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## Preliminary Report on Race and Washington's Criminal Justice System

Research Working Group, Task Force on Race and the Criminal Justice System

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# PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM

Research Working Group\*

Task Force on Race and the Criminal Justice System\*\*

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\*\* The primary task force website can be found at *Race and Criminal Justice*, SEATTLE UNIV. SCH. OF LAW, [www.law.seattleu.edu/x8777.xml](http://www.law.seattleu.edu/x8777.xml) (last visited Jan. 25, 2012). Organizations and institutions on the Task Force include: Administrative Office of the Courts; American Civil Liberties Union of Washington; Central Washington University; Department of Law and Justice; the Defender Association/Racial Disparity Project; Filipino Lawyers of Washington; Fred T. Korematsu Center for Law and Equality, Seattle University School of Law; Gonzaga University School of Law; the Korean American Bar Association of Washington; Latina/o Bar Association of Washington; Loren Miller Bar Association; Middle Eastern Legal Association of Washington; Mother Attorneys Mentoring Association of Seattle; QLaw: the GLBT Bar Association of Washington; Seattle City Attorney's Office; Seattle University School of Law; University of Washington, College of Arts and Sciences; University of Washington School of Law; Vietnamese American Bar Association of Washington; Washington Defender Association; Washington State Access to Justice Board; Washington State Bar Association; Washington State Commission on Asian Pacific American Affairs; Washington State Commission on Hispanic Affairs; Washington State Criminal Justice Training Commission; Washington State Gender and Justice Commission; Washington State Minority and Justice Commission; Washington Women Lawyers.

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## MESSAGE FROM THE TASK FORCE CO-CHAIRS

We are pleased to present the *Preliminary Report on Race and Washington's Criminal Justice System*, authored by the Research Working Group of the Task Force on Race and the Criminal Justice System. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for making recommendations for changes to promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system.

The Task Force came into being after a group of us met to discuss remarks on race and crime reportedly made by two sitting justices on the Washington State Supreme Court. This first meeting was attended by representatives from the Washington State Bar Association, the Washington State Access to Justice Board, the commissions on Minority and Justice and Gender and Justice, all three Washington law schools, leaders from nearly all of the state's specialty bar associations, and other leaders from the community and the bar.

We agreed that we shared a commitment to ensure fairness in the criminal justice system. We developed working groups, including the Research Working Group, whose *Preliminary Report* finds that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

All of our working groups—Oversight, Community Engagement, Research, Recommendations/Implementation, and Education—are coordinating together to develop solutions. We are fortunate to have the formal participation of a broad range of organizations and institutions, with each week bringing new participants. We also have many people contributing in an individual capacity, including many judges.

We have come together to offer our time, our energy, our expertise, and our dedication to achieve fairness in our criminal justice system.

Sincerely,

Justice Steven C. González,  
Past Chair, Washington State Access to Justice Board

Professor Robert S. Chang,  
Director, Fred T. Korematsu Center for Law and Equality

Co-Chairs, Task Force on Race and the Criminal Justice System

## EXECUTIVE SUMMARY

In 1980, of all states, Washington had the highest rate of disproportionate minority representation in its prisons.<sup>1</sup> Today, minority racial and ethnic groups remain disproportionately represented in Washington State's court, prison, and jail populations, relative to their share of the state's general population.<sup>2</sup> The fact of racial and ethnic disproportionality in our criminal justice system is indisputable.

Our research focused on trying to answer why these disproportionalities exist. We examined differential commission rates, facially neutral policies with disparate impacts, and bias as possible contributing causes.

We found that the assertion attributed to then-Justice Sanders of the Supreme Court of Washington that "African-Americans are overrepresented in the prison population because they commit a disproportionate number of crimes,"<sup>3</sup> is a gross oversimplification. Studies of particular Washington State criminal justice practices and institutions find that race and ethnicity influence criminal justice outcomes over and above commission rates.<sup>4</sup> Moreover, global assertions about differential crime commission rates are difficult to substantiate. Most crime victims do not report crimes and most criminal offenders are never arrested.<sup>5</sup> We never truly know exact commission rates.<sup>6</sup> Even if arrest rates are used as a proxy for underlying commission rates, 2009 data show that 45% of Washington's imprisonment disproportionality cannot be accounted for by disproportionality at arrest.<sup>7</sup>

We reviewed research that focused on particular areas of Washington's criminal justice system and conclude that much of the

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1. Scott Christianson, *Corrections Law Developments: Racial Discrimination and Prison Confinement—A Follow-Up*, 16 CRIM. L. BULL. 616, 617 (1980).

2. See discussion *infra* Part II.

3. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 21, 2010), [http://seattletimes.nwsourc.com/html/localnews/2013226310\\_justices22m.html](http://seattletimes.nwsourc.com/html/localnews/2013226310_justices22m.html).

4. See discussion *infra* Part III.B.

5. See *infra* text accompanying note 91.

6. See discussion *infra* Part III.A.

7. Task Force researchers analyzed 2009 data obtained from the Washington State Association of Sheriffs and Police Chiefs, and then replicated the commission versus disparity figure, originally compiled by Crutchfield et al., and found that 55% of the black-white disproportionality in imprisonment rates is attributable to index crime arrest rates. In other words, 45% of the racial disproportionality in imprisonment cannot be explained by and is not attributable to racial differences in arrest rates. See discussion *infra* Part III.A.

disproportionality is explained by facially neutral policies that have racially disparate effects. For the areas, agencies, and time periods that were studied, the following disparities were found:

- Youth of color in the juvenile justice system face harsher sentencing outcomes than similarly situated white youth, as well as disparate treatment by probation officers.<sup>8</sup>
- Defendants of color were significantly less likely than similarly situated white defendants to receive sentences that fell below the standard range.<sup>9</sup>
- Among felony drug offenders, black defendants were 62% more likely to be sentenced to prison than similarly situated white defendants.<sup>10</sup>
- With regard to legal financial obligations,<sup>11</sup> similarly situated Latino defendants receive significantly greater legal financial obligations than their white counterparts.<sup>12</sup>
- Disparate treatment exists in the context of pretrial release decisions, which systematically disfavors minority defendants.<sup>13</sup>
- In Seattle, the black arrest rate for delivery of a drug other than marijuana is twenty-one times higher than the white arrest rate for that offense, one of the highest levels of disparity found across the country.<sup>14</sup> Research suggests that this disparity does not primarily reflect different levels of involvement with illicit drugs.<sup>15</sup>

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8. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998); see also discussion *infra* Part III.B.1.

9. ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, RACIAL/ETHNIC DISPARITIES AND EXCEPTIONAL SENTENCES IN WASHINGTON STATE 72 tbl.13B (1993), available at <http://www.courts.wa.gov/committee/pdf/1993SeptRacia%20EthnicDisparitiesReport.pdf>; see also discussion *infra* Part III.B.2. But see CRUTCHFIELD ET AL., *supra*, at 72 tbl.13A (showing that whites were significantly more likely than blacks to receive sentences above the standard range).

10. Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 451 (2005); see also discussion *infra* Part III.B.3.

11. See WASH. REV. CODE. § 9.94A.760 (Supp. 2011) (defining a legal financial obligation and when it may be imposed).

12. See discussion *infra* Part III.B.4.

13. See discussion *infra* Part III.B.5.

14. KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 56 tbl.10, 57 (2008), available at [http://faculty.washington.edu/kbeckett/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle\\_2008.pdf](http://faculty.washington.edu/kbeckett/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle_2008.pdf).

15. See discussion *infra* Part III.B.6.

- Minority drivers are more likely to be searched by the Washington State Patrol than white motorists, although the rate at which searches result in seizures is highest for whites.<sup>16</sup>

In all of these areas, facially neutral policies result in disparate treatment of minorities over time.

