. Recent highly charged events involving the killing of unarmed black men by police officers and private citizens will serve as the context for weaving together implicit bias and social dominance theories in order to explain individual acts of racism and institutional racism within contemporary criminal law and enforcement.

D. Applying the Theory: Florida v. George Zimmerman

On February 26, 2012, George Zimmerman, a Latino male, shot and killed Trayvon Martin, an eighteen-year-old black male.[363] The incident occurred in Sanford, Florida—a city with a long history of racial inequality and discrimination.[364] Martin's death and the subsequent law enforcement response provide a rich opportunity to examine how both implicit bias and social dominance theories could explain the mistreatment of persons of color within criminal law and enforcement.

1. The Death of Trayvon Martin

On the night he died, Martin was visiting his father and was returning from a local convenience store carrying a bag of candy and a bottle of ice tea.[365] Martin intended to watch the remainder of the NBA Championship game once he reached his father's home.[366] Martin was also talking to a friend on his cellphone.[367]

Unknown to Martin initially, Zimmerman was trailing him by car. Subsequently, Zimmerman called an emergency police operator to

363. Madison Gray, *Trayvon Martin, One Year Later: Where We Are Now*, TIME (Feb. 26, 2013), http://nation.time.com/2013/02/26/trayvon-martin-one-year-later-where-we-are-now/.

364. *Id.*; Tom Brown, *Racist Past Haunts Florida Town Where Trayvon Died*, REUTERS (Apr. 8, 2012), http://www.reuters.com/article/2012/04/08/us-usa-florida-sanford-idUSBRE83706920120408.

365. Gray, *supra* note 363.

366. *Id.*

367. Serge F. Kovaleski, *Martin Spoke of "Crazy and Creepy" Man Following Him, Friend Says* (May 18, 2012), http://www.nytimes.com/2012/05/19/us/trayvon-martins-friend-tells-what-she-heard-on-phone.html.

report that a black male was walking suspiciously through the neighborhood, that he "looked like he was up to no good," and that he looked like he had been "using drugs."[368] The operator asked Zimmerman for his location, which he disclosed. Zimmerman then left his car. Suspecting that Zimmerman was now outside of his car, the operator asked him whether he was following Martin. Zimmerman said that he was. The operator, however, told Zimmerman that he should remain in his car until law enforcement arrived.[369]

Zimmerman, however, viewed himself as a pseudo-law enforcement figure. He dreamed of becoming a cop, but this fantasy never became a reality.[370] Nevertheless, Zimmerman often acted in ways that reflected his inner desire for the power that law enforcement officers possess. For example, Zimmerman took courses that introduced students to local law enforcement work.[371] Zimmerman acted as a pseudo-cop most directly, however, when he volunteered to work for the neighborhood watch program where he and Martin's father lived.[372] In this role, Zimmerman made at least forty-six calls to Sanford police primarily to report people he described as suspicious.[373] According to media reports, many of the allegedly suspicious individuals Zimmerman reported to police were

368. CNN Wire Staff, *Police: Trayvon Martin's Death "Ultimately Avoidable,"* CNN (May 18, 2012), http://www.cnn.com/2012/05/17/justice/florida-teen-shooting/.

369. *Id.*

370. *See* Erin Donaghue, *George Zimmerman Trial: Zimmerman Was a "Wannabe Cop" Who Profiled Trayvon Martin, Prosecutor Says in Closing Argument*, CBS News (July 12, 2013), http://www.cbsnews.com/news/george-zimmerman-trial-zimmerman-was-a-wannabe-cop-who-profiled-trayvon-martin-prosecutor-says-in-closing-argument/; Pedro Oliveira, Jr., *Trayvon's Killer a Cop Wannabe on Paranoid Patrol*, NY POST (Mar. 25, 2012), http://nypost.com/2012/03/25/trayvons-killer-a-cop-wannabe-on-paranoid-patrol/ ("For more than a decade, George Zimmerman dreamed of a life in law enforcement—but instead of becoming a real cop, he lived out his big blue fantasy by tracking down stray dogs, "suspicious" children and other intruders in his gated Florida community.").

371. Oliveira, *supra* note 370.

372. Susan Jacobson, *Trayvon Martin: Zimmerman Was Not Following Neighborhood Watch "Rules," Orlando Sentinel* (Mar. 24, 2012), http://articles.orlandosentinel.com/2012-03-24/news/os-trayvon-martin-neighborhood-watch-20120321_1_zimmerman-community-ties-neighborhood-watch.

373. Bianca Prieto, *Sheriff's Office Releases More 911 Calls Made by George Zimmerman*, ORLANDO SENTINEL (Mar. 19, 2012), http://articles.orlandosentinel.com/2012-03-19/news/os-trayvon-martin-shooting-george-zimmerman-911-20120319_1_neighborhood-county-sheriff-s-office-crime-watch.

young black males.[374] Prior to Martin's death, some residents in the neighborhood reported having problems with Zimmerman's aggressive monitoring.[375]

Although the emergency police operator instructed Zimmerman to remain in his car, he decided to pursue Martin because he was upset that the "[f]ucking punks" or "assholes" "always get away."[376] At this point, the facts become somewhat murky. Within a few minutes of Zimmerman's departure from his car, however, Martin was dead—the victim of a gunshot wound to the chest inflicted by Zimmerman.[377] Martin's body was taken to a morgue before law enforcement officers notified his father the next day.[378]

The responding lead detective believed that Zimmerman committed manslaughter.[379] The local prosecutor, however, did not bring charges.[380] The prosecutor's decision not to charge Zimmerman with a crime provoked nationwide protests.[381] Following intense media coverage and public outcry, Florida Governor Rick Scott appointed State's Attorney Angela Corey to conduct a criminal investigation of Martin's death.[382] After reviewing the evidence, Corey charged Zimmerman with second-degree murder.[383]

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374. *See* Oliveira *supra* note 372.

375. Trymaine Lee, *George Zimmerman Neighbors Complained About Aggressive Tactics Before Trayvon Martin Killing*, HUFFINGTON POST (Mar. 12, 2012), http://www.huffingtonpost.com/2012/03/12/george-zimmerman-trayvon-martin_n_1340358.html.

376. Jelani Cobb, *George Zimmerman's Trial Begins, with a Knock-Knock Joke*, THE NEW YORKER (June 24, 2013), http://www.newyorker.com/news/news-desk/george-zimmermans-trial-begins-with-a-knock-knock-joke.

377. Matt Gutman & Seni Tienabeso, *Trayvon Martin Shooter Told Cops Teenager Went For His Gun*, ABC NEWS (Mar. 26, 2012), http://abcnews.go.com/US/trayvon-martin-shooter-teenager-gun/story?id=16000239.

378. Daniel Trotta, *Trayvon Martin: Before the World Heard the Cries*, *Reuters*, REUTERS (Apr. 3, 2012), http://www.reuters.com/article/2012/04/03/us-usa-florida-shooting-trayvon-idUSBRE8320UK20120403.

