

# Foreword: Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter

Mario L. Barnes\*

*Americans believe in the reality of “race” as a defined, indubitable feature of the natural world. Racism—the need to ascribe bone-deep features to people and then humiliate, reduce, and destroy them—inevitably follows from this inalterable condition. In this way, racism is rendered as the innocent daughter of Mother Nature, and one is left to deplore the Middle Passage or the Trail of Tears the way one deplores an earthquake, a tornado, or any other phenomenon that can be cast as beyond the handiwork of men.*

—Ta-Nehisi Coates<sup>1</sup>

Introduction .....	712
I. (Still) Reckoning with Unconscious Bias from Start to the Finish in	
Criminal Justice Processes .....	720
A. State Actors and “Classic” Unconscious Bias .....	721
B. Hidden Bias Revealed in Structural and Institutional Choices .....	722
C. Combatting the Hidden Biases of Others: Making Identity Real for Courts .....	726
II. Criminal Justice System Outcomes as a Commentary on Which Lives Matter .....	728
Conclusion.....	731

---

\* Professor of Law & Criminology, Law and Society (by courtesy), Associate Dean of Research and Faculty Development, and Co-Director, Center on Law, Equality and Race (CLEaR), University of California, Irvine, School of Law. B.A., J.D., University of California, Berkeley; LL.M., University of Wisconsin. Thank you to all of the participants who made the UCI CLEaR “The Interplay of Race, Gender, Class, Crime and Justice” symposium an engaged day of learning and to the editors of the *UC Irvine Law Review* for their dedication and patience.

1. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 7 (2015).

## INTRODUCTION

When the University of California, Irvine School of Law's Center on Law, Equality and Race (CLEaR) began to plan its spring 2014 symposium, "The Interplay of Race, Gender, Class, Crime and Justice," a significant goal of the conference was to bring together a preeminent group of interdisciplinary scholars to assess anew the seemingly intractable problems surrounding the disparate treatment that socially subordinated individuals experience within the American criminal justice system. Initially, a secondary goal of the conference was to problematize what critical race and feminist legal scholar Angela Harris has described as the "attractions and [the] dangers of organizing around identity."<sup>2</sup> Exploring this paradox of desiring to confront the numerous ill effects of stereotypes related to certain identities—while also being careful not to accept the received wisdom of identity categories as true, hardened, or real<sup>3</sup>—was, however, somewhat overcome by current events.

While they were not the intended focus of the conference, events transpiring across the United States loomed large over its planning. First, the conference was organized and executed in the wake of George Zimmerman's acquittal for the fatal shooting of African-American teenager Trayvon Martin in Sanford, Florida.<sup>4</sup> The Zimmerman case, unfortunately, was not the only case that was potentially demonstrative of the salience of the conference theme. A series of events implicating a broader story of race, gender, class, crime and justice emerged prior to the conference meeting and continued over the months thereafter, as participants were drafting their papers. This story was not merely a tale of outsized violence meted out by an overzealous neighborhood watch captain claiming self-defense.

---

2. Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 210 (1996). In this exceptional introduction to a joint issue of the then *African-American Law and Policy Report* (now *Berkeley Journal of African American Law and Policy*) and *Berkeley Women's Law Journal* (now *Berkeley Journal of Gender Law and Justice*), Professor Harris more fully explained with regard to racial identity, in particular: "'race' entrances us in a familiar but dangerous metaphysics: a representational economy in which bodies stand in both for power and for history." *Id.*

3. While the ascription of social identity categories and the supposed meaning attached to being perceived as belonging to a particular group are largely social phenomena, it does not mean that people do not experience them as having an impact. As the quote that begins this Foreword and the following passage assert, identifying race as a non-biological social construction does not mean that it has no effect on the lives of persons who are marked by it:

Races may not exist as the biological categories many people imagine them to be, but they are still here with us, nonetheless. Races are real because we made them real. If we tossed out all uses of race today, for example, we would find it very difficult to study and find solutions to the serious problem of racial disparities. . . .

GUY P. HARRISON, RACE AND REALITY: WHAT EVERYONE SHOULD KNOW ABOUT OUR BIOLOGICAL DIVERSITY 34 (2010).

4. George Zimmerman, a neighborhood watch captain, killed Trayvon Martin during a confrontation where Zimmerman began following Martin in a suburb of Orlando, Florida, because he believed the teen looked suspicious. See Audra D.S. Burch et al., *George Zimmerman Not Guilty in Murder of Trayvon Martin*, MIAMI HERALD (July 13, 2013), <http://www.miamiherald.com/news/state/florida/trayvon-martin/article1953237.html> [<http://perma.cc/YSG4-NFEX>].

Rather, it involved a series of police killings, which gained national attention. While the ages of the victims and circumstances of the confrontations with police were varied, each situation involved an unarmed, typically young, black male being killed by police officers, few of whom have been criminally indicted for the deaths. As the country was still processing the polarizing decision in the Zimmerman trial,<sup>5</sup> peace officers in Ferguson, Missouri,<sup>6</sup> Staten Island, New York,<sup>7</sup> and Cleveland, Ohio,<sup>8</sup> respectively, reignited a maelstrom by killing black males under conditions that drew skepticism and ire.<sup>9</sup> In response to events such as these, a social

5. Polls indicate that Americans hold racially disparate beliefs about the outcome in the Zimmerman trial. The following Washington Post-ABC News poll data with regard to the Zimmerman verdict are illustrative:

Among African Americans, 86 percent say they disapprove of the verdict—with almost all of them saying they strongly disapprove—and 87 percent saying the shooting was unjustified. . . . In contrast, 51 percent of whites say they approve of the verdict while just 31 percent disapprove. There is also a partisan overlay to the reaction among whites: 70 percent of white Republicans but only 30 percent of white Democrats approve of the verdict. Among all whites, one-third say the shooting was unjustified, one-third say it was justified and the other third say they didn't know enough to have an opinion.

Jon Cohen & Dan Balz, *Race Shapes Zimmerman Verdict Reaction*, WASH. POST (July 22, 2013), [http://www.washingtonpost.com/politics/race-shapes-zimmerman-verdict-reaction/2013/07/22/3569662c-f2fc-11e2-8505-bf6f231e77b4\\_story.html](http://www.washingtonpost.com/politics/race-shapes-zimmerman-verdict-reaction/2013/07/22/3569662c-f2fc-11e2-8505-bf6f231e77b4_story.html) [<http://perma.cc/BC98-BL8P>].

6. Michael Brown, Jr., was shot and killed during a confrontation with Ferguson, Missouri, police officer Darren Wilson in August 2014. In November 2014, a grand jury empaneled to review the shooting decided to not to indict Officer Wilson or any others for Brown's death. *See* Tierney Sneed, *Darren Wilson Not Indicted in Michael Brown's Death*, U.S. NEWS (Nov. 24, 2014, 9:57 P.M.), <http://www.usnews.com/news/articles/2014/11/24/michael-brown-shooter-darren-wilson-not-indicted-by-grand-jury> [<http://perma.cc/W537-JBFE>].

7. Eric Garner was killed by a chokehold administered by Staten Island, New York, officers. As the officers choked him, Garner repeatedly complained, "I can't breathe." *See* Joseph Goldstein & Nat Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>. Four months later, in a shooting by police that received much less attention and was described as "accidental," another unarmed black man, Akai Gurley, was killed by police in Brooklyn, New York. *See* Michael Wilson, *Officer's Errant Shot Kills Unarmed Brooklyn Man*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/nyregion/new-york-police-officer-fatally-shoots-brooklyn-man.html>.

8. The facts of this shooting are perhaps the most bizarre. Twelve-year-old Tamir Rice was killed in Cleveland, Ohio, after he was accurately reported to 911 operators as a "juvenile" possessing a gun that was "probably" fake. Laura Ly & Jason Hanna, *Cleveland Police's Fatal Shooting of Tamir Rice Ruled a Homicide*, CNN (Dec. 12, 2014, 8:55 PM), <http://www.cnn.com/2014/12/12/justice/cleveland-tamir-rice> [<http://perma.cc/BF2U-PGYG>] (describing that the homicide ruling only confers determination that Rice was killed by a person, but not that it was a crime). But for his very young age, the failure of the 911 operator to communicate critical facts to the police and Tamir's large size—reported as 195 pounds—Rice's death could arguably have resulted from a reasonable mistake. The question remains, however: Were he not black, would the police response have been different?