Implicit and explicit racial bias also contributes to this disproportionality by influencing decision-making within the criminal justice system.<sup>17</sup> Race and racial stereotypes play a role in the judgments and decision-making of human actors within the criminal justice system. The influence of such bias is subtle and often undetectable in any given case, but its effects are significant, cumulative, and observable over time.<sup>18</sup> When policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury service, bias often plays a role.<sup>19</sup>

To summarize:

- We find the assertion that the overrepresentation of black people in the Washington State prison system is due solely to differential crime commission rates inaccurate.
- We find that facially race-neutral policies that have a disparate impact on people of color contribute significantly to disparities in the criminal justice system.
- We find that racial and ethnic bias distorts decision-making at various stages in the criminal justice system, contributing to disparities.
- We find that race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

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16. See discussion *infra* Part III.B.8.

17. See, e.g., Robin S. Engel & Richard Johnson, *Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates*, 34 J. CRIM. JUST. 605, 611–12 (2006); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 487, 499 (2004); Richard R. Johnson, *Race and Police Reliance on Suspicious Non-Verbal Cues*, 30 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 277, 280, 286–87 (2007); Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1333 (1994); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 192–93 (1992).

18. See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCI. 729, 729–30 (2000).

19. See discussion *infra* Part III.C.

## DEFINITIONS

### *What We Mean by “Disproportionality” and “Disparity”*

Although the terms disproportionality and disparity often are used interchangeably, there is an important distinction between these two concepts. We have found it useful to distinguish between racial inequities that result from differential crime commission rates and racial inequities that result from practices or policies. In this Report, we use “disproportionality” to refer to a discrepancy between reference groups’ representation in the general population and in criminal justice institutions. In contrast, we use “disparity” when similarly situated groups of individuals are treated differently within those institutions, or to refer to overrepresentation of particular groups in the criminal justice system that stems from criminal justice practices or policies.

### *What We Mean by “Imprisonment” and “Incarceration”*

Imprisonment refers to being held in state prisons. Incarceration refers to being held in state prisons or local jails. Many local jails do not collect and report on ethnicity, i.e., whether someone is Latino or of Hispanic origin.

### *What We Mean by “Rate” and “Ratio”*

When discussing incarceration or imprisonment (as well as other aspects of the criminal justice system), we often discuss the rate of incarceration or imprisonment in comparison to a particular population. Thus, the white incarceration rate is measured by taking the number of whites incarcerated, dividing it by the number of whites in the general population, and then multiplying by 100,000 to determine the number of whites incarcerated per 100,000 whites in the general population. To compare black and white incarceration, we take the black incarceration rate and divide it by the white incarceration rate—a ratio that provides a useful measure of comparison.

### *What We Mean by “Race” and “Ethnicity”*

An inherent problem with race is that not many understand what “race” means. Widely accepted understandings of race focus on biology, invariably pointing to physical differences among humans that are used



to define, in genetic terms, different racial groups.<sup>20</sup> The distinctions that we employ today to categorize humans, such as black, white, and Latino, date back only a few centuries or less.<sup>21</sup> These labels do not signal genetically separate branches of humankind, for there is only one *human* race; no other biological race of humanity exists. Racial distinctions are largely social constructs based upon perception and history.<sup>22</sup>

Not only are these distinctions socially constructed, but they are also in constant flux and under perpetual siege by those who dispute the arbitrary lines that they draw.<sup>23</sup> The problem is compounded by the fact that different institutions use the terms differently. This lack of common nomenclature makes some comparisons difficult. When a term like “Asian” may encompass over two billion individuals, its ability to precisely and accurately describe an individual, much less a group of individuals, becomes challenging. Similar difficulties imperil the classifications of “Hispanic” and “Latino,” which are used to describe not only Dominicans whose descendants may be from Africa,<sup>24</sup> but also Argentines whose ancestry may be traced to Italy,<sup>25</sup> and Peruvians whose forefathers may have emigrated from Japan.<sup>26</sup> Additionally, these traditional categories have come under increasing strain because one in seven marriages within the United States is now “interracial” or “interethnic,” rendering single labels less accurate.<sup>27</sup>

In this Report, we use “race” to refer to groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance. For instance, when using the term “Latina/o”—which we will use where possible rather than “Hispanic”—we mean to describe those individuals whose ancestry is traced back to Latin America, Spain, and Portugal. This definition contemplates race

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20. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994).

21. *Id.* at 7–8.

22. *Id.*

23. *Id.*

24. Benjamin Bailey, *Dominican-American Ethnic/Racial Identities and United States Social Categories*, 35 INT’L MIGRATION REV. 677, 677–78 (2001) (“The majority of Dominicans have sub-Saharan African ancestry, which would make them ‘black’ by historical United States ‘one-drop’ rules.” (footnote omitted)).

25. See Samuel L. Baily, *Chain Migration of Italians to Argentina: Case Studies of the Agnonesi and the Sirolesi*, STUDI EMIGRAZIONE, Mar. 1982, at 73, 75–76.

26. See J. F. NORMANO & ANTONELLO GERBI, THE JAPANESE IN SOUTH AMERICA 3–4 (1943).

27. Susan Saulny, *Counting by Race Can Throw off Some Numbers*, N.Y. TIMES, Feb. 10, 2011, at A1, available at <http://www.nytimes.com/2011/02/10/us/10count.html?scp=1&sq=race%20counting&st=cse>.

and ethnicity as social phenomena, wherein certain characteristics (i.e., history and morphology) are given meanings by society. In this way, race and ethnicity are not objective observations rooted in biology, but rather self-reinforcing processes rooted in the daily decisions we make as individuals and as institutions. Although socially constructed and enacted, race and ethnicity have important consequences for people's lived experiences.

*What We Mean by "Structural Racism"*

A structurally racist system can be understood best as a system in which a society's institutions are embedded with a network of policies and practices that, overtly or subtly, advantage one racial group over another, thereby facilitating racially disparate outcomes. Within such systems, notions and stereotypes about race and ethnicity shape actors' identities, beliefs, attitudes, and value orientations.<sup>28</sup> In turn, individuals interact and behave in ways that reinforce these stereotypes. Thus, even with facially race-neutral policies, implementation decisions are informed by actors' understandings (or lack thereof) about race and ethnicity, often leading to disparities in treatment of people of color. As a consequence, structural racism produces cumulative and persistent racial and ethnic inequalities.<sup>29</sup>

Racism should not be viewed as an ideology or an orientation toward a certain group but instead as a system: "[A]fter a society becomes racialized, racialization develops a life of its own. Although it interacts with class and gender structurations in the social system, it becomes an organizing principle of social relations itself."<sup>30</sup> The persistent inequality experienced by blacks and other people of color in America is, in part, the result of this racial structure.<sup>31</sup> The contemporary racial structure is distinct from that of the past in that it is covert, is embedded within the regular practices of institutions, does not rely on a racial vocabulary, and is invisible to most whites.<sup>32</sup>

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28. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 475–76 (1997).

29. *Id.* at 475.

30. *Id.*

31. *Id.*

32. *Id.* at 467.

## I. INTRODUCTION

Washington State has a mixed history when it comes to its treatment of racial and ethnic minorities. It was founded through the displacement of its native peoples by legal and extralegal means.<sup>33</sup> Washington's early history included severe anti-immigrant sentiment expressed first toward Chinese immigrants<sup>34</sup> and then Japanese immigrants, who were the target of the state's Alien Land Laws.<sup>35</sup> Yet unlike other states that instituted de jure segregation of schools and severely limited participation in the legal system,<sup>36</sup> Washington did not mandate school segregation by law and was the only western state that did not ban interracial marriage.<sup>37</sup> In fact, Washington became so well known for its openness that interracial couples would often travel to the state solely to get married.<sup>38</sup> A ready coalition of four distinct racial minorities—blacks, Chinese, Filipinos, and Japanese—worked together during the 1930s to defeat various policies that targeted racial minorities.<sup>39</sup> These

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33. See generally 31 HUBERT HOWE BANCROFT, HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845–1889 (S.F., The History Co. 1890).