379. Matt Gutman, *Trayvon Martin Investigator Wanted Manslaughter Charge*, ABC NEWS (Mar. 27, 2012), http://abcnews.go.com/US/trayvon-martin-investigator-wanted-charge-george-zimmerman-manslaughter/story?id=16011674.

380. *Id.*

381. CNN Wire Staff, *From coast to coast, protesters demand justice in Trayvon Martin case*, CNN (Mar. 26, 2012), http://www.cnn.com/2012/03/26/justice/florida-teen-shooting-events/.

382. *Gov. Rick Scott Appoints Special Prosecutor for Trayvon Martin Case*, TAMPA BAY TIMES (Mar. 22, 2012), http://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-appoints-special-prosecutor-for-trayvon-martin-case/1221406.

383. Matt Gutman, Candace Smith & Pierre Thomas, *George Zimmerman Charged With*

2. Trayvon Martin and Racial Discourse

Public opinion polls regarding Martin's death split heavily along racial lines. Blacks overwhelmingly believed that Zimmerman was guilty of murder and that race was a factor in Martin's death and the law enforcement response. Whites, on the other hand, were more likely to view Zimmerman as innocent and to believe that race was irrelevant to the incident.[384]

Before Zimmerman's criminal trial, Attorney General Eric Holder announced that the Department of Justice would investigate Martin's death to determine whether the circumstances warranted a federal civil rights prosecution.[385] This announcement provoked the ire of many conservatives, who contended that Holder was racist against whites.[386] President Obama also angered many conservatives when, briefly addressing the controversy, he said "if I had a son, he'd look like Trayvon. . . . When I think about this boy, I think about my own kids."[387] Some commentators accused President Obama of fomenting

2nd Degree Murder in Trayvon Martin's Death, ABC NEWS (Apr. 11, 2012), http://abcnews.go.com/US/george-zimmerman-charged-murder-trayvon-martin-killing/story?id=16115469.

384. Richard Faussett, *U.S. Divided by Race in Trayvon Martin Case, Not on Deadly Force*, L.A. TIMES (Apr. 13, 2012), http://articles.latimes.com/2012/apr/13/nation/la-na-nn-trayvon-martin-gun-rights-poll-20120413. Similar patters emerged after a jury acquitted Zimmerman. Gary Langer, *Vast Racial Gap on Trayvon Martin Case Marks a Challenging Conversation*, ABC NEWS (June 22, 2013), http://abcnews.go.com/blogs/politics/2013/07/vast-racial-gap-on-trayvon-martin-case-marks-a-challenging-conversation/.

385. ene Lynch, *Trayvon Martin Case: Federal Charges Are Still A Possibility*, L.A. TIMES (Apr. 11, 2012), http://articles.latimes.com/2012/apr/11/nation/la-na-nn-trayvon-martin-case-holder-20120411.

386. Indeed, an unnamed member of Zimmerman's family sent a public letter to a conservative blog that accused Holder of racism for merely investigating Martin's death, while he had not made a similar move with respect to the New Black Panthers, a black extremist group, that placed a bounty on Zimmerman's life. Federal hate crimes legislation, however, does not cover such a scenario. For a full discussion of this letter, *see* Darren Lenard Hutchinson, *George Zimmerman "Relative" Calls Eric Holder A Racist; Grossly Misinterprets Federal Hate Crimes Law*, DISSENTING JUSTICE (Apr. 9, 2012), http://dissentingjustice.blogspot.com/2012/04/george-zimmermans-wingnut-relative.html. *See also Holder's Black Panthers Blind Spot*, WASH. TIMES (Apr. 10, 2012), http://www.washingtontimes.com/news/2012/apr/10/holders-black-panther-blind-spot/ (accusing Holder of being racist towards whites and pointing to his failure to enforce Florida criminal law, which is beyond the jurisdiction of the Department of Justice, as evidence).

387. Krissah Thompson & Scott Wilson, *Obama on Trayvon Martin: If I Had a Son, He'd Look Like Trayvon*, WASH. POST (Mar. 23, 2012), http://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPpVS_story.html?hpid=z1.

racial division.[388] President Obama's comments, however, were very guarded.[389] Indeed, President Obama has consistently followed a very narrow and reserved strategy regarding race.[390]

During Zimmerman's criminal trial, Rachel Jeantel, the nineteen year-old friend with whom Martin was speaking when he encountered Zimmerman, testified for the prosecution. Jeantel said that Martin told her that Zimmerman, whom he described as a "creepy-ass cracker," was following him.[391] Jeantel also testified that she heard Martin say "[w]hy are you following me" and then a "hard-breathing man," presumably Zimmerman, ask "[w]hat you doing around here."[392] Finally, Jeantel testified that she heard Martin say "get off, get off."

Jeantel, however, did not perform well on cross-examination. She had difficulty answering some of the defense lawyer's questions, and she struggled to express her thoughts.[393] She appeared unable to read a portion of a transcript the defense lawyer gave her.[394] Jeantel also seemed visibly exasperated by the number of questions the defense lawyers asked her to answer.[395]

The jury of all women and nearly all whites (one juror was woman of color) acquitted Zimmerman of second-degree murder and manslaughter.[396] The jury's decision provoked many debates

388. Ta-Nehisi Coates, *Fear of a Black President*, THE ATLANTIC (Aug. 22, 2012), http://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/ (discussing reaction among some conservative commentators to Obama's statement about Trayvon Martin).

389. *See* Thompson & Wilson, *supra* note 396 (discussing Obama's "calibrated" response to Trayvon Martin controversy).

390. *Id.*

391. Gene Demby, *The Secret History of the Word "Cracker,"* NPR (July 1, 2013), http://www.npr.org/blogs/codeswitch/2013/07/01/197644761/word-watch-on-crackers.

392. Seni Tienabeso & Matt Gutman, *Trayvon Martin Told Friend About Man Following Him in Final Moments*, ABC News (June 26, 2013), http://abcnews.go.com/US/trayvon-martin-told-friend-man-final-moments/story?id=19490796.

393. *See* Jelani Cobb, *Rachel Jeantel on Trial*, THE NEW YORKER (June 27, 2013), http://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial.

394. *Id.*

395. Erin Donaghue, *George Zimmerman Trial: Defense Grills Trayvon Martin's Friend on Her Account of Phone Conversation*, CBS New (June 27, 2013), http://www.cbsnews.com/news/george-zimmerman-trial-defense-grills-trayvon-martins-friend-on-her-account-of-phone-conversation/.

396. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-

regarding the soundness of the verdict.[397] The decision also engendered a public discussion of race and crime that revealed deep chasms between people of color and whites regarding the significance of race to Zimmerman's acquittal.[398] The racially disparate opinions regarding the outcome of Zimmerman's criminal trial, however, reflect broader disagreement among whites and people of color regarding the relevance of race in contemporary American society.[399]

The racial discourse fell primarily into two camps. Blacks, other people of color, and political liberals generally believed that law enforcement, prosecutors, jurors, and Zimmerman actively discriminated on the basis of race to Martin's detriment.[400] Whites and political conservatives, however, dismissed race as a possible factor in either Martin's death or the subsequent handling of the case by legal authorities and the jury.[401] Some commentators who dismissed the significance of race to Martin's death and Zimmerman's acquittal contended that individuals who disagreed with this position fueled racial antagonism.[402]

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verdict-trayvon-martin.html?pagewanted=all (reporting on the acquittal); Graham Winch, *All-Female Jury to Try Zimmerman*, CNN (June 23, 2013), http://www.cnn.com/2013/06/20/justice/florida-zimmerman-trial/ (reporting racial composition of jury).

397. *Compare* Scott Neuman, *Civil Rights Groups Call Zimmerman Verdict A "Miscarriage"* (July 14, 2013), http://www.npr.org/blogs/thetwo-way/2013/07/14/202058198/civil-rights-groups-call-zimmerman-verdict-a-miscarriage (reporting negative reaction to Zimmerman's acquittal among social justice advocates) *with* Richard Lempert, *The George Zimmerman Trial: Virtues of an Acquittal*, BROOKINGS (July 18, 2013), http://www.brookings.edu/research/opinions/2013/07/18-zimmerman-trayvon-martin-trial-lempert ("George Zimmerman was not proven guilty of either murder or manslaughter, and the jury, after some deliberation, reached the right result. If there is anything to celebrate about the trial, this is it. The system worked.").

398. *See* Langer, *supra* note 391 (reporting racial opinion of Zimmerman's acquittal)

399. *See* Eibach et al., *supra* note 14, at 453 (discussing opinion polls showing dramatic difference between black and white opinions regarding the existence of racial discrimination); Anderson et al., *supra* note 14 at 37 (summarizing different views whites and blacks hold with respect to the contemporary significance of racism); Hutchinson, *supra* note 14, at 919 & n.4 (citing numerous studies finding dramatic differences among whites and persons of color regarding the ongoing significance of race).

400. Langer, *supra* note 391.

401. *Id.*

402. Bruce Thornton, *Our Race-Hack President*, FRONTPAGE MAG. (July 22, 2013), http://www.frontpagemag.com/2013/bruce-thornton/our-race-hack-president/ (arguing that Obama's sympathetic comments to Trayvon Martin's parents "reinforced all the race-hack rhetoric keeping this country racially divided and most blacks mired in social and economic

Both sides of this racial discourse offered inadequate analysis. The racial arguments regarding Martin's death suffered because the race-bias and race-neutral camps treated racism in simplistic terms. They generally portrayed racism as the intentional and conscious actions by discrete individuals to inflict harm or disparate treatment upon a person of a different race. Both of these positions are unhelpful. The race-bias camp could not possibly demonstrate that every white person involved in the case acted with racial animus that cumulatively led to Zimmerman's acquittal. On the other hand, the race-neutral side could not prove that race did not motivate any of the numerous whites involved in the incident. Both sides searched for a consciously racist perpetrator. Finding none, the race-neutrals declared that Zimmerman's trial was fair and unaffected by race. The race-bias folks, however, contended that race was obviously a part of the decision-making—although neither the state actors nor Zimmerman made explicit statements that indisputably evinced racial animus.

3. Trayvon Martin and Implicit Bias

Racial discrimination, as implicit bias research reveals, typically occurs due to nonconscious prejudice, rather than conscious animus.

misery"). Thornton is a "Shillman Journalism Fellow at the Freedom Center, a Research Fellow at Stanford's Hoover Institution, and a Professor of Classics and Humanities at the California State University." *Id.* Gary DeMar, *Two Black Teenagers Murder White Woman—Race Hustlers Nowhere to be Found*, GODFATHER POLITICS (June 11, 2012), http://godfatherpolitics.com/5616/two-black-teenagers-murder-white-woman-race-hustlers-nowhere-to-be-found/#vseIDMPFXhuqoJSs.99 ("The Trayvon Martin shooting is a perfect example [of "race-baiting" by "so-called black leaders"]. Every day in America blacks kill other blacks, and in the case of the Cedartown woman, whites. The race baiters are nowhere to be found because there is no political capital and money to be made."); Glenn Beck, *Oprah's Extreme Trayvon Comparison*, GLENN BECK, http://www.glennbeck.com/2013/08/06/oprahs-extreme-trayvon-comparison/ (arguing that Oprah Winfrey's drawing parallels between Martin and Emmitt Till lynching was "despicable"); Staff Article, *Documents Obtained by Judicial Watch Detail Role of Justice Department in Organizing Trayvon Martin Protests*, JUDICIAL WATCH (July 10, 2013), http://www.judicialwatch.org/press-room/press-releases/documents-obtained-by-judicial-watch-detail-role-of-justice-department-in-organizing-trayvon-martin-protests/ (accusing Department of Justice of helping organize protests to prosecute Zimmerman, although DOJ's role was to facilitate and mediate discussions to avoid community conflict). Many of these examples come from conservative blogs staffed by amateurs. Bruce Thornton, however, is a noted exception. See supra (discussing Thornton's credentials).

Implicit bias can affect behavior even among individuals who subscribe to racial egalitarianism. The reality of implicit racial bias means that race could have impacted any moment of the Trayvon Martin tragedy, starting with his death and continuing to Zimmerman's acquittal.

Zimmerman could have believed Martin was planning a burglary or that he was under the influence of a drug due to racial stereotypes that construct men of color as dangerous and criminal.[403] With respect to black men, Kathryn Russell-Brown's research describes this pernicious stereotype as the "criminalblackman."[404] This same negative construct could have led whites in the United States generally to believe Zimmerman acted in self-defense.[405] Furthermore, the pervasiveness of implicit bias could also mean that some of the decisions by law enforcement officers and prosecutors resulted from nonconscious bias.[406] Zimmerman's acquittal could also demonstrate the operation of implicit racial biases among members of the jury. Martin's race could have made Zimmerman's assertion of self-defense more credible.[407]

That Martin was a teenager did not spare him from implicit racial stereotyping. A recent study, for example, found that whites tend to overestimate the age of black children and do not view them as innocent, the way that children are typically seen. The study measured the implicit racial attitudes of a largely-white sample of police officers and an all-white sample of undergraduate students. [408] Both samples overestimated the age of black children and rated them as being more culpable for criminal behavior than white or Latino

403. Lee, *supra* note 5, at 111 ("It is unlikely that Zimmerman would have thought Martin was 'real suspicious,' 'up to no good,' and 'on drugs or something' if Martin had been White. Race likely influenced Zimmerman's perception that Martin posed a threat of criminality, whether Zimmerman was aware of this or not.")

404. KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME 3 (1998).

405. Lee, *supra* note 5, at 114 (arguing that disparate racial views regarding Trayvon Martin case likely result from differing racial perspectives among Americans).