9. Regrettably, during the course of the editing of this Foreword, two additional such killings of young black men at the hands of police took place in North Charleston, South Carolina and Baltimore, Maryland. One significant difference in these cases is that the government indicted the responsible officers. *See* Dana Ford, *South Carolina Ex-Police Officer Indicted for Walter Scott Killing*, CNN (June 8, 2015), <http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott> [<http://perma.cc/B99K-D6GA>] (reporting North Charleston Officer Michael Slager was indicted for the April 2015 killing of Walter Scott during traffic stop, after a bystander's video emerged of the officer shooting

movement arose, challenging the perceived injustice surrounding these unnecessary deaths and proclaiming the societal worth of those who were killed. The campaign adopted the tagline “Black Lives Matter.”<sup>10</sup> The message of the phrase is obvious: only in a society where Blacks<sup>11</sup> are considered to be of low social value could their deaths under such circumstances routinely result in neither criminal prosecution nor civil sanction.<sup>12</sup> Moreover, not until society sufficiently values the lives of such men

---

Scott, an unarmed black man, as he attempted to run away); Alan Blinder & Richard Pérez-Peña, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html> (reporting that the officers were indicted on various charges after twenty-five-year-old Freddie Gray died from complications of a spinal cord injury which occurred while he was being transported in police custody); Ian Duncan, *6 Trials Loom in Freddie Gray Case*, L.A. TIMES, Sept. 6, 2015, at A14 (stating that the judge rejected the defense’s motions to dismiss the charges for the officers outright). Additionally, the death of Sandra Bland, an African-American woman who died in police custody in Texas, after being arrested for failing to signal prior to a lane change, has drawn community skepticism. Abby Oppenheimer and Abby Phillip, *I Will Light You up!: Texas Officer Threatened Sandra Bland with Taser During Traffic Stop*, WASH. POST. (July 22, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says/> [<http://perma.cc/3HCS-VW9U>] (explaining that Bland’s death has been initially classified as a suicide, although it is also being investigated as a homicide).

10. For information on the genesis of one representation of the movement and its demands, see BLACK LIVES MATTER, <http://blacklivesmatter.com> [<http://perma.cc/LRN9-L7LT>] (last visited Oct. 18, 2015), and Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), <http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/> [<http://perma.cc/4HND-KGAF>], for an interview with Alicia Garza, who is credited with initiating the use of the phrase. Garza credits two other female activists, Patrisse Cullors and Opal Tometi, as cofounders of the movement. Guynn, *supra*.

11. Black is capitalized here and throughout the article when used as a noun to refer to the racial/cultural group to be consistent with the capitalization of similarly used words describing other groups, such as Latino and Asian. On this point, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). A similar approach to capitalization will be taken when white is used as noun.

12. The Civil Rights Division of the Department of Justice has an ongoing investigation into George Zimmerman to determine if he should be prosecuted for violating Trayvon Martin’s civil rights. See Sari Horwitz, *George Zimmerman Not Expected to Face Civil Rights Charges in Trayvon Martin Death*, WASH. POST (Oct. 1, 2014), [http://www.washingtonpost.com/world/national-security/george-zimmerman-not-expected-to-face-civil-rights-charges-in-trayvon-martin-death/2014/10/01/4cd2ebd2-498e-11e4-a046-120a8a855cca\\_story.html](http://www.washingtonpost.com/world/national-security/george-zimmerman-not-expected-to-face-civil-rights-charges-in-trayvon-martin-death/2014/10/01/4cd2ebd2-498e-11e4-a046-120a8a855cca_story.html) [<https://perma.cc/KJU3-KCPP>]. Under Florida’s “Stand Your Ground” law, it is unlikely that Trayvon Martin’s parents can sue Zimmerman civilly. See FLA. STAT. ANN. § 776.032 (West 2010 & Supp. 2015) (“A person who uses or threatens to use force as permitted in § 776.012, § 776.013, or § 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened . . .”). The U.S. Department of Justice has completed an investigation into the practices of the Ferguson Police Department. Department of Justice officials have announced that Officer Wilson will not be subjected to federal prosecution for killing Michael Brown, Jr., but the investigation has uncovered widespread racial bias in the practices of the Ferguson Police Department. See Kevin Johnson & Yamiche Alcindor, *DOJ: Wilson Won’t Be Charged in Ferguson Fatal Shooting*, USA TODAY (Mar. 4, 2015, 10:06 PM), <http://www.usatoday.com/story/news/nation/2015/03/04/justice-ferguson-inquiry/24365713> [<http://perma.cc/84HU-ANAJ>]. The Department of Justice investigation is available in its entirety at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police)

and women, and all others who are viewed as socially marginal, will eradicating bias-influenced policing and criminal adjudication become a political priority.

Given this country's history of activist groups organizing around antilynching campaigns, the impetus behind the "Black Lives Matter" movement is not new.<sup>13</sup> The continuing necessity for such a campaign, however, is disheartening and implicates a question black abolitionist Sojourner Truth long ago posed to a group of women's rights activists. At an Akron, Ohio conference, where the virtues of white women were extolled but the plight of black women was being ignored, she queried in an extemporaneous speech: "[A]in't I a woman?"<sup>14</sup> The "Black Lives Matter" movement and campaign similarly questions what is so different about the members of certain disadvantaged groups that justice should not be available to

---

\_department\_report.pdf [http://perma.cc/G45M-YDGQ]. In the wake of the Department of Justice's announcement regarding its investigation, the parents of Michael Brown have announced their intent to sue Wilson civilly. Tamir Rice's death is currently being investigated, but his parents have already filed a civil suit against the responsible officers. See Ly & Hanna, *supra* note 8. For Eric Garner, a grand jury decided not to indict the responsible officers. See J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1. Two families settled their cases. Eric Garner's family sued New York City for \$75 million and settled the case for \$5.9 million. See J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html> (reporting that Baltimore settled Freddie Gray's claims for \$6.4 million). Freddie Gray's family has also settled. See Keith L. Alexander, *Baltimore Reaches \$6.4 Million Settlement with Freddie Gray's Family*, WASH. POST. (Sept. 8, 2015), [https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a\\_story.html](https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a_story.html) [https://perma.cc/3P4B-CC2X].

13. See, e.g., JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY 6–11 (2004); Paula J. Giddings, *It's Time for a 21st-Century Anti-Lynching Movement*, NATION (Aug. 27, 2014), <http://www.thenation.com/article/181403/its-time-21st-century-anti-lynching-movement> [http://perma.cc/XJ2R-NAVY].

14. The following is a particularly relevant portion of that famous speech:

That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?

Sojourner Truth, Address at the Akron, Ohio, Women's Convention: Ain't I A Woman? (May 29, 1851), <http://legacy.fordham.edu/halsall/mod/sojtruth-woman.asp> [http://perma.cc/79YS-5J27]. A more subtle point that needs to be acknowledged about Sojourner Truth's message is that while "women" referred to white women, "Blacks" typically referred to black men. This point has been borne out in numerous contemporary contexts. See, e.g., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1982) (making the point within Women's Studies); Phillip Atiba Goff et al., "Ain't I A Woman?": Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 SEX ROLES 392 (2008) (exploring negative interactive effects of race and gender groups for black women); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that feminist legal theory invests in essentialism when white women's experiences are treated as capable of standing in for the experiences of all women).

them. Aren't black lives as worthy of protection from indiscriminate state violence as anyone else's life? To paraphrase Sojourner's question, "Aren't we people?"<sup>15</sup> The appropriateness of posing such a question, however, has become more complicated, as varying constituencies have raised concerns with the potential alienating impact of the "Black Lives Matter" movement.<sup>16</sup>

The tensions arising out of the race-specific nature of the social movement will be addressed further below.<sup>17</sup> Here, however, it is important to acknowledge that race does matter when discussing crime and punishment. The killings noted above, and the many commonplace disadvantages and indignities that shape the experiences of black, brown, and poor people within the criminal justice system, suggest that members of certain marginalized groups are not "people," at least not ones for whom justice is delivered in a truly "colorblind" manner.<sup>18</sup> Much of the work of criminologists, legal scholars, and sociolegal researchers has critically assessed myriad aspects of a criminal justice system that has historically sanctioned

---

15. As a substitute for the word "we," any number of words reflecting subordinated group identities, such as, "Blacks," "Latino/as," "the poor," "immigrants," could be used.