34. See, e.g., DOUG CHIN, SEATTLE'S INTERNATIONAL DISTRICT: THE MAKING OF A PAN-ASIAN AMERICAN COMMUNITY 22 (2001) (documenting the 1886 attempted forcible removal of 350 Chinese immigrants from Seattle); ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 59–60 (1988) (documenting the forcible removal of Chinese from Tacoma throughout 1885 and 1886).

35. See Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853–1889*, 12 U. PUGET SOUND L. REV. 197, 235–36 (1989).

36. See, e.g., CAL. EDUC. CODE §§ 8003, 8004 (Deering 1944) (repealed 1947) (authorizing the segregation of children of Chinese, Japanese, or Mongolian parentage, and Indians under certain circumstances); *People v. Hall*, 4 Cal. 399 (1854) (interpreting a statute that excluded “Blacks” and “Indians” from testifying against white defendants, and classifying Chinese persons as either “Indian” or “Black” in order to exclude the testimony of a Chinese witness against the white defendant).

37. Stefanie Johnson, *Blocking Racial Inter-marriage Laws in 1935 and 1937: Seattle's First Civil Rights Coalition*, SEATTLE C.R. & LAB. HIST. PROJECT (2005), <http://depts.washington.edu/civilr/antimiscegenation.htm>. The Washington Territory, however, did ban interracial marriage from 1866 to 1868. Act of Jan. 20, 1866, § 2(3), 1865–1866 Wash. Sess. Laws 80, 81 (“Marriages . . . are prohibited . . . [w]hen either of the parties is a white person and the other a negro or Indian, or a person of one-half or more negro or Indian blood.”), repealed by Act of Jan. 23, 1868, § 1, 1867–1868 Wash. Sess. Laws 47, 47-48; Act of Jan. 29, 1855, § 1, 1854–1855 Wash. Sess. Laws 33, 33 (“[A]ll marriages heretofore solemnized in this territory, where one of the parties to such marriage shall be a white person, and the other possessed of one-fourth or more negro blood, or more than one-half Indian blood, are hereby declared void.”).

38. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 342 (1989).

39. Johnson, *supra* note 37 (“Four distinct racial minorities—blacks, Filipinos, Japanese, and Chinese—dominated the Seattle's [sic] civil rights politics over the 1930s, and each group brought something different to the political table . . .”).

initial campaigns laid the groundwork for future collaboration that would cut across racial lines.<sup>40</sup>

Despite this coalition, troubling manifestations of racial discrimination in the public and private spheres continued, demonstrating that Washington State was hardly immune to racial bias. For instance, in March 1942, 14,400 persons of Japanese descent lived in Washington State, including 9600 in King County alone.<sup>41</sup> Of these, nearly 13,000 were incarcerated and placed into internment camps.<sup>42</sup> Over 30% of those forcibly removed from Seattle never returned to their homes.<sup>43</sup> After World War II, Seattle's black population experienced its own backlash, as restrictive covenants and other forms of housing discrimination proliferated throughout Washington State between 1940 and 1960.<sup>44</sup> These covenants were so effective in Seattle that they functionally concentrated 78% of the black community into the area known as the "Central District."<sup>45</sup> While residential discrimination is no longer sanctioned by the law, its effects continue to reverberate even today.<sup>46</sup>

Even after Japanese American incarceration ended and residential discrimination became less overt, one area continued to produce racialized outcomes: the criminal justice system. In 1980, scholar Scott Christianson published findings showing that Washington State led the nation in disproportionate imprisonment of blacks.<sup>47</sup> While every state disproportionately imprisoned blacks, the overrepresentation of blacks relative to the size of the black population was greatest in Washington.<sup>48</sup> In a 2005 report discussing Christianson's finding, Robert Crutchfield found that while blacks in 1980 constituted approximately 28% of the prison population, they constituted approximately 3% of the general

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40. *Id.* ("The 1935 and 1937 campaigns laid the groundwork for future multi-ethnic collaboration on subsequent civil rights and progressive issues.")

41. DAVID A. TAKAMI, *DIVIDED DESTINY: A HISTORY OF JAPANESE AMERICANS IN SEATTLE* 46 (1998).

42. *Id.* at 50.

43. Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 748–49 (2008).

44. QUINTARD TAYLOR, *THE FORGING OF A BLACK COMMUNITY: SEATTLE'S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 178–80* (1994).

45. *Id.* at 179.

46. Henry W. McGee, Jr., *Seattle's Central District, 1990–2006: Integration or Displacement?*, 39 URB. LAW. 167, 214–16 (2007).

47. Christianson, *supra* note 1.

48. *Id.* at 616.

population.<sup>49</sup> The black share of the prison population was more than nine times greater than the black share of the general population.<sup>50</sup> Nationally, the black share of the prison population was four times greater than the black share of the general population.<sup>51</sup>

Christianson's findings sparked a firestorm of concern among policymakers, researchers, and citizens in Washington State.<sup>52</sup> The state legislature responded by commissioning a study to determine whether racial disparity existed in Washington's criminal justice system.<sup>53</sup> The 1986 Crutchfield and Bridges study was the first in a series of studies over the last twenty-five years to find that racial bias exists at various points in Washington's criminal justice system.<sup>54</sup> In particular, this first study found that race affects the processing of felony cases in Washington State, even after controlling for legally relevant factors.<sup>55</sup> That is, all things being equal, outcomes were worse for defendants who were black than for defendants who were white.<sup>56</sup>

In the wake of the 1986 Crutchfield and Bridges report, the state legislature established the Washington State Minority and Justice Task Force to study "the treatment of minorities in the state court system, to recommend reforms and to provide an education program for the judiciary."<sup>57</sup> Among other findings, the 1990 report concluded that minorities perceive "that bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly."<sup>58</sup> In particular, this

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49. See Exhibit 2: Declaration and Report of Robert D. Crutchfield, Ph.D. at 244–45, *Farrakhan v. Gregoire*, No. 2:96-cv-00076-RHW (E.D. Wash. Jan. 27, 2006), ECF No. 233-4, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofmaterialfactspart3.pdf>.

50. *Id.*

51. *Id.*

52. The Washington State Legislature began to focus on racial disproportionality within the criminal justice system after Christianson's 1980 report came out. In response, the legislature commissioned the original Crutchfield and Bridges study of 1986, which spawned many of the other studies cited in this Report. Cumulatively, these studies make Washington one of the most, if not the most studied state when it comes to racial disproportionality in the criminal justice system. See *id.* at 244.

53. *Id.*

54. *Id.*

55. GEORGE S. BRIDGES & ROBERT D. CRUTCHFIELD, INST. FOR PUB. POLICY & MGMT., UNIV. OF WASH., RACIAL AND ETHNIC DISPARITIES IN IMPRISONMENT 26 (1986).

56. *Id.* at 34.

57. CHARLES Z. SMITH, WASH. STATE MINORITY & JUSTICE TASK FORCE, WASH. STATE SUPREME COURT, FINAL REPORT, at xxi (1990), available at <http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>.