406. *Id.* at 112–13 (arguing that race likely explains why Zimmerman initially did not face criminal charges).

407. *Id.* at 150–51 (discussing how racial stereotypes of the victim can impact the perceived reasonableness of a defendant asserting self-defense).

408. Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison, Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 528–30 (2014).

children.[409] The age-estimation errors and culpability ratings were highest for black boys.[410]

Other research confirms that young persons of color are often seen as being prone to criminality. One study tested implicit biases among police and probation officers who work with juvenile offenders. The study reveals that white police and probation officers tend to believe that young persons of color have a greater risk of reoffending than similarly situated whites.[411] The participants also rated the criminal activity of juveniles of color as more serious than similar types of behavior of young white offenders. Implicit racial bias renders black children blameworthy, unsympathetic, and deserving of punishments reserved for adults.[412]

The possible impact of implicit racial bias in Zimmerman's acquittal becomes even more compelling in light of the specific facts regarding his pursuit of Martin. Zimmerman followed young Martin on a rainy night, in his car and on-foot; defied the instructions of the police dispatcher to remain in his car; said that he was upset that trouble-makers always get away; searched for Martin on foot; lost him; and within minutes returned to his car where Martin suddenly appeared and violently attacked him, despite the fact that Martin was simply walking home from a convenience store and talking to a friend on the phone. Implicit racial biases make this story plausible for many whites, including some whites who support racial egalitarianism.

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409. *Id.* at 532.

410. *Id.* at 540. This research could explain why twenty-nine-year-old George Zimmerman overestimated Trayvon Martin's age. During a court appearance, Zimmerman apologized to Martin's parents and said that he did not realize Martin was just a teenager. Richard Fausset, *George Zimmerman Apologizes to Trayvon Martin Family; Bond Set*, L.A. TIMES (Apr. 20, 2012), http://articles.latimes.com/2012/apr/20/nation/la-na-nn-george-zimmerman-bond-trayvon-martin-20120420 ("I did not know how old he was. I thought he was a little bit younger than I am, and I did not know if he was armed or not.").

411. Graham & Lowrey, *supra* note 327, at 483.

412. See Henning, *supra* note 29, at 419–26 (discussing impact of implicit bias upon young offenders of color); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW AND HUMAN BEHAVIOR 483, 499 (2004) ("The results of these two studies offer new insights into the problem of racial disparities in the juvenile justice system. At least some of that disparity might be due to the unconscious racial stereotypes of those who determine the fate of offending youth.").

4. Trayvon Martin and Social Dominance Theory

The search for a consciously racist actor in the death of Trayvon Martin also distorts the institutional nature of racism and the subordination of persons of color within criminal law and enforcement. Social dominance theory holds that criminal law and enforcement are powerful instruments of group domination. Given the broader historical and contemporary context of race and crime in Florida and the United States, legal commentators should resist examining the legal and public response to Martin's death solely as a manifestation of implicit racial bias. Martin's death and Zimmerman's acquittal raise serious questions about the inferior status of persons of color within criminal law and enforcement and the ongoing use of law as an instrument of social domination.

As demonstrated by the Florida Supreme Court's decision in *Luke v. State*,[413] historically, Florida criminal law and enforcement explicitly discriminated on the basis of race.[414] Furthermore, racial discrimination in Florida criminal law and enforcement constituted a critical part of a broader system of white supremacy. Racism within Florida criminal law and enforcement reminded the "degraded caste . . . of their inferior position" and of their "subjection to the authority of the free white citizens."[415]

After the Civil War, Florida, like other southern states, enacted Black Codes designed to reenslave blacks.[416] During Reconstruction, blacks in Florida routinely experienced racial violence from whites.[417] Whites used racial violence to maintain their social dominance.[418] Despite the severity of anti-black violence, these

413. 5 Fla. 185 (1853).

414. *Id.* at 195–96.

415. *Id.* at 195. *See also* Joseph Conan Thompson, *Toward a More Humane Oppression: Florida's Slave Codes, 1821–1861*, 71 THE FLORIDA HISTORICAL Q. 324, 325–26 (1993) (discussing the race-based crimes and punishments contained in Florida's Slave Codes).

416. For a discussion of Black Codes generally, see *supra* text accompanying notes 287–95. For a discussion of Florida's Black Codes, *see* Jerrell H. Shofner, *Custom, Law, and History: The Enduring Influence of Florida's "Black Code,"* 55 THE FLORIDA HISTORICAL Q. 277, 277–83 (1977).

417. *See generally* Ralph L. Peek, *Lawlessness in Florida, 1868–1871*, 40 THE FLORIDA HISTORICAL Q. 164 (1961) (discussing widespread racial violence in Florida during Reconstruction Era).

418. *Id.* at 164 ("In this bloody struggle the issue at stake was the possession of local, state,

crimes were largely unpunished.[419] Whites harassed, threatened, and used actual violence to retain their social dominance.[420] Also, virulent racism among whites and the disenfranchisement of blacks meant that lawlessness among whites received broad support from most of the electorate.[421]

Following Reconstruction, blacks continued to suffer horrible abuses in Florida. In the late-nineteenth century until the mid-1940s, many black Floridians were lynched for alleged criminal activity or for simply not deferring to whites.[422] Florida had the highest rate of lynching among all of the states in the Deep South.[423] Also, lynching in Florida, as elsewhere, largely went unpunished.[424] Lynching was

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and national political and economic power, and this issue was colored and made more complex by social and racial elements, including the most virulent race hatred.").

419. *Id.* at 165.

420. *Id.*

421. *Id.*

422. Paul Ortiz painstakingly details post-Reconstruction racial violence in Florida in his excellent work Emancipation Betrayed. *See* PAUL ORTIZ, EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920 (2006); *see also* Jack E. Davis, *"Whitewash" in Florida: The Lynching of Jesse James Payne and Its Aftermath*, 68 THE FLORIDA HISTORICAL QUART. 277 (1990) (discussing 1945 lynching of Jesse James Payne, which occurred nearly twenty years after lynching had greatly subsided and lost favor in the rest of the nation); Jerrell H. Shofner, *Judge Herbert Rider and the Lynching at Labelle*, 59 THE FLORIDA HISTORICAL QUART. 292 (1981) (discussing lynching of Henry Patterson in 1926 in LaBelle, Florida); Walter T. Howard, *Vigilante Justice and National Reaction: The 1937 Tallahassee Double Lynching*, 67 THE FLORIDA HISTORICAL Q. 292 (1981) (discussing the 1937 lynching of Richard Ponder and Ernest Hawkins in Tallahassee, Florida); Joshua Youngblood, *"Haven't Quite Shaken the Horror": Howard Kester, the Lynching of Claude Neal, and Social Activism in the South During the 1930s*, 86 THE FLORIDA HISTORICAL Q. 3 (2007) (discussing 1934 lynching of Claude Neal in Greenwood, Florida).