16. There have been recent complaints, for example, from republican presidential candidates that the #BlackLivesMatter phrase and movement are racist. See Editorial Board, Editorial, *The Truth of 'Black Lives Matter'*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html>. Other organizations have sought to decenter the movement's focus on black lives or point out the harm of such an approach. See, e.g., Edgar Waters, "Cops' Lives Matter," *Says Sheriff After Houston Killing*, TEX. TRIBUNE (Aug. 29, 2015), <https://www.texastribune.org/2015/08/29/texas-leaders-weigh-deputys-death/> [<https://perma.cc/56K2-QJAL>] (reporting that in the wake of the killing of a Harris County, Texas, deputy, Sheriff Ron Rickman stated that "Cops Lives Matter" to ostensibly address the antipolice rhetoric some associate with #BlackLivesMatter and others who have protested racialized police violence); David Weigel, *Glenn Beck Got 20,000 People to Turn out for an 'All Lives Matter' Rally*, WASH. POST (Aug. 31, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/08/31/glenn-beck-got-20000-people-to-turn-out-for-an-all-lives-matter-rally> [<http://perma.cc/H5DT-CEUL>] (discussing the attempt to transform "All Lives Matter" from a retort to #BlackLivesMatter into a rallying cry for religious conservatives). The dispute has not been unidirectional. #BlackLivesMatter supporters, for example, have pushed back against the "All Lives Matter" message. See Jim Brunner, *Black Lives Matter Rally Shuts down Sanders; Later Rally Draws 15,000*, SEATTLE TIMES (Aug. 8, 2015, 3:22 PM), <http://www.seattletimes.com/seattle-news/politics/black-lives-matter-protesters-shut-down-bernie-sanders-rally/> [<http://perma.cc/45VD-Z7XW>] (updated Aug. 11, 2015, 9:45 AM) (describing that protesters disrupted democratic presidential candidate Bernie Sanders' campaign events due to his claimed failure to sufficiently support the goals of the black-oriented movement); Alan Rappaport, *Hillary Clinton's 'All Lives Matter' Remark Stirs Backlash*, N.Y. TIMES (June 24, 2015, 11:27 AM), <http://www.nytimes.com/politics/first-draft/2015/06/24/hillary-clintons-all-lives-matter-remark-stirs-backlash/>.

17. See *infra* notes 91–97 and accompanying text.

18. "Colorblind" here is used to reference a belief that our government institutions operate without "seeing race." While this attachment to race neutrality is a popular political perspective, I side with those who believe that colorblind and/or post-racial claims remain largely aspirational in this country. See, e.g., RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW (2013); Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); see also OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 3–4 (2014) (finding that race is such a powerful social construction that race and operative stereotypes are communicated to blind individuals, who speak in terms of "seeing" race).

racialized violence.<sup>19</sup> At one time, disparate treatment was achieved through societal practices and explicit policies designed to assert control over the socially diminished<sup>20</sup>—a category in which young, urban brown and black men were considered to be the most dangerous and least favored.<sup>21</sup> Although society has moved toward a criminal justice system that is premised upon the tenets of formal equality, significant disparities have remained.<sup>22</sup> Inordinately large amounts of data exist from multiple sources confirming that, from policing, to charging, to convictions, to punishment, it is evident that identity still matters.<sup>23</sup> Data such as

19. See, e.g., Nick Petersen & Geoff Ward, *The Transmission of Historical Racial Violence: Lynching, Civil Rights-Era Terror, and Contemporary Interracial Homicide*, 5 RACE & JUST. 114 (2015).

20. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2012) (advancing the concept that disproportional overcriminalization of minorities in the United States has created a “racial caste” system and arguing that this disproportionate overrepresentation in the criminal justice system, today, continues the system of social control over Blacks that was once overtly maintained through slavery and Jim Crow laws); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 32–33 (2011) (noting that changes over time that have resulted in a rise in centralization and demise of local control are responsible for the significant discrimination that plagues the United States criminal justice system); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 2–3 (2011) (describing how race has been expressly used as a political wedge issue).

21. See generally VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011). Similar claims have been made with regard to the treatment of women of color in the criminal justice system. See, e.g., BETH E. RITCHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941 (2006); Jose L. Morin, *Latinas/os and U.S. Prisons: Trends and Challenges*, 6 LATINO STUD. 11–34 (2008); Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012).

22. See, e.g., Barnes et al., *supra* note 18, at 991–92. For other sources addressing racialized differences, see *supra* notes 20–21, and *infra* note 40 and accompanying text. One aspect of the system that may explain how race bias is captured even without intentional bias is the significant amount of discretion given to prosecutors over whom to punish and for how long. See ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (exposing how prosecutorial discretion contributes to unequal justice).

23. Disproportionate outcomes by race in crime and punishment have become a truism in this country. One can, however, see large amounts of data amassed at several key sites. For example, the Department of Justice’s Bureau of Statistics maintains data on incarceration broken down by crime, state and federal designation, race, and gender. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 247282, PRISONERS IN 2013 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<http://perma.cc/P42B-GL6V>]. Detailed information on the disparate effect of criminal justice practices on communities of color can be found in materials produced by the organizations such as the Center for American Progress and The Sentencing Project. The Center for American Progress compiles data on a myriad of topics, such as the overrepresentation of minorities—especially women of color—in the criminal justice system, racialized police practices, differential treatment of juveniles by race, and how data on race and crime interact with important opportunities in other areas of social life, such as education, voting, and employment. Representative data can be found at its website. See Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation’s Criminal-Justice System*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states> [<https://perma.cc/EH38-ZVRJ>].

The Sentencing Project maintains over 500 resources for information on race and crime. For an

these are too often ignored as a legal matter because they are presumed to arise from other-than-intentional governmental discrimination.<sup>24</sup> Hence, the overincarceration of those at the margins goes largely unchallenged because in our ostensibly equal society, we have discrimination without discriminators.<sup>25</sup> Disparate racial outcomes are not interrogated, but instead are understood as natural or commonplace.<sup>26</sup> As a result, the first “to see” race is labeled the racist.<sup>27</sup>

The identities and social statuses of the victims and the ways in which their lives and, at times, deaths have been treated within the criminal justice system clearly implicate the overarching theme of the conference. Elements of these incidents are impliedly and explicitly connected to topics addressed within the papers constituting this symposium. Importantly, they at once highlight the continuing significance of identity, principally race, as a means to disadvantage certain minority groups. Identities, however, represent more than affinity groups. They are a socially constructed means for “othering” folks.<sup>28</sup> Additionally, inhabiting a minority

---

example particularly relevant to the claims within this Foreword, see generally THE SENTENCING PROJECT, CRIMINAL JUSTICE PRIMER: POLICY PRIORITIES FOR THE 111TH CONGRESS (2009) (designed, in part, to educate Congress on the racialized impact of crime and punishment). This publication and most of The Sentencing Project’s other research is maintained on its website, which includes the following on its home page:

More than 60% of the people in prison are now racial and ethnic minorities. For Black males in their thirties, 1 in every 10 is in prison or jail on any given day. These trends have been intensified by the disproportionate impact of the ‘war on drugs,’ in which two-thirds of all persons in prison for drug offenses are people of color.

*Racial Disparity*, SENT’G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> [<http://perma.cc/WFQ3-DB57>].

24. As the Supreme Court’s opinion in *McCleskey v. Kemp* famously surmised, a correlation between race and negative consequences within the criminal justice system is not proof of causation. In order to assert an actionable claim of discrimination under the Constitution, one must prove that discrimination was the object of the government program. *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987) (assessing racially disproportionate impact of the administration of the Georgia death penalty). This case built upon the approach to equal protection established in two earlier cases. *See* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (stating that the Equal Protection Clause is violated where some government action is taken “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

25. *See generally* EDUARDO BONILLA SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 93 CALIF. L. REV. 1023, 1028 (2010).

26. *See, e.g.*, COATES, *supra* note 1; IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 109 (2003) (describing the ways that racism is adopted as a “common sense” part of our societal lexicon).

27. *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 134–35 (2014) (arguing that rather than using explicit references to race, conservatives now use “coded racial appeals”).