58. *Id.* at 10.

perception of bias extended to criminal proceedings, where minorities reported that they received disparate treatment from prosecutors, law enforcement authorities, and public defenders.<sup>59</sup> The report concluded that more research was needed to determine how race affects individual experiences with various aspects of Washington's criminal justice system, such as pretrial release, bail, prosecutorial discretion, and quality of counsel.<sup>60</sup>

Decades later, the perception that racial bias permeates the criminal justice system persists.<sup>61</sup> But now there is substantial evidence to support the notion that racial inequities do permeate the criminal justice system. Subsequent studies commissioned since 1986 have confirmed that Washington cannot justify its disproportionate minority incarceration rates on the sole basis that minorities commit more crimes.<sup>62</sup> For instance, the extant research concerning the Washington State Patrol suggests that race does not affect police discretion with regard to stops but does affect searches.<sup>63</sup> Other research indicates that Seattle drug arrest patterns and outcomes are shaped by race.<sup>64</sup> Another study found that even after controlling for legally relevant factors, racial differences

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59. *Id.* at 25–33.

60. *Id.* at 21–22.

61. *See, e.g.*, SAM PAILCA, OFFICE OF PROF'L ACCOUNTABILITY, SEATTLE POLICE DEP'T, REPORT ON SEATTLE'S RESPONSE TO CONCERNS ABOUT RACIALLY BIASED POLICING 1 (2003), available at <http://www.seattle.gov/police/opa/Docs/BiasedPolicing.pdf> (discussing the widespread perception that racial bias exists in law enforcement).

62. *See* Exhibit 2: Declaration and Report of Robert D. Crutchfield, Ph.D., *supra* note 49, at 237–40.

63. *See, e.g.*, NICHOLAS P. LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., REPORT TO THE WASHINGTON STATE PATROL 23, 42–43 (2007) [hereinafter LOVRICH ET AL., 2007 STUDY], available at [http://www.wsp.wa.gov/publications/reports/wsu\\_2007\\_report.pdf](http://www.wsp.wa.gov/publications/reports/wsu_2007_report.pdf) (finding that police stops involving blacks, Native Americans, and Hispanics are more likely to result in searches); NICHOLAS P. LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., ANALYSIS OF TRAFFIC STOP DATA COLLECTED BY THE WASHINGTON STATE PATROL 2 (2005), available at [http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/wsu\\_2005\\_report\[1\].pdf](http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/wsu_2005_report[1].pdf) (finding the same); NICHOLAS LOVRICH ET AL., DIV. OF GOV'TL STUDIES & SERVS., WASH. STATE UNIV., WSP TRAFFIC STOP DATA ANALYSIS PROJECT REPORT 2–3 (2003) [hereinafter LOVRICH ET AL., 2003 STUDY], available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.102.7223&rep=rep1&type=pdf> (finding the same).

64. Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 119, 129 (2006) [hereinafter Beckett et al., *Race, Drugs, and Policing*] (concluding that racially disproportionate drug arrest rates in Seattle cannot be explained by comparing commission rates, but rather are the result of police practices that have a racially disparate impact); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 435–36 (2005) [hereinafter Beckett et al., *Lessons from Seattle*] (concluding the same).

affect how cases are processed: minorities were more likely than whites to be held in custody prior to trial, less likely than whites to be released on personal recognizance following arrest, and more likely to receive monetary bail.<sup>65</sup> While these and other studies have focused on different decision-making points in the criminal justice system, one troubling conclusion, in particular, underlies each study's findings: when it comes to Washington State's criminal justice system, race matters.

Given this state's history and the evidence demonstrating the importance of race in the criminal justice system, members of the community were understandably concerned when two sitting Washington State Supreme Court Justices opined on October 7, 2010, that racial minorities are overrepresented in the prison population solely because they commit more crimes and not because any bias exists in the criminal justice system.<sup>66</sup> The comments themselves betrayed a common misunderstanding about whether this issue is more complex than a cursory review of certain crime conviction rates might imply. Conviction rates are not a valid proxy for commission rates.

In the wake of these comments, concerned community members came together to form the Task Force on Race and the Criminal Justice System. We met because the simplistic notion that black overrepresentation in our prisons occurs because blacks commit more crimes did not fit with our sense of how racial and ethnic minorities are treated in today's society and in our criminal justice system. We realized quickly, though, that it was important not to proceed on assumptions that unfair treatment existed.

The Task Force divided into five working groups: Oversight, Community Engagement, Research, Recommendations/Implementation, and Education. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, investigate possible causes. This fact-based inquiry was designed to serve as a basis for recommending changes that would promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system. As we engaged in this work, the Research Working Group reported back to the broader Task Force. Our membership grew as more and more organizations and institutions recognized the importance of this issue,

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65. GEORGE S. BRIDGES, WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, A STUDY ON RACIAL AND ETHNIC DISPARITIES IN SUPERIOR COURT BAIL AND PRE-TRIAL DETENTION PRACTICES IN WASHINGTON 52–53 (1997), *available at* [http://www.courts.wa.gov/committee/pdf/1997\\_ResearchStudy.pdf](http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf).

66. Miletich, *supra* note 3.

not just for the affected racial and ethnic groups, but also for the best aspirations we have as a state. One measure of the goodwill of the people of the State of Washington is the broad range of organizations and individuals who have joined the Task Force, for what all of us have come to realize is a multi-year project.

For this Report, the Research Working Group reviewed evidence on disproportionality in Washington's criminal justice system and considered whether crime commission rates accounted for this disproportionality. We found that crime commission rates by race and ethnicity are largely unknown and perhaps unknowable, but that some researchers simply take arrest rates as good proxies for underlying commission rates for all crimes.<sup>67</sup> We found that use of arrest rates likely overstates black crime commission rates for several reasons.<sup>68</sup> But even if arrest rates are used as a proxy for underlying crime commission rates, the extent of racial disproportionality is not explained by commission rates. In 1982, 80% of black imprisonment in Washington for serious crimes could not be accounted for based on arrest rates, though by 2009, this had dropped to 45%.<sup>69</sup>

We then identified and synthesized research on nine issues for which evidence exists regarding the causes of Washington's disproportionality: (1) juvenile justice; (2) prosecutorial decision-making; (3) sentencing outcomes; (4) legal financial obligations ("LFOs"); (5) pretrial release; (6) drug enforcement; (7) asset forfeiture; (8) traffic enforcement; and (9) prosecution for Driving While License Suspended ("DWLS"). In each of these areas, the research, data, and findings pertain specifically to Washington State.<sup>70</sup>

We also reviewed research regarding bias, especially research on unconscious or implicit bias. We found that cognitive neuroscience and social psychology help us to better understand the existence and behavioral consequences of unconscious or implicit racism.<sup>71</sup>

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67. See, e.g., Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1264 (1982).

68. For instance, because most black victims identify their assailants as black, and because black victims have a higher reporting rate generally, crimes involving black suspects are more likely to receive police attention. See discussion *infra* Part III.A.

69. Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 179 (1994); see also discussion *infra* Part III.A.

70. The informational resources and preliminary findings were made available to the Recommendations and Implementation Working Group to help inform their policy recommendations.

71. See, e.g., Phelps et al., *supra* note 18.



The evidence we gathered demonstrates that within Washington State's criminal justice system, race and ethnicity matter in ways that are inconsistent with fairness, that do not advance legitimate public safety objectives, and that undermine public confidence.

Part II presents the Working Group's findings and data regarding racial disproportionality within Washington State's criminal justice system. Part III discusses three possible causes for this disproportionality. Part III.A discusses differential commission rates, concluding that this factor alone cannot account for the disproportionality observed in the criminal justice system. Part III.B discusses seven racially neutral policies that have racially disparate effects, and thus help explain racial disproportionality. Finally, Part III.C discusses bias, whether explicit or implicit, and how it produces racial disparity.