423. Davis, *supra* note 444, at 277 (observing that "by 1920 [Florida] had the nation's highest lynching rate relative to its population"); WALTER HOWARD, LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930S, 15 (2005) (observing that "in the 1930s . . . Florida was the most lynch-prone state in the South"); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 37 (1995) (reporting that Florida blacks were most vulnerable to lynching).

424. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEM. 31, 31–32 (1996) ("Despite the notoriety of [lynching] and the fact that the perpetrators were often well-known to the community, the lynching of a black person by a white mob was rarely investigated, even more rarely prosecuted, and almost never punished"); *id.* at 40 (observing that "only about eight-tenths of one percent of the lynchings in the United States since 1900 have been followed by convictions for the perpetrators" compared with a rate of "forty-four percent" for "regular homicides during the same period").

very popular among southern whites, who, unlike blacks, could vote.[425] Even if elected officials in the South wanted to suppress lynching and provide justice for the victims, they knew that their efforts would come with serious political risks.[426] Furthermore, many white office holders, including law enforcement officials, shared whites' general desire for racial domination, and the unpunished lynching of blacks perpetuated white supremacy.[427] Indeed, law enforcement officials often willingly turned over blacks to lynch mobs or actively participated in lynchings.[428] During the Progressive Era, black lives simply did not matter in the South.

Because states offered very little refuge for blacks from lynch mobs, antilynching activists turned to the federal government. From 1882 to 1951 opponents of lynching in Congress introduced over one hundred bills to ban mob violence in the states.[429] Despite these efforts and the systematic refusal of southern states to protect blacks from white mob violence, Congress failed to pass antilynching legislation.[430]

Southern whites, including Floridians, also used violence to eject blacks from their land and livelihoods. In January 1923, whites killed at least six blacks in the all-black unincoporated area of Rosewood, Florida.[431] The violence began after a white woman in a neighboring town alleged that a black man had raped her.[432] A group of white

425. *Id.* at 41.

426. *Id.*

427. *See* Howard, *supra* note 423, at 28 ("The prevalence of lynching in Florida between 1880 and 1930, though progressively declining, reveals that whites in this former slave state resorted to such extralegal tactics primarily to intimidate and control a large minority population so as to perpetuate white supremacy, maintain Jim Crow customs and laws, and discipline black communities."); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Approach*, 39 COLUM. HUM. RTS. L. REV. 261, 274 (2007) ("The public torture of blacks accused of offending the racial order demonstrated whites' unlimited power and blacks' utter worthlessness. This nation's rights, liberties, and justice were meant for white people only; blacks meant nothing before the law."); *id.* ("Lynchings were not exceptions to the law; they were extensions of the inequitable formal administration of justice and part of a broader system of racial control.").

428. Holden-Smith, *supra* note 424, at 40.

429. *Id.* at 44.

430. *Id.*

431. R. THOMAS DYE, ROSWEOOD, FLORIDA: THE DESTRUCTION OF AN AFRICAN AMERICAN COMMUNITY, 58 THE HISTORIAN 605 (1996).

432. *Id.* at 611.

men, including the county sheriff, used scenting dogs to search for the alleged assailant. Although the white vigilantes could not locate the alleged rapist, they pursued blacks whom they believed might have harbored him.[433] The sheriff had to take one man into custody in order to prevent a lynching.[434] The mob, however, stopped another black man in Rosewood and accused him of secreting the alleged rapist.[435] The mob then tied the individual to a tree and shot and mutilated him.[436]

At this point, the violence escalated. Operating on rumors regarding the location of the alleged assailant, a mob of twenty to thirty whites converged on the home of another Rosewood family and kicked down the front door.[437] The black residents, however, were prepared to defend themselves. Two whites were killed during an ensuing gun battle.[438] The vigilantes retreated after they exhausted their ammunition.[439]

The white mob's defeat represented a serious breach of Jim Crow customs. Black self-defense constituted a paramount challenge to white supremacist rule.[440] As news of the gun battle and brazen black resistance spread, two hundred whites from neighboring cities converged upon Rosewood in order to restore white dominion.[441] For two weeks, white vigilantes committed acts of violence against blacks in Rosewood.[442] They acted indiscriminately.[443] They also burned down every black-owned home. Blacks fled the city on foot and by trains operated by sympathetic white conductors.[444] Officially,

433. *Id.* at 612.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.* at 614–15.
438. *Id.* at 615.
439. *Id.*
440. *Id.* ("The idea that blacks in Rosewood had taken up arms against the white race was unthinkable in the Deep South."); *id.* at 621 ("When blacks sought protection against this climate of violence by arming themselves, whites viewed their response as a direct threat to the very nature of southern society.").
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* at 618.

two whites and six blacks died during the mayhem, but some survivors contend that many others lost their lives.[445]

Rosewood was never rebuilt, and Levy County, in which the town was located, became primarily white due to the mass exodus of blacks.[446] The Rosewood riots destroyed a once-thriving black community.[447] And like many participants in acts of racial violence in the South, the perpetrators of the Rosewood riots escaped punishment. The local prosecutor convened an all-white grand jury that declined to return any indictments.[448] Florida law enforcement officials never arrested or prosecuted anyone for this violent racial atrocity.[449] In 1994, however, the Florida legislature passed a bill that provided reparations for Rosewood's black families and their descendants to compensate them for their loss of property.[450]

The history of lynching and tragedies like Rosewood demonstrate that legal authorities in Florida allowed whites to kill blacks with impunity during the Jim Crow era. Black criminality directed towards whites, however, received very brutal responses from state and private actors. White supremacy compelled harsh punishments for blacks who actually or allegedly harmed whites. White racial domination, however, meant that black life was unworthy of protection.

Today, Florida criminal law continues to inflict group harms upon persons of color. Empirical studies demonstrate that blacks and Latinos receive longer sentences than white offenders who commit similar crimes.[451] Black men and women are particularly vulnerable to longer sentences in Florida due to prosecutorial decisions to pursue available sentencing enhancements, such as habitual offender penalties.[452] The disparate treatment of persons of color within Florida criminal law and enforcement has seriously curtailed the ability of blacks to participate in the political process. A March 2014

445. *Id.* at 619–20.
446. *Id.* at 621–22.
447. *Id.* at 608–11.
448. *Id.* at 620.
449. *Id.*
450. *Id.* at 605.
451. *See* Crawford, *supra* note 257.
452. *See* Caravelis et al., *supra* note 258.

report submitted by the American Civil Liberties Union and the Lawyers Committee for Civil Rights to the United Nations Human Rights Committee found that the rate of felon disenfranchisement in Florida is "the highest and most racially disparate in the U.S."[453] 1.5 million Floridians cannot vote due to felony convictions.[454] Felon disenfranchisement policies prevent twenty-three percent of voting-age black Floridians from exercising political rights.[455] A criminal conviction imposes additional burdens upon ex-offenders, including employment discrimination and exclusion from juries.[456] Although past convictions harm most job seekers, research shows that the harm is most acute for people of color.[457] Also, recent research finds that incarceration causes long term negative health effects that remain with inmates after they are released.[458] In jurisdictions where people of color suffer higher rates of incarceration, imprisonment could diminish the overall health of communities of color.[459]

Criminal convictions also harm families and other dependents of the offenders. Empirical research, for example, finds that paternal incarceration is strongly linked with child homelessness.[460] Homelessness has tremendous implications for the economic and physical well-being of children. Homeless children suffer higher rates of "victimization" and "exposure to infectious disease"; they have

453. AMERICAN CIVIL LIBERTIES UNION & LAWYERS COMMITTEE FOR CIVIL RIGHTS, FOLLOW-UP REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE IN CONNECTION WITH THE FOURTH PERIODIC REVIEW OF THE UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Mar. 2014, *available at* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_CSS_USA_16508_E.doc.