28. “Othering,” a phrase utilized within postcolonial and critical race discourses, refers to a process whereby the social construction of identity for outgroups is achieved through alienation, exploitation, and marginalization. *See, e.g.*, FALGUNI A. SHETH, TOWARD A POLITICAL PHILOSOPHY OF RACE 7–8 (2009) (comparing the broader concept of “othering” from postcolonial/poststructural discourses to racialization from race discourses); Jessica T. Decuir & Adrienne Dixson, “*So When It Comes out, They Aren’t That Surprised that It Is There*”: *Using Critical Race Theory as a Tool of Analysis of Race*



identity that may be marked by multiple disadvantaging categories, with regard to race, gender, sexuality, class, etc., results in there being overlapping and reinforcing bases upon which to assign winners and losers in the worlds of crime and punishment.<sup>29</sup> Unpacking these separate but connected bases upon which disadvantage is created within the criminal justice system is the work of not only this group of scholars but also any who care about losing a generation of people of color to overincarceration.<sup>30</sup> Below, common and unique themes across this collection are explored. One consistent theme is that hidden forms of discrimination contribute to racialized consequences in various locations within the criminal justice system. Two of these articles take on the task of addressing, head-on, unconscious race considerations in the practices of state actors.<sup>31</sup> Two pieces, by contrast, demonstrate how ostensibly neutral state institutional policies actually inscribe “raced”<sup>32</sup> norms through rule or policy choices,<sup>33</sup> and two others demonstrate how individual forms of hidden bias are given effect through state rules

---

*and Racism in Education*, 33 EDUC. RES. 26–27 (2004) (describing race and racism as producing one type of “othering” that can be countermanded through critical race strategies).

29. People for whom there are multiple overlapping and reinforcing bases to discriminate may be without remedy unless their jurisdictions are open to intersectional analyses of subordination. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI LEGAL F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242, 1243–44 (1991).

30. See López, *supra* note 25, at 1028–30. As the following passage details, this concern is particularly stark for African-American males:

By the close of 2012, over 2.2 million men and women were incarcerated in local, state, and federal correctional facilities and close to 4.8 million people were under some form of criminal justice supervision. The risks of incarceration and criminal justice contact, however, are highly stratified by race and social class and in ways that lead to critical omissions and elisions that undermine assessments of black progress. While estimates suggest that 1 in 100 adults was incarcerated in 2008, 10% of African-American men age 20–34 currently reside in prison or jail. Among young African-American men with less than a high school diploma, arguably those most in need of the resources and opportunities afforded by civil rights legislation, more than one in three, or 35%, were incarcerated on any given day in 2012.

Becky Pettit & Bryan Sykes, *Civil Rights Legislation and Legalized Exclusion: Mass Incarceration and the Masking of Inequality*, 30 SOC. F. 589, 591 (2015) (citation omitted).

31. See Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759 (2015); Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735 (2015).

32. On race as a verb, see John A. Powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 104 (1997) (“[R]ace operates as a verb before it assumes significance as a noun. Before someone can be said to possess a racial characteristic . . . there must first be a process of ‘racing’ in which the attributes that differentiate racial classifications are designated and signified.”).

33. See Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the “War on Drugs,”* 5 U.C. IRVINE L. REV. 783 (2015); Bryan Sykes et al., *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813 (2015). For an excellent new analysis of how the criminal justice system, which is regarded as race neutral, actually constitutes and inscribes race, see Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through Colorblind Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406 (2015).

that ignore how race affects individual decision-making.<sup>34</sup> While each article emphasizes a different element of the link between identity, crime, and justice, using both empirical and critical means, these projects ultimately reflect the central point of this Foreword: it is systemic outcomes that demonstrate which lives truly matter, and to ignore this is to abandon any real hope for justice.

I. (STILL) RECKONING WITH UNCONSCIOUS BIAS FROM START TO THE FINISH  
IN CRIMINAL JUSTICE PROCESSES

In 1987, Professor Charles Lawrence published *The Ego, the Id and Equal Protection: Reckoning with Unconscious Bias* in the *Stanford Law Review*. In this foundational article that is required reading for any persons seeking an introduction to the Critical Race Theory (CRT) canon, Charles Lawrence—using psychoanalytic and cognitive social frames—articulated the dangers of a legal system too wed to measuring inequality solely through proof of intentional discrimination.<sup>35</sup> Since the publishing of that article, social scientists and legal scholars have continued to define the extent to which unconscious bias affects legal processes.<sup>36</sup> At myriad touch-points from the beginning to the end of the journey between crime and punishment (and beyond), these symposium articles either address this phenomenon or consequences associated with it.<sup>37</sup>

---

34. See Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015); Jonathan Markovitz, *“A Spectacle of Slavery Unwilling to Die”: Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873 (2015).

35. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319, 322 (1987). Professor Lawrence has more recently addressed his earlier thoughts on unconscious bias. See Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931 (2008).

36. See, e.g., IMPLICIT RACIAL BIAS: ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012); Irene V. Blair et al., *Implicit Attitudes*, in 1 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 665 (M. Mikulincer et al. eds., 2015); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (noting that antidiscrimination doctrines wrongly assume that bias must be tied to animus). There are many studies of unconscious bias in the criminal justice system. Stanford Law Professor and MacArthur “Genius” Grant winner, Jennifer Eberhardt has been responsible for a number of them. See, e.g., R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006); Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); see also Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004) (finding that people were unaware of how they were affected by the Afrocentric features of defendants and were unable to avoid feature-based stereotyping even when explicitly directed to do so); Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1320 (2002) (examining race-based responses to potentially threatening people and finding a “shooter’s bias” against presumed black perpetrators, who are shot quickly and more frequently); Justin D. Levinson et al., *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, 513–22, 548–52 (2014) (exploring how implicit bias may affect jury decision-making in capital cases).

37. It should be acknowledged that within this Foreword references to unconscious bias are

A. State Actors and “Classic” Unconscious Bias

In *Policing Race and Gender*, Professor Eric Miller assesses the effects of implicit bias at a very early moment within the criminal justice system: initial police (*Terry*) stops.<sup>38</sup> Professor Miller’s overarching project is to demonstrate not only how *Terry* stops rely on an officer’s implicit bias,<sup>39</sup> but what the stops communicate to drivers about social status. In particular, he concerns himself with persons for whom their “suspiciousness” is triggered by stereotypes related to their race and gender identities. His analysis in this area is consistent with a recent, excellent study of police auto stops, where researchers found that the reasons for stops and how drivers are treated in stops communicate a diminished social status based upon race and class.<sup>40</sup> Similarly, with regard to *Terry* stops, Professor Miller surmises:

The first problem is the set of implicit biases that affect all of us when examining the actions of others. The police are not immune to such biases. And these biases have targeting and treatment impacts. The second problem is the authoritarian model of policing, dominated by a need to exert command authority over the public, which is often driven by certain ideas about masculinity. Such biases particularly affect the way officers treat the public during the encounter. Each of these features increases police scrutiny of the poor, minorities, and sometimes women, at the same time as decreasing police tolerance for challenges from these communities.<sup>41</sup>

Professor Miller’s contentions with regard to hyperscrutiny of—and intolerance for challenges from—people of color identify another consequence of unconscious bias within *Terry* stops: policing practices teach members of certain groups that they have no access to the privileges of full citizenship.<sup>42</sup>

Professor Andrea Armstrong takes on a somewhat less familiar context in which to study the unconscious biases of government workers: prison disciplinary proceedings. In *Race, Prison Discipline, and the Law*, she attempts to identify how

---

largely rooted to its explication within social cognition theory, which only partially captures how the operation of the phenomenon has been theorized. See Mona Lynch, *Afterword: Criminal Justice and the Problem of Institutionalized Bias—Comments on Theory and Remedial Action*, 5 U.C. IRVINE L. REV. 935, 939–42 (2015) (discussing the difference between sociological and psychological conceptualizations of implicit bias).

38. Miller, *supra* note 31, at 738–39. “*Terry* stop” refers to police stops based upon reasonable suspicion that were approved in *Terry v. Ohio*, 392 U.S. 1871, 1884–85 (1968).

39. For an example of how implicit bias is operationalized in *Terry* stops, see L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012) (assessing forms of race bias in *Terry* stops through hit rates—the percentage of times police successfully discover evidence of a crime for persons they stop).

40. CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 135–36 (2014). Not only does the study find that Blacks are treated differently with regard to reasons for stops, they are given much less leeway to question officers. *Id.* at 76.

41. Miller, *supra* note 31, at 753.

42. This was also a key finding in the aforementioned police stop study. See EPP ET AL., *supra* note 40.

implicit bias affects these processes.<sup>43</sup> According to Professor Armstrong, her goal was to connect the dots between “the statistical evidence on the significance of race to . . . prison disciplinary decisions and . . . the legal validation of these racial norms [achieved] through judicial deference.”<sup>44</sup> Marrying an older study that found racialized applications of rules within disciplinary proceedings with more recent evidence of racial bias from social cognition instruments such as implicit association tests, Professor Armstrong argues that race—which is, according to case law, not to be considered in internal prison proceedings—becomes a present but unacknowledged part of prison disciplinary rules.<sup>45</sup> This surreptitious consideration of identity is amplified by rules that are quite vague and provide for significant judicial deference being paid to the decisions of correctional officers.<sup>46</sup> To the extent internal disciplinary processes potentially mete out stiffer punishments based on race, these practices undermine legitimacy for minority inmates.<sup>47</sup>

Taken together, these articles demonstrate how government actors at various locations in the chain between initial police contact and confinement—where social identities of suspects and prisoners should not matter—have their attitudes and behaviors affected by stereotypes related to identity. While these pieces identify a more commonplace or “classic” form of implicit bias, other articles within the symposium demonstrate that government policies and personal citizen conduct can also taint the ostensibly neutral criminal justice system. These less commonly analyzed areas of concern are next considered.

#### B. *Hidden Bias Revealed in Structural and Institutional Choices*

Not all forms of so-called unintentional prejudice are achieved as a direct result of the cognitive processes of individual state actors. Some racialized consequences result from ostensibly race-neutral policy choices within state institutions. Professor Silva’s article, *Collateral Damage: A Public Housing Consequence of the “War on Drugs,”* addresses a racialized disparity of this type that occurs at the end of one’s sentence.<sup>48</sup> Specifically, she focuses on the collateral consequences of incarceration by exploring exclusionary federal housing policies. Her goal is, “not only to supplement

---

43. Armstrong, *supra* note 31, at 762–73.

44. *Id.* at 761.

45. *See id.* at 768–70.

46. *See id.* at 770–73.

47. Tom Tyler has conducted many studies that confirm that the perception of an unfair process undermines the legitimacy of a system. *See, e.g.,* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003). More recent studies have found a more particularized relationship between race and perceptions of fairness with regard to the criminal justice system. *See* EPP ET AL., *supra* note 40, at 76 (finding that disparate treatment based on race has caused black drivers to disproportionately question the legitimacy of auto stops); MARK PEEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 68–69 (2010) (arguing that Blacks experience the criminal justice system as racialized and hence patently unfair).

48. *See generally* Silva, *supra* note 33.

the collateral consequences literature by identifying and examining additional issues in the administration of federal housing policy but also to draw attention to the inequities inherent in the current system.”<sup>49</sup> She does so by challenging how federal law gives “an unwarranted amount of discretion to PHAs<sup>50</sup> in assessing cause for exclusion from the program and also fails to provide sufficient statutory and regulatory guidance in the enforcement of PHA lease agreements.”<sup>51</sup> This work is helpful because it is illustrative of how a choice to decentralize standards for the use of federal funds can result in disparate consequences for the marginalized across states.<sup>52</sup> Additionally, such housing-exclusion policies, due to the manner in which outcomes are so closely tied to drug convictions, signal a racialized consequence from the outset. The problem is the drug laws, which have been deeply racialized as a function of the U.S. government’s war on drugs.<sup>53</sup> Though lawmakers may argue that amendments to drug laws were intended to increase crime control in urban localities,<sup>54</sup> the result of the policies has been the hyperincarceration of black and brown men.<sup>55</sup> This result occurred primarily due to a shift that transformed what had been state and local drug offenses into federal crimes.<sup>56</sup> As a result of the federalization of even low-level drug crimes, federal sentencing standards—which were worded in a race-neutral fashion—created significant racially disparate consequences. For example, though a recent U.S. Supreme Court decision allowed some room for deviation from mandatory minimums,<sup>57</sup> there has been a severe punishment difference between the powder cocaine favored by Whites and crack cocaine that was disproportionately sold and used by Blacks.<sup>58</sup> The punishment

---

49. *Id.* at 785.

50. Editor’s note: PHA is the acronym for a public housing authority.

51. Silva, *supra* note 33, at 785.

52. This strategy of providing block grants to states for discretionary dispersal also created unequal state-by-state rate rules in the context of Aid to Families with Dependent Children (i.e., welfare benefits) during the Clinton Administration. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 661 (2009).

53. See, e.g., MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (2009), [http://www.sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf) [<http://perma.cc/V4DK-L524>]; Doris M. Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41 (2011).

54. See, e.g., Provine, *supra* note 53, at 45–47 (highlighting the widespread fear that dangerous drugs would spread beyond urban areas to “white America” as a powerful motivator for the passage of increasingly harsh laws geared toward urban areas).

55. See, e.g., ALEXANDER, *supra* note 20, at 5–7; Provine, *supra* note 53, at 41–46; Michael Tonry & Michael Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 23–29 (2008).

56. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 43–46 (2009) (noting the connection between the war on drugs and mass incarceration); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

57. *Kimbrough v. United States*, 552 U.S. 85 (2007) (holding that federal district judges have discretion to impose sentences outside the range dictated by the Federal Sentencing Guidelines for cases involving crack cocaine).

58. See Provine, *supra* note 53, at 45–46. Initially, a five-year mandatory minimum sentence applied to convictions for five grams of crack and 500 grams of powder cocaine. Recent changes to the

disparity was so great and racialized that in one state a court found there was no rational basis for such a difference.<sup>59</sup> Finally, the policing of drug crimes as a practice has captured unspoken connections between identity and space.<sup>60</sup>

Based on how disparate but neutral sentencing policies have interacted with policing practices, large numbers of Latino and African American men have felony drug convictions. Black women and Latinas have been similarly affected.<sup>61</sup> People of color, then, disproportionately suffer from collateral consequences of drug convictions because federal law allows state agencies (PHAs) to deny or terminate housing for persons who have engaged in drug-related criminal activity. Professor Silva points out a number of issues with PHA processes. For example, they employ nonuniform standards for the burden of proof applied to assessing the quality of evidence, the policies may pertain to drug activities on or off housing premises, and policies may cover minor drug offenses as well as alcohol offenses.<sup>62</sup> Taken together, the components of this critique illuminate another significant issue that perpetuates disadvantage within the criminal justice system: arbitrariness.

In *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, Professor Sykes and his co-authors also explore a juncture within the criminal justice system where identity implications are obscured by institutional policies. The focus of this piece, however, is to reveal not only social justice concerns but also how such policies result in additional costs to municipalities.<sup>63</sup> This article looks at rules for the provision of counsel to the poor, which are criticized due to their inefficiency. Incarceration is a costly enterprise. The article demonstrates the cost savings that would accrue to jurisdictions such as Cook County (Chicago), if they were to provide lawyers within twenty-four hours of arrestees being taken into custody.<sup>64</sup> This savings largely is accomplished through a reduction in the time the arrestee would spend in jail prior to and after trial.<sup>65</sup> Of

---

Controlled Substances Act have somewhat narrowed this gap to twenty-eight grams for crack and 500 powder, effectively reducing the difference from 100 to one to approximately eighteen to one. *See* 21 U.S.C. § 841 (2012); Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010).

59. *See* State v. Russell, 477 N.W.2d 886, 889–91 (Minn. 1991). This finding is significant given that the rational basis standard is so liberal that it almost always results in laws being upheld. *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1077–78 (2011).

60. *See* KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE: REPORT FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE DEFENDER ASSOCIATION (2008), [https://www.aclu.org/sites/default/files/field\\_document/race20and20drug20law20enforcement20in20seattle\\_20081.pdf](https://www.aclu.org/sites/default/files/field_document/race20and20drug20law20enforcement20in20seattle_20081.pdf) [<https://perma.cc/59MA-HB7A>] (revealing that while the greatest amount of drug use took place in the predominately white Seattle suburbs, policing for drug offenses took place in inner-city, predominately black neighborhoods).