## II. RACIAL DISPROPORTIONALITY WITHIN WASHINGTON STATE'S CRIMINAL JUSTICE SYSTEM

For context, we note that the United States has the highest incarceration rate of any country in the world, more than twice as great as the two Organization for Economic Cooperation and Development countries with the next highest rates (Chile and Israel), more than six times that of Canada, nearly four times that of Mexico, and nearly five times as great as the United Kingdom.<sup>72</sup> Within the United States, the high incarceration rate is disproportionately experienced by certain racial and ethnic groups, with whites incarcerated at a rate of 412 per 100,000 white residents, blacks incarcerated at a rate of 2290 per 100,000 black residents, and Latinos incarcerated at a rate of 742 per 100,000 Latino residents.<sup>73</sup> In the United States, drawing from 2005 data, blacks are incarcerated at 5.6 times and Latinos at 1.8 times the rate of whites.<sup>74</sup>

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72. *World Prison Brief, Entire World—Prison Population Rates per 100,000 of the National Population*, INT'L CTR. FOR PRISON STUDIES, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate) (last visited Dec. 30, 2011). An OECD country is one that participates in the Organization for Economic Cooperation and Development whose purpose is to coordinate policy among certain developed countries.

73. MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* 4 tbl.1 (2007), available at [http://sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

74. *Id.* at 3.

TABLE 1: PRISON AND JAIL INCARCERATION RATES AND RATIOS, 2005, UNITED STATES<sup>75</sup>

	Incarceration rate (per 100,000)	Disproportionality ratio (in comparison to White)
White	412	n/a
Black	2290	5.6
Latino	742	1.8

In 2005, the black incarceration rate in Washington, 2522 per 100,000 black residents, was greater than the national average.<sup>76</sup> The Latino incarceration rate, reported at 527 per 100,000 Latino residents, was lower than the national average. We include this figure with caution, however, because many local jails, including King County's, do not collect ethnic demographic information. In 2005, blacks in Washington were incarcerated at 6.4 times and Latinos at 1.3 times the rate of whites, with the caveat that the Latino figure likely reflects both an undercount of Latinos and an overcount of whites.<sup>77</sup> The fact of racial and ethnic disproportionality in Washington's incarcerated population is indisputable.

TABLE 2: PRISON AND JAIL INCARCERATION RATES AND RATIOS, 2005, WASHINGTON<sup>78</sup>

	Incarceration rate (per 100,000)	Disproportionality ratio (in comparison to White)
White	393	n/a
Black	2522	6.4
Latino	527	1.3

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75. *Id.* at 4 tbl.1.

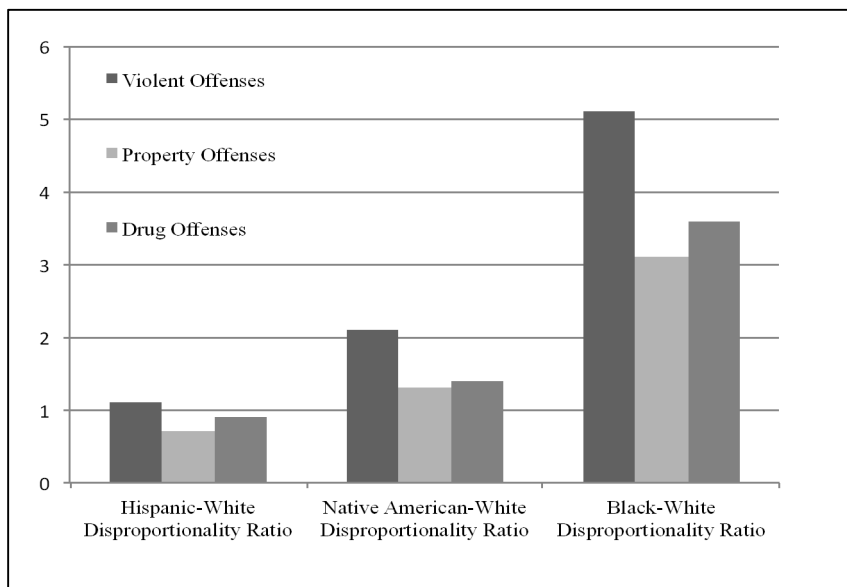
76. *Id.* at 6 tbl.2, 11 tbl.6, 13 tbl.7.

77. *Id.* at 6 tbl.2. The result is that the Latino-white ratio is likely significantly greater than 1.3 to 1 and the black-white ratio is probably slightly higher than 6.4 to 1. *Id.*

78. *Id.* at 6 tbl.2.

Our review of more recent data reveals that racial and ethnic disproportionalities exist at many different stages of the criminal justice system, including arrest, charging, conviction, and imprisonment.<sup>79</sup> The figure below shows 2010 Hispanic-white, black-white, and Native-white disproportionality ratios at conviction for serious felonies by offense categories. The figure shows that the disproportionalities are not consistent for different offense categories.

FIGURE 1: 2010 HISPANIC-WHITE, NATIVE AMERICAN-WHITE, AND BLACK-WHITE DISPROPORTIONALITY RATIOS AT CONVICTION FOR SERIOUS FELONIES BY OFFENSE CATEGORIES<sup>80</sup>



The data provided to us by the Office of Financial Management, the Washington State Center for Court Research, and the Washington Association of Sheriffs and Police Chiefs on arrests, charges, convictions, and imprisonment show that racial and ethnic disproportionalities still exist at these different points in Washington's criminal justice system. We turn now to examine possible causes of these disproportionalities.

79. See discussion *infra* Part III.

80. These ratios are comparisons between the rates per 100,000. For example, Figure 1 illustrates that blacks and Native Americans are, respectively, over five and two times more likely than whites to be convicted of a violent offense. The 2010 data are on file with the Gonzaga Law Review.

### III. PROFFERED CAUSES FOR RACIAL DISPROPORTIONALITY

#### A. *Crime Commission Rates*

The best available evidence suggests that the disproportionalities discussed in Part II are only partly attributable to racial differences in crime commission rates. It is important to note that crime commission rates cannot be known directly and can only be estimated. Generally, two methods are used to estimate the level of crime commission among different racial and ethnic groups. Some criminologists use crime victimization survey data in which victims identify the perceived race of their assailant to gain insight regarding differential commission rates by race.<sup>81</sup> These data reflect victim perceptions of racial identity of their assailant and include only nonfatal but violent crimes where there is direct contact between the victim and the perpetrator (e.g., robbery, rape, and assault).<sup>82</sup> Because information about victim perceptions of perpetrators' race is available for only a few violent offenses, crime victimization survey data present an incomplete picture of crime commission rates by race.

Other criminologists use arrests as a proxy for crime commission.<sup>83</sup> But this likely presents a distorted picture because blacks are overrepresented in arrests compared to victim identifications. For example, in the 2005 crime victim survey, victims of nonfatal violent crimes identified their assailants as black 23.7% of the time.<sup>84</sup> By contrast, 39% of those arrested for nonfatal violent crimes in 2005 were black.<sup>85</sup> Consequently, studies that treat arrests as a measure of crime commission will likely overstate the rate of crime commission by blacks and therefore underestimate racial disparity in criminal justice processing.

A recent comprehensive review of data from numerous studies of the effect of race on the police decision to arrest similarly concludes that

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81. See, e.g., Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985) (relying on victim reports to generate a study on the racial composition of prisons).

82. See *id.*

83. See, e.g., Blumstein, *supra* note 67.

84. Victimization survey data are drawn from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 215244, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES tbls.40 & 46 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus05.pdf>.