454. Steve Bousquet, *Tampa Woman Champions Floridians' Right to Vote*, TAMPA BAY TIMES, Mar. 3, 2013.

455. *Id.*

456. See Alexander, *supra* note 333, at 191–92, 193–94.

457. Devah Pager, *The Mark of a Criminal Record*, 108 AMER. J. OF SOC. 937, 957–60 (2003).

458. Jason Schnittker, Michael Massoglia & Christopher Uggen, *Incarceration and the Health of the African American Community*, 8 DU BOIS REV. 133, 138 (2011) ("A growing body of research suggests that, on balance, incarceration increases the risk for poor health.").

459. *Id.* at 137 ("The unusually high prevalence of incarceration among African Americans relative to Whites allows for the possibility that incarceration can actually account for some portion of the racial disparity in health.").

460. Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS OF THE AMER. ACAD. OF POL. AND SOC. SCI. 74, 75 (2014).

"little access to health care"; a higher "risk of mortality relative to housed children"; and a harder time completing their education.[461] Homeless children also have greater risk of "abuse" and "suffer more mental health problems than other children."[462] Collectively, these problems can have devastating effects on the economic opportunities of homeless children as they transition into adulthood.[463]

Paternal incarceration also causes serious problems for the mother of the incarcerated individual's child or children. Research shows that mothers of children with incarcerated fathers are more susceptible to major depression and greater life dissatisfaction.[464] These results are exacerbated by poverty but exist regardless of socioeconomic status.[465]

Maternal incarceration appears to have a strong negative impact on a child's educational completion. One study found that maternal incarceration substantially lowers the likelihood of a child completing college.[466] Paternal incarceration caused similar, but less pronounced effects.[467] Children of incarcerated mothers have higher rates of high-school drop-out and lower levels of college attendance. The impact of paternal incarceration upon educational outcomes was not as strongly correlated as maternal incarceration.[468]

And with particular relevance to the Trayvon Martin tragedy, Florida criminal law and enforcement disproportionately impacts youth of color. Children who attend Florida public schools receive disparate punishments for school behavioral infractions. These punishments can include suspensions, expulsions, transfer to

461. *Id.*
462. *Id.*
463. *Id.* ("These effects are relevant not only for contemporary inequality in homelessness among children but also for future inequality in civic preparedness and political participation among these children as they become adults.").
464. Christopher Wildeman, Jason Schnittker, & Kristin Turney, *Despair by Association? The Mental Health of Mothers with Children by Recently Incarcerated Fathers*, 77 AMER. SOCIOLOGICAL REV. 216, 234 (2012).
465. *Id.*
466. John Hagan & Holly Foster, *Children of the American Prison Generation: Student and School Spillover Effects of Incarcerating Mothers*, 46 LAW & SOCIETY REV. 37, 57-58 (2012).
467. *Id.* at 58.
468. *Id.*

alternative education programs, and criminal charges.[469] Studies find that race impacts the rate and severity of punishment.[470] This pattern mirrors national data.[471] Black male students are more acutely impacted by school disciplinary policies; black disabled male students are the most negatively affected.[472]

Many students can face criminal charges for behavioral infractions, and law enforcement often becomes involved in very minor cases. According to an *Orlando Sentinel* report, in 2012 Florida arrested 12,000 students a total of 14,000 times for school infractions.[473] Of those arrests, a total of 67 percent were for misdemeanors.[474] And less than 5 percent involved weapons charges.[475]

The racial disparities in school discipline can seriously impact the well-being of communities of color. Studies show that criminal and noncriminal sanctions for school misconduct diminish academic performance and school attendance, reduce the likelihood that a child will graduate from high school, increase student disengagement from school, and enhance the likelihood that the child will engage in criminality as an adult.[476]

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469. *See* FLORIDA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE IN FLORIDA: DISCIPLINE PRACTICES LEAVE MANY CHILDREN BEHIND 9–12 (2010) (discussing racially disparate school discipline policies such as office referrals, suspension, expulsion, and transfer to alternative schools within Duval County, Florida) [hereinafter SCHOOL DISCIPLINE IN FLORIDA].

470. SCHOOL DISCIPLINE IN FLORIDA, *supra* note 496, at 9–12.

471. Russell J. Skiba, Robert H. Horner, Choong-Geun Chung & M. Karega Rausch, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCHOOL PSYCHOL. REV. 85, 95-103 (2011) (finding black and Latino students more harshly punished than whites for same school behavior infractions); Tamar Lewin, *Black Students Face More* Discipline, Data Suggests, N.Y. TIMES (Mar. 6, 2012), http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html (reporting substantial disproportionality in punishment among blacks, Latinos and whites, with particularly high disparities among black and Latino children with disabilities).

472. *See* Lewin, *supra* note 471.

473. Leslie Postal & Lauren Roth, *Thousands of Student Arrests Alarm Florida Justice Leaders*, ORLANDO SENTINEL (Feb. 10, 2013), http://articles.orlandosentinel.com/2013-02-10/features/os-school-arrests-florida-prison-pipeline-20130209_1_school-arrests-disabled-students-juvenile-justice.

474. *Id.*

475. *Id.*

476. *See* Alicia Darensbourg, Erica Perez & Jamilia J. Blake, *Overrepresentation of African American Males in Exclusionary Discipline: The Role of School-Based Mental Health Professionals in Dismantling the School to Prison Pipeline*, 1 J. OF AFRICAN AMERICAN MALES

Viewed systematically, criminal law and enforcement in Florida disproportionately deprive persons of color of freedom from physical restraint and their ability to vote. Florida criminal law and enforcement also lock persons of color in poverty due to the harsh educational and economic consequences of convictions. Numerous aspects of Florida criminal law and enforcement subordinate persons of color. The historical use of criminal law and enforcement to achieve racial domination counsels against an analysis of Martin's death and Zimmerman's acquittal that primarily searches for biased individuals or that dismisses the relevance of race altogether.