61. *See, e.g.*, Bobbi Murray, *Orphaned by the Drug War*, in *THE W EFFECT: BUSH'S WAR ON WOMEN* 21 (Laura Flanders ed., 2004).

62. *See* Silva, *supra* note 33, at 798–99, 803–04.

63. *See* Sykes, et al., *supra* note 33.

64. *Id.* at 815.

65. *Id.* at 817.

course the timely provision of counsel to the poor would also ensure that poor defendants would be less likely to engage in incriminating and unwise conduct.<sup>66</sup>

To the extent jurisdictions deny the timely provision of counsel, these decisions most affect those who are socioeconomically disadvantaged. As people of color and immigrants are overrepresented among the poor, it makes sense to conclude that the counsel-provision policies the researchers analyze will be acutely felt by minorities. Government actions creating a disparate impact on minorities, where there is no evidence of discriminatory intent, however, do not upset constitutional equal protection.<sup>67</sup> In addition to being another example of the inadvisability of maintaining a discriminatory intent standard, this piece draws attention to critical strategies for addressing hidden bias moving forward. First, articles such as this one, which reframe disadvantage through efficiency concerns, increase the likelihood of more broad-based law reform. This is so because people who may not be interested in the social justice aspects of fighting against “unintended” racialized consequences may support cost-cutting measures.<sup>68</sup> Second, this study demonstrates that there are areas within the criminal justice system where “interest convergences” may be exploited.<sup>69</sup> In this context, there is a convergence because what is good for poor minorities is also good for everyone else.

The work of Silva and Sykes, et al. is illuminating for the way that it reveals that some prejudicing effects are created or exacerbated by institutional rule choices. While individual governmental actors may also continue to manifest unconscious bias in the ways they carry out their jobs, these articles demonstrate that parts of the uneven playing field in the criminal justice system are principally structured through the impact of the institutional rules, irrespective of the actions of state workers. Interestingly, in each of the areas presented, one has to engage in an extrapolation step in order to see the relevance of race to the particular policy.<sup>70</sup> Failing to account

---

66. *Id.*

67. See *McCleskey v. Kemp*, 481 U.S. 277, 286–87 (1987); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 258 (1979); *Washington v. Davis*, 426 U.S. 229, 240 (1976). For a discussion of the fallacy of the Supreme Court’s approach to equality in these and other constitutional discrimination cases, see Ian F. Haney López, *Equal Protection as Intentional Blindness*, in *CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA* 67, 69–79 (Anne Richardson Oakes ed., 2015).

68. There is, however, a trade-off here. People who may generally support fiscal conservatism may not do so here if there is a perception that the savings weaken crime control.

69. Derrick Bell’s well-known theory of interest convergence posits that programs and policies designed to produce gains for Blacks in society are more likely to be successful when they also include gains for Whites. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

70. For housing policies, the connection to race is through overly punitive federal drug laws. See *supra* notes 48–51 and 62. For the provision of counsel policies, the connection to race is the more ubiquitous and seamless overlap between race and poverty. See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109 (2009); Gustafson, *supra* note 52, at 662 n.89, 662–64 (noting the way that race and class overlap in the determining of sanctions within the welfare system).

for such an impact, however, would seem to involve a peculiar type of governmental myopia. While both articles do a convincing job of identifying problems and challenging unfavorable results, they do not query whether institutional forms of structural bias require a different type of remedy. Confronting how ignoring disparate impact data operates to silently endorse bias in institutional policies and practices, is a precursor conversation to discussing the bias next considered: instances where government rules or proceedings include opportunities for capturing individual citizens' prejudices.

*C. Combatting the Hidden Biases of Others: Making Identity Real for Courts*

Not all implications of identity within the criminal justice system are tied to actions of governmental actors or institutional rule choices that silently inculcate racist norms; the behaviors and attitudes of individuals within a society can also create systemic repercussions. In some cases, how identity matters is most tied to courts being spaces that tolerate the biases of involved third parties, such as witnesses and jurors.<sup>71</sup> Law professor Cynthia Lee and lawyer and political science professor Jonathan Markovitz each attempt to address a version of this phenomenon. Professor Lee's piece identifies how jurors' potential implicit bias can be undermined by explicitly addressing their racial attitudes. Within the area of voir dire, specifically, Professor Lee argues "that calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases."<sup>72</sup> In this way, Professor Lee's work is consistent with studies that have found that failing to challenge race bias where it exists results in an increase in the bias.<sup>73</sup> Professor Lee points out that, consistent with the views of Professor Albert Alschuler, asking jurors simple and close-ended questions about their potential biases is unlikely to be helpful.<sup>74</sup> She, instead, espouses "a series of open-ended questions asking jurors to reflect upon how racial bias, both explicit and implicit, might affect their ability to impartially consider the evidence, can be beneficial."<sup>75</sup> At a crucial juncture then, before any evidence is heard in a trial, race is identified as an important consideration, one that is rarely mentioned, but may be ever-present within jurors' psyches and deliberations. Although Professor Lee does not centrally make the claim, deliberately introducing questions of race and bias early in trials

---

71. See Levinson et al., *supra* note 36. This was essentially the case presented in *McCleskey v. Kemp*, where Georgia administered a death penalty program that gave effect to the unconscious biases of jurors. See *McCleskey*, 481 U.S. at 286–87.

72. Lee, *supra* note 34, at 867.

73. See, e.g., Victoria Plaut, *3 Myths Plus a Few Best Practices for Achieving Diversity*, SCI. AM. (Sept. 16, 2014), <http://www.scientificamerican.com/article/3-myths-plus-a-few-best-practices-for-achieving-diversity> [<http://perma.cc/LGA7-G85W>] (addressing studies where failing to account for the importance of race negatively impacted measures of implicit bias).

74. Lee, *supra* note 34, at 869–72.

75. *Id.*



may also serve the function of priming juries to be more sensitive to the potential effects of race throughout their deliberations.

Professor Markovitz's contribution addresses another instance where the criminal justice system is open to giving effect to personal biases. Considerations of reasonableness exist at myriad locations within the criminal justice system, including within standards for *mens rea* and affirmative defenses. Since reasonableness is most often measured by a societal objective standard, it is not instantly apparent that jurisdictions may import stereotyped meanings into reasonableness assessments. However, in both formal and informal ways, a defendant's/witness's/juror's subjective understanding—which may be influenced by identity stereotypes—can be determinative within courts.<sup>76</sup> It is for this reason that California issues a jury instruction to caution jurors against allowing antisocial biases to inform their reasonableness assessments.<sup>77</sup> Professor Markovitz's first important contribution is to reject antisocial animus, unconscious or otherwise, as consistent with claims of reasonableness.<sup>78</sup> Second, in a world where we have been hamstrung in addressing disparate impact because there is no absolute proof of governmental discriminatory intent, he moves away from applying the Equal Protection Clause as a means to achieve his goal. Rather, he makes the innovative suggestion that ferreting out bias in reasonableness assessments can be achieved through applying the language of the Thirteenth Amendment.<sup>79</sup>

For both Professors Lee and Markovitz, their proposals are strategic interventions rather than broader solutions for eliminating all forms of individual identity bias within the criminal justice system. Also, it is not clear that either of them fully embraces how difficult even these limited changes will be to achieve in a society that is obsessed with post-racialism.<sup>80</sup> Additionally, with regard to

---

76. See, e.g., *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (applying a New York state “hybrid” reasonableness standard that included subjective and objective beliefs); see also Markovitz, *supra* note 34. California employs an objective reasonableness standard, but that did not prevent a court from ruling in favor of the defendant in *People v. Berry*, 18 Cal. 3d 509, 515 (1976) (describing the California standard as objective but including Berry's subjective history with gendered conflict in deciding that he was entitled to a provocation instruction that turned on reasonableness). Even in a case that transpired after California adopted its anti-bias jury instruction, a jury deadlocked on whether an accused was reasonably provoked by receiving unwanted attention from a male classmate who dressed as a girl. See Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, at AA1 (reporting that after an initial mistrial, Brandon McInerney later plead guilty to second-degree murder for shooting classmate, Larry King).

77. That statute states:

In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.”

CAL. PENAL CODE § 1127h (Deering 2008).

78. Markovitz *supra* note 34, at 888.

79. *Id.* at 922–25.