85. Arrest data are drawn from *Crime in the United States 2005*, FED. BUREAU OF INVESTIGATION tbl.43 (Sept. 2006), [http://www2.fbi.gov/ucr/05cius/data/table\\_43.html](http://www2.fbi.gov/ucr/05cius/data/table_43.html).

minority suspects are more likely to be arrested than white suspects.<sup>86</sup> This analysis controls for “demeanor, offense severity, presence of witnesses, quantity of evidence at the scene, the occurrence or discovery of a new criminal offense during the encounter, the suspect being under the influence of drugs or alcohol, prior record of suspect, [and] requests to arrest by victims . . . .”<sup>87</sup> Race appears to have an impact apart from these factors.<sup>88</sup>

Differences in reporting practices and offending patterns may also contribute to the overrepresentation of black suspects among arrestees. As a result of these differences, black suspects are more likely to come to the attention of the police.<sup>89</sup> Specifically, most white victims identify their assailants as white, and most black victims identify their assailants as black.<sup>90</sup> Over half of violent crimes and over 60% of property crimes are not reported by victims to the police.<sup>91</sup> Higher reporting rates among black victims mean that crimes involving black suspects are more likely to come to the attention of the police.<sup>92</sup>

But even if we use arrest rates as a proxy for crime commission, there remains a very significant disproportionality at imprisonment that is not accounted for by arrest rates. A 1994 study by Crutchfield, Bridges, and Pitchford compared black-white disproportionality in 1982 index crime arrests and incarceration rates, and found that differential rates of crime commission (as measured by arrest) explained only 19.3% of the black-white disproportionality in Washington State prisons.<sup>93</sup> Using 2009 data obtained from the Washington State Association of Sheriffs and Police Chiefs, we replicated the Crutchfield et al. analysis and found that 55% of the black-white disproportionality in imprisonment rates is attributable to index crime arrest rates.<sup>94</sup> In other words, 45% of the

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86. Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 475 (2011).

87. *Id.* at 495–98.

88. *Id.* at 490.

89. ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 214258, BLACK VICTIMS OF VIOLENT CRIME 5 tbl.5 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf> (noting the percentage of violent victimization from 2001 to 2005, by victim race/Hispanic origin and offender race).

90. *Id.*

91. JENNIFER L. TRUMAN & MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ 231327, CRIMINAL VICTIMIZATION, 2009, at 9 tbl.12 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf> (noting the percentage of crimes reported to the police in 2009, by gender, race, and Hispanic origin).

92. *Id.*

93. Crutchfield et al., *supra* note 69.

94. Index crimes are defined by the FBI and include homicide, rape, robbery, aggravated assault,

racial disproportionality in imprisonment is not attributable to racial differences in arrest rates. Thus, it appears that a larger share of disproportionality in confinement rates stems from arrest patterns than was the case in 1982.

However, the 55% figure should not be interpreted as evidence that differences in crime commission rates explain over half of the overrepresentation of blacks in state prisons for several reasons.<sup>95</sup> First, this interpretation assumes arrests are an accurate measure of crime, but it is likely that they overrepresent people of color for the reasons stated above. In particular, arrest data probably overrepresent black suspects.<sup>96</sup> In addition, Latinos are not identified as such in the arrest and incarceration data for which the 55% figure is derived.<sup>97</sup> Because most Latinos in Washington State are identified racially as white in these data, the white arrest and incarceration rates used in these calculations are inflated, and the results therefore underestimate the extent to which blacks are overrepresented at the arrest stage relative to crime commission rates. Finally, this method assesses disproportionality in state prisons but does not tell us anything about racial disproportionalities in jails, community supervision, and misdemeanor courts. Indeed it is likely that discretion and disproportionality are greater in these parts of the criminal justice system. Thus, concluding that 55% of the racial disproportionality in imprisonment rates is attributable to arrest patterns, and assuming that arrest patterns reflect crime commission rates, overstates the extent to which disproportionality in prisons flows from differential crime commission rates. Whatever the precise figure, it is clear that differential crime commission rates can explain only a part of the racial disproportionalities that characterize Washington State courts, jails, and prisons.

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burglary, larceny (over \$50), motor vehicle theft, and arson. *Uniform Crime Reporting Program Frequently Asked Questions*, FED. BUREAU OF INVESTIGATION 2 (Apr. 2009), [http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr\\_faqs08.pdf](http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs08.pdf). The 2009 data are on file with the Gonzaga Law Review. This analysis involved calculating the black-white arrest and imprisonment disproportionality ratios, and then the percent of the latter that is a function of the former.

95. Nor should this figure be interpreted to mean that 45% of disproportionality in confinement necessarily stems from race differences in criminal justice processing: legally relevant factors such as offender score may account for some or all of this discrepancy.

96. Arrest data are problematic because a comparison of victimization surveys and arrest data show that blacks are arrested at a higher rate than they are identified by victims. *See* discussion *supra* notes 89–94; *see also* Kochel et al., *supra* note 86.

97. Again, this is because some state and local agencies do not identify Latinos as a separate racial group.

B. *Structural Racism: Facially Neutral Policies with Racially Disparate Effects*

The Research Working Group focused its efforts on nine issues covered by existing research and data, and in each area we found that racial disproportionalities are caused, in part, by practices and policies that produce racially disparate outcomes. We are not arguing that particular individuals, actors, or agencies are intentionally discriminating. The studies described below do not prove that any one actor or group of actors is racist. Rather, the research as a whole suggests that Washington State's criminal justice system facilitates racially disparate outcomes in two more subtle ways. First, in some instances, facially neutral policies have racially disparate outcomes. For example, judicial consideration of ostensibly race-neutral factors such as employment status when making pretrial release decisions disadvantages defendants of color because they are less likely than white defendants to be employed.<sup>98</sup>

Second, the research suggests that the race or ethnicity of suspects and defendants affects how those individuals are perceived, and that this perception impacts how they are treated within the criminal justice system. The literature on implicit bias, discussed in Part III.C, shows that these race effects are likely to be unconscious and unintended rather than conscious and purposeful. While traditional models of racism emphasize individual acts of discrimination or racially charged policies, structural racism describes the interaction between various institutions and practices that are neutral on their face but nevertheless produce racialized outcomes.<sup>99</sup>

Put differently, structures matter and a system's structure has a tremendous influence over the results a system produces. Policies can produce foreseeable, if unintended, harms that run along racial lines.<sup>100</sup>

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98. See *Washington State Employment Situation Report for March 2010*, WASH. STATE EMP'T SEC. DEP'T (Apr. 13, 2010) (on file with Washington Law Review) which states:

Historically, the Black or African American population has had the highest unemployment rates, roughly twice that of both white and Asian populations. For the first quarter of 2010, the Black or African American population had an unemployment rate of 16.7 percent, the white and Asian populations, 9.5 percent and 8.1 percent, respectively. The Black or African American unemployment rate jumped by 3.1 percent between the first quarter of 2009 and the first quarter of 2010, while white and Asian populations increased only 1.3 percent and 1.6 percent, respectively.

*Id.*

99. See generally John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008).

100. *Id.* at 794.

Moreover, bias may be unconscious or conscious. This suggests that we should not concentrate on individual motives but instead on those practices and procedures whose cumulative effect is to facilitate racialized outcomes—that is, outcomes that fall along racial lines. By identifying and then reforming these structures and processes, we can begin to address racial disproportionality within Washington's criminal justice system.

The Research Working Group's findings are discussed below regarding each studied context of disproportionality in Washington State's criminal justice system.

### 1. *Racial Disparity in Juvenile Justice*

Youth of color are overrepresented in Washington State's juvenile justice system.<sup>101</sup> Although policymakers, practitioners, and researchers have studied this disproportionate minority contact (DMC) for the past twenty years,<sup>102</sup> the problem still persists. For example, in 2007, African American youth comprised just under 6% of the state's population aged ten through seventeen years, but comprised roughly 12% of the state's juvenile arrests.<sup>103</sup> Youth of color are similarly overrepresented at the disposition stage (that is, the stage at which a decision or conviction is rendered). Two years prior, in 2005, African American youth comprised just under 4% of the state's population, but received over 13% of the state's juvenile dispositions.<sup>104</sup> There was a similar pattern of overrepresentation for Latino youth (11% of the state population, yet received 14% of the juvenile dispositions)<sup>105</sup> and for Native American youth (2% of the state population yet received nearly 5% of the juvenile dispositions).<sup>106</sup>

This disproportionality is even greater for youth committed to the

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101. WASH. STATE SENTENCING GUIDELINES COMM'N, DISPROPORTIONALITY AND DISPARITY IN JUVENILE SENTENCING, FISCAL YEAR 2005, at 1 & tbl.1 (2005), available at [http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Adult\\_DisparityDisproportionality\\_FY2005.pdf](http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Adult_DisparityDisproportionality_FY2005.pdf).