Furthermore, given the institutional nature of racism, the elements of race that impacted Martin's life extend far beyond his particular situation and implicate a variety of criminal justice practices throughout the United States. Implicit bias research alone cannot address the breadth of racial injustice caused by criminal law and enforcement. Social dominance theory, by contrast, permits the institutional analysis of racism needed to explain why Martin's death and the law enforcement response made blacks vulnerable nationwide. Social dominance theory could also provide a rich

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IN EDUC. 196, 199 (2010) (observing that "research . . . indicates that involvement in exclusionary discipline leads to feelings of alienation from school, elevated dropout rates, and alarming incarceration rates"); Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline,"* 9 FORUM ON PUB. POL'Y 1 (2009) ("Increased drop-out rates are directly related to the repeated use of suspension and expulsion."); Emily Arcia, *Achievement and Enrollment Status of Suspended Students Outcomes in a Large, Multicultural School District*, 38 EDUC. AND URB. SOC'Y 359, 367 (2006) (finding that suspensions correlate with diminished future academic achievement and higher drop-out rates); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUSTICE Q. 462, 477 (2006) ("First, first-time court appearance during high school is more detrimental for education outcomes than first-time arrest without a court appearance."); *id.* at 478 (finding that "court appearance hinders educational attainment, increasing the probability of dropout" and that "[h]igh school dropout, in turn, may set in motion a number of negative outcomes including unemployment and increased criminal involvement"); Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 90 NEW DIRECTIONS FOR YOUTH DEVELOPMENT 17, 26 (2003) ("School suspension correlates significantly with a host of negative outcomes, including students' poor academic achievement, grade retention, delinquency, dropping out, disaffection and alienation, and drug use."); Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEVELOPMENT 9, 11 (2003) (discussing positive correlation between lack of high school graduation and future incarceration); *id.* ("The single largest predictor of later arrest among adolescent females is having been suspended, expelled, or held back during the middle school years.").

empirical context for existing works within legal theory that view criminal law and enforcement as sites of racial subordination.[477]

E. A Second Application: The Killing of Michael Brown

During the completion of this Article, a series of incidents involving race and crime became media sensations. These incidents include the killing of several unarmed black males by whites who were not punished for the homicides they committed.[478] One incident that occurred in Ferguson, Missouri, occupied national attention for several months in 2014.

On August 9, 2014, Darren Wilson, a white police officer in Ferguson, shot and killed Michael Brown, an eighteen-year-old black male.[479] Like the killing of Trayvon Martin, Michael Brown's death became a social media sensation and received intense scrutiny in the national media.[480] Brown's body lay in the street where he was shot for over four hours.[481] Protestors gathered and demanded information from the Ferguson police department, but officials resisted providing the public any details regarding the shooting, including the name of the officer who shot Brown.[482] The perceived resistance of Ferguson officials caused anger among many activists in Missouri and across the nation.[483]

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477. *See, e.g.*, ALEXANDER, *supra* note 333 (discussing contemporary incarceration of blacks as the reestablishment of Jim Crow); Roberts, *supra* note 450, at 283 ("Mass imprisonment, capital punishment, and police terror are not universally associated with racial subjugation. But these barbaric practices can be traced to the enslavement of Africans in the United States and their endurance in modern America serves to sustain the racial order.).

478. See *supra* text accompanying notes 1–5.

479. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html?_r=0.

480. *Id.*

481. *Id.*

482. Julie Bosman & Timothy Williams, *Missouri Police Cite Threats in Deciding Not to Name Officer Who Shot Teenager*, N.Y. TIMES (Aug. 12, 2014), http://www.nytimes.com/2014/08/13/us/ferguson-police-cite-safety-risk-in-decision-not-to-name-officer-in-shooting.html.

483. Jon Swaine, Rory Carroll & Amanda Holpuch, *Ferguson Police Release Name of Officer Who Shot Michael Brown*, THE GUARDIAN (Aug. 15, 2014), http://www.theguardian.com/world/2014/aug/15/ferguson-police-darren-wilson-michael-brown-shooting (observing that the lack of information from police contributed to "disgruntlement" of protesters).

1. Implicit Bias and Ferguson

The Ferguson police alleged that Officer Darren Wilson confronted Brown for "walking down the middle of the street"[484] and that a physical confrontation occurred which led to the shooting.[485] Witnesses disputed this account.[486] Police later released a statement that reported Brown was involved in a convenience store robbery shortly before Wilson confronted him.[487] Wilson, however, had no knowledge of the alleged robbery or Brown's supposed participation.[488] It is plausible that police released this information in order to activate implicit stereotypes that associate black men and criminal activity. People who had previously believed that Brown was possibly responsible for his own death could now find him culpable because they *knew* he was just another black male criminal.

2. Social Dominance and Ferguson

Brown's death led to massive of protests in Ferguson and around the nation.[489] In response to protests in Ferguson, local police utilized military weapons and vehicles, along with tear gas, riot gear, and other armaments, to subdue the protestors.[490] To many observers, this dramatic display of force did not seem proportional to any risks the protestors presented.[491] But the protestors threatened more than tranquility. They also challenged perceived white supremacist police

484. Julie Bosman & Alan Blinder, *Midnight Curfew in Effect for Ferguson*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/us/ferguson-missouri-protests.html.

485. *Id.*

486. *Id.*

487. Swaine et al., *supra* note 516.

488. *Id.*

489. Catherine E. Shoichet, Ben Brumfield &Tristan Smith, *Tear Gas Fills Ferguson's Streets Again*, CNN (Aug. 13, 2014), http://www.cnn.com/2014/08/13/us/missouri-teen-shooting/.

490. *Id.*; Matthew Daly, Eric Tucker & Robert Burns, *Military Gear on Ferguson Police Piques Concern in Washington*, PBS NEWSHOUR: THE RUNDOWN (Aug. 15, 2014), http://www.pbs.org/newshour/rundown/military-gear-ferguson-police-piques-concern-washington/; Jamelle Bouie, *The Militarization of the Police: It's Dangerous and Wrong to Treat Ferguson Like a War Zone*, SLATe (Aug. 13, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_military_weapons_threaten_protesters.html.

491. *See* Bouie, *supra* note 489.

practices.[492] The police conduct took place within a broader context of historical and contemporary racism in Missouri. Data reported after Brown's death reveals a strong likelihood that Ferguson police racially profile blacks. In 2013, for example, blacks constituted 86 percent of traffic stops and ninety-two percent of vehicle searches subsequent to a traffic stop.[493] Blacks, however, only constitute 67 percent of Ferguson's population.