80. See, e.g., Barnes et al., *supra* note 18, at 968, 992 (generally defining post-racialism as a societal

Professor Markovitz's proposal, the Court has been loath to expand its application of the Thirteenth Amendment, even where some contemporary problem is a true "badge or incident" of slavery.<sup>81</sup> That the world is not ready for a particular proposal, however, is not a reason to forgo advancing it. Moreover, both the Lee and Markovitz proposals serve as effective entrées into a conversation about whether greater vigilance is required in policing the way the criminal justice system can become captured by the biases of its participants.<sup>82</sup>

## II. CRIMINAL JUSTICE SYSTEM OUTCOMES AS A COMMENTARY ON WHICH LIVES MATTER

*Like cancer, racism/white supremacy is a societal illness. To people of color, who are the victims of racism/white supremacy, race is a filter through which they see the world. Whites do not look at the world through this filter of racial awareness, even though they also comprise a race.*<sup>83</sup>

The pieces in this symposium have all looked at some criminal justice process, practice, or interaction as a tool for evaluating systemic outcomes. Noting how race, gender, class, and other markers of social group membership and social status assignment matter to these outcomes was a primary goal of the conference. Based on the varied topics that have been explored in these papers, it would be nearly impossible to refute a claim that there are punitive consequences to inhabiting certain identities within the criminal justice system. It is for this reason that the incidents that lead to the organizing of "Black Lives Matter" should be understood as belonging to the broader group of phenomena the symposium was designed to interrogate. Given the recent pushback toward the movement,<sup>84</sup> including news media claims that it is a "hate group,"<sup>85</sup> it is also necessary to at least briefly address the connection between race and presumptions as to which lives matter.

Since the genesis of "Black Lives Matter" was partially sparked by police

---

belief that due to racial progress, race has lost its salience, and racism remains only as a function of aberrant, individual conduct); *see also* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2009) (describing post-racialism as a move designed to obscure the importance of race in society and noting one goal of the move is to achieve "a national consensus around the retreat from race-based remedies on the basis that the racial eras of the past have been and should be transcended").

81. Markovitz, *supra* note 34, at 918.

82. Within constitutional jurisprudence, this type of capture has been rejected by the Supreme Court in cases like *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (determining that the state was not required to enforce contracts with racial covenants), and *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967) (finding that the state was not forced to enforce a voter-initiated constitutional amendment which violated the Equal Protection Clause).

83. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 398 (footnotes omitted).

84. *See supra* note 16 and accompanying notes.

85. *See, e.g.*, Rachel Blinder, *Elisabeth Hasselbeck Suggests Black Lives Matter Movement is a Hate Group*, N.Y. DAILY NEWS (Sept. 1, 2015, 9:15 AM), <http://www.nydailynews.com/news/national/elisabeth-hasselbeck-black-lives-matter-hate-group-article-1.2344132>.

killings of unarmed men, it makes sense to focus on the use of force by police. Even without a detailed empirical study, in a world where identity did not matter to police uses of deadly force, one would expect population metrics to be somewhat representative.<sup>86</sup> Blacks, for example, make up roughly thirteen to fourteen percent of the U.S. population.<sup>87</sup> One would imagine then that they would be proportionately represented among those killed by police. The rough data, however, indicate that there are typically 400 police killings of civilians.<sup>88</sup> While the total number of black deaths at the hands of the police vary year over year, the percentage of black deaths have routinely nearly doubled,<sup>89</sup> and at times tripled,<sup>90</sup> the proportionate number of Blacks in the population. These numbers alone support a campaign of public concern, inquiry, and redress. The numbers alone, however, do not capture the visceral emotion that gave rise to the movement.

“Black Lives Matter” arises out of multiple frustrations, a few of which will be addressed here. First, if black lives really mattered in equal measure to all others, would we see such disparate outcomes without universal alarm or outrage? Second, as the quote that begins this section articulates, for many of those who are burdened by the weight of minority identity categories, color consciousness becomes a lens

---

86. Given the many other factors that may contribute to adverse group outcomes, relative population statistics should be regarded as a crude tool helpful for demonstrating relative impact. To say more would require a study assessing a greater number of demographic characteristics, employing controls, and engaging the complex literature on favorable and adverse group outcomes. On the latter point, see James P. Scanlan, *Race and Mortality Revisited*, 51 *SOCIETY* 328–46 (2014); and James P. Scanlon, *The Things the Government Doesn't Know About Racial Disparities*, HILL (Jan. 28, 2014), <http://thehill.com/blogs/congress-blog/civil-rights/196543-things-the-legislative-and-executive-branches-dont-know> [<http://perma.cc/NA5E-E53B>] (studying comparative group disadvantage and noting the anomaly “that reducing the frequency of an adverse outcome tends to increase relative differences in experiencing it”).

87. Data on the U.S. population and population growth are maintained on the U.S. Census Bureau website. Data current to 2014 indicate that Blacks or African-Americans make up 13.2 percent of the U.S. population. See *Welcome to Quick Facts Beta*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/00> [<http://perma.cc/5MA8-8GKJ>] (last visited Oct. 18, 2015).

88. The data, which are reported by local authorities to the FBI are believed to be incomplete because they only track killings deemed justified and do not include all localities. See Kevin Johnson et al., *Local Police Involved in 400 Killings per Year*, USA TODAY (Aug. 24, 2014, 9:41 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357/> [<http://perma.cc/J92F-E92H>] (indicating the investigation covered a seven-year period, ending in 2012). A more comprehensive research project being conducted by Berkeley Law Professor Frank Zimring looks at four decades of reports and has confirmed the rough accuracy of 400 deaths. Tina Susman & Maria L. La Ganga, *Police Killing, Beating of Civilians Raise Issue of Reasonable Force*, L.A. TIMES (Nov. 16, 2014), <http://www.latimes.com/nation/la-na-police-prosecution-20141116-story.html> [<http://perma.cc/8WA3-HEEG>].

89. Johnson et al., *supra* note 88 (noting that on average 96 of 400, or twenty-four percent, of police killings between 2006 and 2012 were of Blacks).

90. Franklin E. Zimring, *Killings by Police are Almost a Daily Occurrence in America*, S.F. CHRONICLE (Feb. 27, 2015), <http://www.sfchronicle.com/opinion/article/Killings-by-police-are-almost-a-daily-occurrence-6105999.php> [<http://perma.cc/C3GR-R76A>] (“The targets of police fire are overwhelmingly male, and almost 40 percent of the victims are African American—about three times the proportion of African Americans in the U.S. population.”).

or filter to make sense of one's social world.<sup>91</sup> Finally, social, cultural and historical cues inform the movement's position that disproportionately large numbers of deaths at the hands of the police reflect the low social value placed on black lives. The cues, however, are not the same for every racial or social group. Renowned Berkeley Comparative Literature Professor Judith Butler has effectively expanded on both of these points.

So what we see is that some lives matter more than others, that some lives matter so much that they need to be protected at all costs, and that other lives matter less, or not at all. And when that becomes the situation, then the lives that do not matter so much, or do not matter at all, can be killed or lost or exposed to conditions of destitution, and there is no concern, or even worse, this is regarded as the way it is supposed to be. The callous killing of Tamir Rice and the abandonment of his body on the street is an astonishing example of the police murdering someone considered disposable and fundamentally ungrievable.

When we are talking about racism and anti-black racism in the United States, we have to remember that under slavery [a] black li[fe] [was] considered only a fraction of a human life, so the prevailing way of valuing lives assumed that some lives mattered more, were more human, more worthy, more deserving of life and freedom, where freedom meant minimally the freedom to move and thrive without being subjected to coercive force.<sup>92</sup>

The dehumanization of Blacks was not only achieved through social practice; legal action and inaction were also tools of subjugation. While Professor Butler draws connections to chattel slavery, which was legal in America, Blacks who were not slaves were also not recognized as full citizens with rights to be protected.<sup>93</sup> Moreover, violence visited upon black bodies through lynchings and other forms

---

91. See Grillo & Wildman, *supra* note 83. As Michelle Alexander has noted, color consciousness need not be understood as creating racial division. See ALEXANDER, *supra* note 20, at 226 (“A commitment to color consciousness places faith in our capacity as humans to show care and concern for others, even as we are fully cognizant of race and possible racial differences.”).