102. See, e.g., Emily R. Cabaniss et al., *Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices*, 12 *AGGRESSION & VIOLENT BEHAV.* 393, 394–400 (2007) (discussing scholarly and congressional efforts that have taken place since 1988).

103. GOVERNOR'S JUVENILE JUSTICE ADVISORY COMM., WASH. STATE DEP'T OF SOC. & HEALTH SERVS., TITLE II FORMULA GRANTS PROGRAM APPLICATION: COMPREHENSIVE 3-YEAR PLAN FOR FFY 2009–2011, at 13 (2009), available at [http://juvjustice.njcn.org/media/resources/public/resource\\_308.pdf](http://juvjustice.njcn.org/media/resources/public/resource_308.pdf).

104. See WASH. STATE SENTENCING GUIDELINES COMM'N, *supra* note 101.

105. See *id.*

106. *Id.*



Juvenile Rehabilitation Administration (JRA).<sup>107</sup> The proportion of African American youth in JRA facilities is five to six times the proportion of their population in the state;<sup>108</sup> Native American youth reside in JRA facilities at a rate of two times the proportion of their respective population in Washington State.<sup>109</sup>

Even worse, it appears that youth of color may receive disparate sentencing decisions. In 2005, African American and Asian or Pacific Islander youth were sentenced to the longest average terms in county detention.<sup>110</sup> African American youth also received the longest terms of dispositions involving electronic home monitoring and work crew.<sup>111</sup>

Factors other than differential crime commission rates may contribute to these racialized outcomes. For instance, a study of probation officers' assessments of youth in Washington State has found that African American youth receive more negative attribution assessments about the causes of their offenses than white youth and that these characterizations lead to more punitive sentence recommendations.<sup>112</sup> In particular, the study shows that probation officers consistently portray black youth differently than white youth in descriptions about the nature of their criminal offending.<sup>113</sup> Black youths' crimes are commonly attributed to internal traits (attitudes and personalities) while white youths' crimes are attributed to their social environment (peers and family).<sup>114</sup> These characterizations shape probation officers' assessments about the threat of future offending and lead to more severe sanctions and sentencing recommendations for black youth.<sup>115</sup>

Policy changes are needed to both assess and address rates of DMC and to investigate the mechanisms that produce the disproportionate and disparate outcomes. We recommend increasing the quality and access to data management systems that can generate case characteristics. These characteristics are critical to investigating the extent of DMC and the processes that lead to the overrepresentation.

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107. Washington State's JRA serves the state's highest-risk youth. *See* GOVERNOR'S JUVENILE JUSTICE ADVISORY COMM., *supra* note 103, at 4. A county juvenile court may commit a particular juvenile offender to JRA custody if the individual has committed many lower-level offenses or a serious crime. *See id.*

108. WASH. STATE SENTENCING GUIDELINES COMM'N, *supra* note 101, at 3 & tbl.2.

109. *Id.*

110. *Id.*

111. *Id.*

112. Bridges & Steen, *supra* note 8.

113. *Id.* at 563–64.

114. *Id.*

115. *Id.* at 564–66.

Furthermore, decision-making environments need to be explored for points of discretion that can lead to youth of color being overselected for more severe sanctioning decisions (such as policies leading to detention decisions and practices of case assessments and recommendations). Organizational climates should recognize the ways in which subtle biases can enter into decision-making, and decision-makers should openly discuss how differences in culture can influence processing decisions.

## 2. *Prosecutorial Decision-Making*

Prosecutors' charging decisions and sentencing recommendations have an important impact on criminal justice outcomes. For example, a 1995 study by Crutchfield, Weis, Engen, and Gainey found that prosecutors are significantly less likely to file charges against white defendants than they are against defendants of color.<sup>116</sup> This difference persists even after legally relevant factors—offense seriousness, criminal history, and weapons charges—are taken into account.<sup>117</sup> That study also found that King County prosecutors recommend longer confinement sentences for black defendants (after legal factors were held constant), and that prosecutors are 75% less likely to recommend alternative sentences for black defendants than for similarly situated white defendants.<sup>118</sup>

## 3. *Confinement Sentencing Outcomes*

Several studies following the Sentencing Reform Act of 1981<sup>119</sup> find that race shapes confinement sentence outcomes in Washington State—that is, those sentences that lead to jail time. A 2003 study by Engen, Gainey, Crutchfield, and Weis found that defendants of color are moderately less likely than similarly situated white defendants to receive sentences that fall below the standard range.<sup>120</sup> A 2004 study by Fernandez and Bowman found that Latino defendants sentenced in

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116. ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, WASH. STATE SUPREME COURT, RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF FELONY CASES IN KING COUNTY 4 (1995), available at <http://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf>.

117. *Id.*

118. *Id.* at 39–40.

119. WASH. REV. CODE §§ 9.94A.010–.930 (2010 & Supp. 2011).

120. Rodney L. Engen et al., *Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 CRIMINOLOGY 99, 116–17 (2003); see also CRUTCHFIELD ET AL., *supra* note 9, at 32, 34, 72 tbl.13B.

conservative counties with comparatively large Latino populations are less likely to receive the statutorily established drug-offender sentencing alternative than other defendants.<sup>121</sup> And most recently, a 2005 study by Steen, Engen, and Gainey found that among felony drug offenders, the odds that a black defendant will be sentenced to prison are 62% greater than the odds for similarly situated white defendants.<sup>122</sup> These studies clearly indicate that race and ethnicity matter for confinement sentencing outcomes.

4. *Variability and Ethnic Disparity in the Assessment of “Legal Financial Obligations” in Washington State Courts*

Whenever a person is convicted in a Washington State superior court, the court may order the payment of a “legal financial obligation” (“LFO”), which is essentially a financial penalty that the defendant must pay as a consequence of the conviction.<sup>123</sup> LFOs are now a common supplement to prison, jail, and probation sentences for people convicted of crimes in Washington State courts. For example, all felons must be assessed a \$500 Victim Penalty Assessment Fee for each conviction and a \$100 DNA Collection Fee at the time of the first conviction.<sup>124</sup> Although fine and fee amounts are specified statutorily, judges have significant discretion in determining whether to impose many other authorized fees and fines.<sup>125</sup>

This judicial discretion has led to a high degree of variability in LFO assessment. Significant variation exists even among similar cases and similarly situated offenders.<sup>126</sup> For example, one first-time white defendant convicted of delivery of methamphetamine in the first two months of 2004 was assessed \$610 in fees and fines; in a different county, another first-time white defendant convicted of the same crime during the same time period was assessed \$6710 in fees and fines.<sup>127</sup>

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121. Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, 36 COLUM. HUM. RTS. L. REV. 41, 63, 66–68 (2004).

122. Steen et al., *supra* note 10.

123. WASH. REV. CODE § 9.94A.760 (Supp. 2011).

124. WASH. REV. CODE §§ 7.68.035, 43.43.690 (2010 & Supp. 2011).

125. KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM’N, WASH. STATE SUPREME COURT, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* 9–10 (2008), available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

126. *Id.* at 24 tbl.4 (depicting wide variations in Washington State superior court LFO assessments).