A *New York Times* article reports numerous other sources of racial conflict within Ferguson.[494] Although blacks constitute two-thirds of the Ferguson population, whites dominate positions of political power in the city. The mayor of Ferguson is white, as are five of the six city council members.[495] All seven of Ferguson's school board members are white, and they caused a controversy in 2013 when they fired a black school superintendent without providing a reason.[496] In 2013, the police department in nearby St. Louis fired a lieutenant because he ordered officers to profile blacks in shopping districts.[497] Furthermore, historically, Missouri was a slave state that remained segregated following emancipation.[498] Indeed, Missouri was the setting for *Dred Scott v. Sandford*, in which a slave unsuccessfully sought judicial relief from slavery.[499]

The history of white domination in Missouri seems highly relevant in Ferguson today. Black defiance to whites' social dominance triggered a powerful militaristic display by local authorities. As leading social dominance theorists Sidanius and Pratto

492. Tanzina Vega & John Eligon, *Deep Tensions Rise to the Surface After Ferguson Shooting*, N.Y. TIMES (Aug. 16, 2014), http://www.nytimes.com/2014/08/17/us/ferguson-mo-complex-racial-history-runs-deep-most-tensions-have-to-do-police-force.html.

493. Alexis C. Madrigal, *How Much Racial Profiling Happens in Ferguson?*, THE ATLANTIC (Aug. 15, 2014), http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/.

494. *See* Vega & Eligon, *supra* note 492.

495. *Id.*

496. *Id.*

497. *Id.*

498. *See* PAUL FINKLEMAN, DRED SCOTT V. SANDFORD, IN THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS 24 (Melvin I. Urofsky ed., 2007) (discussing *Dred Scott* and Missouri history and politics); A. Leon Higginbotham, Jr., *Race, Sex and Missouri Jurisprudence: Shelley v. Kramer in a Historical Perspective*, 67 WASH. U. L. REV. 673 (1989) (discussing numerous influential cases challenging slave law and post-bellum racial segregation in Missouri).

499. 60 U.S. 393 (1857).

predict, however, "systematic terror is likely to be most ferocious when subordinates directly challenge and confront the hegemonic control of dominants."[500] The powerful police response to Ferguson protestors and the possible racist motivation that led to Brown's death strongly suggest that in post-racial America, there remains an "obvious propriety in visiting [blacks'] offences with more degrading punishment than is inflicted on the white citizens."[501]

Subsequently, a grand jury of three blacks and nine whites declined to indict Wilson. This decision led to additional protests. Many commentators argued that the prosecutor on the case took extraordinary efforts to make sure that the grand jury did not indict Wilson, including cross-examining prosecution witnesses, calling Wilson to testify, softly questioning Wilson in order to avoid undermining his credibility, and presenting evidence that exculpated Wilson.[502] These arguments seem plausible given the evidence in the case and the typical ease that prosecutors enjoy securing grand jury indictments.[503] The prosecutor's efforts to avoid an indictment validate the subordination of blacks through police violence. The prosecutor's actions also resemble historical practices that immunized white racial violence from punishment.

In addition, Wilson made a comment during his grand jury testimony that strongly suggests a motivation rooted in social dominance. Wilson testified that he decided to shoot Brown because "[h]e looked up at me and had the most intense aggressive face. . . . The only way I can describe it, it looks like a demon. That's how

500. SIDANIUS & PRATTO, *supra* note 50, at 41.

501. *Luke*, 5 Fla. at 195.

502. Kimberly Kindy & Carol D. Leonnig, *In Atypical Approach, Grand Jury in Ferguson Shooting Receives Full Measure of Case*, WASH. POST (Sept. 7, 2014), http://www.washingtonpost.com/politics/in-atypical-approach-grand-jury-in-ferguson-shooting-receives-full-measure-of-case/2014/09/07/1dec6ffe-339b-11e4-8f02-03c644b2d7d0_story.html; Jeffrey Fagan & Bernard E. Harcourt, *Fact Sheet: Questions and Answers for Columbia Law School Students about Grand Juries* (Dec. 5, 2014), http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury; Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER, Nov. 25, 2014, http://www.newyorker.com/news/news-desk/use-grand-jury.

503. Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/.

angry he looked."[504] Wilson also offered testimony that invokes racial stereotypes of black men as dangerous, lawless, and violent:

> Very aggressive. Um, he is I don't really know how to describe it. Um, he turns. I looked at his face. It was just intense. It was. I've never seen anybody look that, for lack of a better words, crazy, I've never seen that. I mean, it was very aggravated, um, aggressive, hostile. Just, you couldn't, you could, you could tell he was lookin' through ya. There was nothing he was seeing . . .[505]

Dehumanization and social dominance are intertwined.[506] Wilson's testimony reveals the white supremacist nature of Brown's killing. Brown was demonic, aggressive, hostile, and angry. Brown was so vile that his manner was unfamiliar to Wilson—who presumably had encountered dangerous criminals during his career. Wilson had no other choice but to kill Brown.

Because Wilson described Brown as a demon, rather than a teenager, members of the grand jury could have believed his statement that he needed to use lethal force. This outcome is consistent with a history of racial subordination. The social construction of blacks as violent savages has justified violent racial repression throughout American history. That history resonates in Brown's death and Wilson's freedom from punishment.

V. CONCLUSION

This Article argues that implicit racial biases and social domination both contribute to the existence of racial hierarchy in the United States. Antidiscrimination law, however, only finds culpability when individuals purposefully act with racial animus. Racial animus is difficult to prove because racial stereotypes

504. Emily Wax-Thibodeaux, *Wilson Said the Unarmed Teen Looked Like a "Demon": Experts Say His Testimony Was Dehumanizing and "Super-Humanizing,"* WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/11/25/wilson-said-the-unarmed-teen-looked-like-a-demon-experts-say-his-testimony-was-dehumanizing-and-super-humanizing/.

505. *Id.*

506. *See supra* notes 345–51 and accompanying text.

typically exist nonconsciously. Yet these implicit racial attitudes can and do influence behavior. Courts and lawmakers, however, immunize racial discrimination from legal invalidation because they refuse to refashion the law to address the pervasiveness of implicit bias.

Group-based social hierarchy also remains a central feature of racism in the United States. Social dominance theory illustrates how criminal law and enforcement perpetuate the subordination of persons of color. The same impulse that fueled racist criminal law and enforcement in the past—the desire to maintain white supremacy—continues to affect law and policy today. Individual people alone do not cause racial subordination. Instead, powerful groups and institutions structure race relations.

The killing of Trayvon Martin and Michael Brown and similar recent incidents demonstrate that implicit biases make persons of color vulnerable to acts of individual violence. An individuated analysis of the deaths of Martin and Brown and the innocence of their killers, however, does not comprehensively explain these tragedies. These incidents demonstrate that criminal law and enforcement continue to perpetuate racial subordination. In other words, these homicides, although perpetrated by individuals, are not isolated events. Instead, they constitute acts of institutional racism that support the maintenance of white supremacy.

Legal scholars who use social science literature such as implicit bias theory to supply an empirical foundation for racial justice advocacy should also engage scholarship, such as social dominance theory, that analyzes group-based social hierarchy. Because social dominance theory addresses the structural nature of inequality, this research could enhance legal scholarship regarding contemporary racism and lead to more helpful policies designed to ameliorate the conditions of racial hierarchy.