92. George Yancy & Judith Butler, Opinion, *What's Wrong With 'All Lives Matter'?*, N.Y. TIMES (Jan. 12, 2015, 9:00 PM), <http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/>. In an additional explication of her former point, Professor Butler powerfully asserts:

In fact, the point is not just that black lives can be disposed of so easily: they are targeted and hunted by a police force that is becoming increasingly emboldened to wage its race war by every grand jury decision that ratifies the point of view of state violence. Justifying lethal violence in the name of self-defense is reserved for those who have a publicly recognized self to defend. But those whose lives are not considered to matter, whose lives are perceived as a threat to the life that embodies white privilege can be destroyed in the name of that life. That can only happen when a recurrent and institutionalized form of racism has become a way of seeing, entering into the presentation of visual evidence to justify hateful and unjustified and heartbreaking murder.

*Id.*

93. See *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1857).

of racialized terrorism for many years was rarely prosecuted and hence was de facto legally sanctioned.<sup>94</sup>

The legacy of the history of Blacks as victims of unchecked state-sanctioned violence, provides a context that helps to explain why a movement would need to single out the group as still as needing protection. While any reference to addressing the perceived unique needs of a particular racial group is likely to result in the alienation of some others,<sup>95</sup> “Black Lives Matter” is not a call for special treatment. It is a call for equal treatment.<sup>96</sup> In some ways, a preference for expanding to an “All Lives Matter” framework is just a call to recognize the common humanity of all people. Such a change, however, potentially ignores important elements of a racialized struggle for equality. Insisting that “All Lives Matter” decenters the racial component of the movement—a component many argue should remain front and center because to ignore the racial dimensions of a raced problem is to deny a primary explanation for why the problem exists.<sup>97</sup> Additionally, “All Lives Matter” may encourage the use of careless analogy. Yes, all people should be free from indiscriminate police violence, but not all who are subject to such violence experience it in comparable ways.<sup>98</sup> Neither of these points strike me as particularly earth shattering or threatening. Considering the real and disproportionately significant effects of police violence within black and poor communities, only those who believe that explicitly noting racial difference is equivalent to investing in racial discrimination, would ultimately fail to acknowledge the relevance of the movement’s race-specific name.

#### CONCLUSION

As a group of articles, these symposium pieces go a long way toward demonstrating how it is that the U.S. criminal justice system purports to be blind to identity, but operates in a manner where identity-group membership, especially in

94. See Peterson & Ward, *supra* note 19.

95. To be clear, #BlackLivesMatter has mostly covered the killings of black boys and men. As such, another movement, #SayHerName, was created to draw specific attention to black women and girls who have been killed by police. See Lilly Workneh, #SayHerName: Why We Should Declare that Black Women and Girls Matter, Too, HUFFINGTON POST (May 21, 2015, 7:59 PM), [http://www.huffingtonpost.com/2015/05/21/black-women-matter\\_n\\_7363064.html](http://www.huffingtonpost.com/2015/05/21/black-women-matter_n_7363064.html) [<http://perma.cc/6U8Z-XUZM>].

96. This debate over equal versus special rights has also been a flashpoint in efforts to secure protections for gays and lesbians. See, e.g., Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda,”* 1 AFR.-AM. L. & POL’Y REP. 33, 44–47 (1994).

97. See Yancy & Butler, *supra* note 92 (“When some people rejoin with ‘All Lives Matter’ they misunderstand the problem . . . It is true that all lives matter, but it is equally true that not all lives are understood to matter which is precisely why it is most important to name the lives that have not mattered . . .”).

98. On the dangers of such comparisons, even among subordinated groups, see Russell, *supra* note 96, at 71–77, for commentary on such analogies that we should be careful to “avoid false universalities and the dangers of essentialism.” For further implications on making comparisons, see also Grillo & Wildman, *supra* note 83.

certain disfavored groups, strongly tracks disparate outcomes. Unconscious bias does not provide an all-encompassing explanation for the myriad problems identified in this collection. It does however work as a type of connective tissue that interweaves across these pieces, in a manner that reveals that bias does not operate as a singular phenomenon. Governmental policies, state actors, and individual citizen-participants all contribute to a criminal justice system where difference most often equals disadvantage. As we feared when we began to plan the symposium, these articles, while timely and illuminating, have provided more explanations than solutions. Additionally, as the recent spate of police killings of black men (and women) evinces, the real-world consequences of living at the intersection of socially unpopular identity markers are more dismal than ever.

Despite the bleak current circumstances and outlook for change in the criminal justice system, there really is no choice but to soldier on.<sup>99</sup> To do other than this is to accept as equitable unfair societal arrangements that reserve the highest forms of due process and substantive equality for those lucky enough to be born into privileged identity groups. Based on the work here, I would suggest that future interventions be more varied and intersectional. While the conference presentations involved a more diverse group of topics than those covered in the symposium papers, race, and to a lesser extent gender and class considerations, are predominant within these articles. This is not surprising given the sizeable nature of the racialized disparities within the system. The race discussions, however, have also largely focused on the comparative experiences of Blacks, Whites, and, to a lesser extent, Latina/os. There are clearly additional at-risk racial and ethnic group populations.<sup>100</sup> Moreover, to truly engage with the conference theme in a robust manner, particular attention should be paid to carefully studying the enhanced burden of simultaneously inhabiting multiple identity categories. For example, in a recent study cited above, researchers studied many characteristics for cars and drivers involved in police auto stops and found that young, black men who drove cars consistent with certain socioeconomic markers were most likely to be stopped.<sup>101</sup> Being able to make this type of claim with regard to other identity categories would be very helpful.

The premise of this Foreword is that exposing the numerous and complex

---

99. The late, great Critical Race Theory scholar and activist Derrick Bell, often made this point in his writings. Although he described racism as an “integral, permanent and indestructible component of this society,” he also saw the uplifting value of telling the truth about race and continuing to fight against racism even where defeat was certain. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: ON THE PERMANENCE OF RACISM*, at ix–x (1992).

100. Empirical studies have proven that disparate racial consequences of police engagement extend beyond the black/white binary. See, e.g., Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 SEATTLE U. L. REV. 673, 677 (2012) (analyzing Washington state traffic stop data reflecting that in certain areas, in addition to Blacks, Asians, East Indians, and Native Americans are more likely than Whites to receive traffic citations).

101. EPP ET AL., *supra* note 40, at 64.

ways that identity can be punitive within the criminal justice system can give rise to a type of empathy that is often absent from conversations about crime and punishment. Anyone with a conscience who is engaged in the world can clearly see that change is required unless we are willing to sacrifice another generation from among black, brown, poor, and disenfranchised people. What is not clear is what the more privileged among society are willing to do on behalf of people who “are not ourselves.”<sup>102</sup> Despite the movement’s focus on a particular racial group, “Black Lives Matter” is not seeking special recognition for African-American victims. Rather, the movement seeks to undermine how historical racial violence and modern stereotypes have coalesced to render certain marginal people—black men in particular—unworthy of the due process and humane treatment that all are constitutionally required to receive within the U.S. criminal justice system. Merely proclaiming that “All Lives Matter” or some variant of a more universal statement would ignore this important reality. Ultimately, the movement and the pieces in this symposium are endorsing the notion that race still matters. Nothing in this message, however, attacks a “justice for all” viewpoint. Anyone who supports justice for a lost black life should wholeheartedly support justice for any life regrettably lost at the hands of dubious police violence. In fact, failing to see all participants within the system as having a “shared status”<sup>103</sup> nearly ensures that selected minority groups will continue to disproportionately bear the consequences of a fundamentally unfair criminal justice enterprise.<sup>104</sup>

---

102. This is a question posed by the late Critical Race and LatCrit scholar, Duke Law professor Jerome Culp. See Jerome M. Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 481 (1997); Jerome M. Culp, Jr., *Seventh Aspect of Self-Hatred: Race, LatCrit, and Fighting the Status Quo*, 55 FLA. L. REV. 425, 426 (2003).

103. Economist Julianne Malveaux has asserted such a claim within the context of the War on Terror, noting, specifically, that across race, class, and nation, it is important to understand that “a life is a life is a life.” THE PARADOX OF LOYALTY: AN AFRICAN AMERICAN RESPONSE TO THE WAR ON TERRORISM 186 (Julianne Malveaux & Regina A. Green eds., 2002).

104. I have recently made this point within the context of assessing the dangers of the increased violence sanctioned under stand-your-ground laws. See Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015).