127. *Id.*

This variability also fosters racialized outcomes. A recent study of Washington State LFOs found that a number of extra-legal factors influence the assessment of fees and fines, even after controlling for offender and Sentencing Reform Act (SRA) offense score.<sup>128</sup> In particular, the statistical analysis shows that Latino defendants receive significantly greater fees and fines than similarly situated non-Latino defendants.<sup>129</sup>

The debt that accrues from the assessment of fees and fines is substantial relative to ex-offenders' expected earnings.<sup>130</sup> For instance, defendants sentenced in the first two months of 2004 had been assessed an average of \$11,471 by the courts over their lifetime.<sup>131</sup> Because Washington State currently charges 12% interest on unpaid LFOs, these financial obligations often persist and expand over the course of many years.<sup>132</sup> By 2008, the individuals sentenced in early 2004 still owed an average of \$10,840 in court debt.<sup>133</sup> Ex-offenders who consistently pay \$50 a month will still possess legal debt after *thirty years of regular monthly payments*.<sup>134</sup> Legal debt—and poor credit ratings—constrains opportunities and limits access to housing, education, and economic markets.<sup>135</sup> Nonpayment of legal debt may also trigger arrest and reincarceration.<sup>136</sup> We believe that the fairness and wisdom of the laws authorizing the discretionary assessment of legal financial obligations need to be reevaluated.

##### 5. *Racial and Ethnic Disparity in Pretrial Release Decisions in Washington State Courts*

Whether an individual is released pending trial has a significant influence on the outcome of a case, and it can have cascading effects on a defendant's family, ability to maintain a job, and ability to pay for

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128. *Id.* at 23–25.

129. *Id.* at 24–25; see also Alexes Harris et al., *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 248–52 (2011).

130. Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010).

131. *Id.* at 1773–75.

132. WASH. REV. CODE § 10.82.090 (Supp. 2011).

133. Harris et al., *supra* note 130, at 1775.

134. *Id.* at 1776–77.

135. *Id.* at 1777–82.

136. *Id.* at 1782–85; see also AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5, 6 (2010), available at [http://www.aclu.org/files/assets/InForAPenny\\_web.pdf#page=8](http://www.aclu.org/files/assets/InForAPenny_web.pdf#page=8).

representation.<sup>137</sup> The Bureau of Justice Statistics found that 78% of defendants held on bail while awaiting trial were convicted, compared to 60% of defendants who were released pending trial.<sup>138</sup> In addition, defendants held on bail receive more severe sentences than defendants not detained prior to trial.<sup>139</sup> Studies suggest that this correlation is not solely a function of case characteristics.<sup>140</sup> Rather, detention itself has a small but statistically significant effect on nonfelony case outcomes and a significant impact on felony case outcomes.<sup>141</sup>

Although Washington State court rules specify factors courts must consider when determining whether to release a defendant, judges retain significant discretion.<sup>142</sup> Research demonstrates that extra-legal factors, including race and ethnicity, significantly impact pretrial release decisions.<sup>143</sup> In particular, the evidence shows that blacks and Latinos are detained before trial at higher rates than white defendants.<sup>144</sup> For instance, a 1997 University of Washington study found that “minority defendants and men were less likely to be released on their own recognizance than others even after adjusting for differences among defendants in the severity of their crimes, prior criminal records, ties to the community and the prosecuting attorney’s recommendation.”<sup>145</sup> Thus, defendants of color are held on bail at higher rates than other defendants. Given how much pretrial detention affects case outcomes, this finding is troubling.

Judges’ consideration of seemingly race-neutral factors may explain the disparate pretrial detention of defendants of color. In particular, when determining whether to release a defendant or to impose bail, judges often consider the defendant’s employment status, the length and

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137. See generally JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE (1979).

138. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SER. NO. NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 & tbl.5 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf>.

139. *Id.*

140. MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 6 (2007), available at <http://www.cjareports.org/reports/detention.pdf>; MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 2: FELONY CASES 58 (2008) [hereinafter PHILLIPS, FELONY CASE OUTCOMES], available at <http://www.cja-reports.org/reports/felonydetention.pdf>.

141. PHILLIPS, FELONY CASE OUTCOMES, *supra* note 140.

142. BRIDGES, *supra* note 65, at 1–2.

143. *Id.* at 7.

144. *Id.* at 52–53.

145. *Id.* at 7.

character of the defendant's residence in the community, and the defendant's family ties and relationships.<sup>146</sup> Though presumably not designed to disadvantage people of color, consideration of these factors often has that consequence.<sup>147</sup> African Americans, Native Americans, and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility.<sup>148</sup> Judicial focus on such factors means that people from these ethnic groups are less likely to be released on their own recognizance than whites.<sup>149</sup> We suggest that courts should consider factors that are not only race-neutral on their face but also race-neutral in practice when making pretrial detention decisions.

#### 6. *Racial Disparity in Drug Law Enforcement*

Seattle has one of the highest rates of racial disparity in drug arrests in the United States.<sup>150</sup> Although only 8% of Seattle's population is black, 67% of those who are arrested for delivery of a serious drug (narcotics other than marijuana) in Seattle are black.<sup>151</sup> However, a rigorous, data-driven 2008 analysis of drug use, delivery, and law enforcement patterns in Seattle indicates that this racial disparity in arrest rates does not reflect the reality of the local drug economy.<sup>152</sup> Nor is it a function of public health, public safety, or civilian complaints.<sup>153</sup>

According to Seattle Police Department (SPD) arrest figures, the total black drug arrest rate was more than thirteen times higher than the white drug arrest rate in 2006.<sup>154</sup> Blacks were more than twenty-one times more likely to be arrested for selling serious drugs than whites in 2005 to 2006, despite the fact that multiple sources suggest that whites are the majority of sellers and users of serious drugs in Seattle.<sup>155</sup> This rate of

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146. *Id.* at 12.

147. *Id.*

148. *Id.*

149. *Id.* at 53.

150. BECKETT, *supra* note 14, at 56 tbl.10; Beckett et al., *Race, Drugs, and Policing*, *supra* note 64, at 115 & tbl.1.

151. BECKETT, *supra* note 14, at 56 tbl.10.

152. *Id.* at 1; *see also* Beckett et al., *Race, Drugs, and Policing*, *supra* note 64, at 119; Beckett et al., *Lessons from Seattle*, *supra* note 64, at 419, 426–29.

153. BECKETT, *supra* note 14, at 3; *see also* Beckett et al., *Race, Drugs, and Policing*, *supra* note 64, at 129; Beckett et al., *Lessons from Seattle*, *supra* note 64, at 430–35.

154. BECKETT, *supra* note 14.

155. *See id.* (using multiple data sources, such as questionnaires and surveys, police reports, and live observations).

disparity is surpassed by only one of the other thirty-eight comparably sized cities in the nation for which data are available.<sup>156</sup>

The research shows that the primary cause of racial disparity in Seattle's drug law enforcement is SPD's focus on crack cocaine—to the virtual exclusion of other serious drugs such as heroin, powder cocaine, ecstasy, and methamphetamine.<sup>157</sup> In 2005 to 2006, nearly three-quarters (74.1%) of all planned arrests for delivery of a serious drug involved crack cocaine, a pattern that has remained consistent over time.<sup>158</sup> Of those individuals arrested for crack-cocaine delivery, 73.4% were black.<sup>159</sup> By contrast, less than 20% of those arrested for delivering any other serious drug were black.<sup>160</sup>

The overrepresentation of crack-cocaine offenders among drug arrestees does not appear to be a function of public health and safety concerns, nor of resident complaints.<sup>161</sup> Powder cocaine and ecstasy—not crack cocaine—are the most widely used serious drugs in Seattle.<sup>162</sup> Although crack-cocaine use poses health risks, it is less likely than other serious drugs, such as heroin and other opiates, to be associated with infectious disease and drug-related mortality.<sup>163</sup> Moreover, those arrested for crack-cocaine offenses are the *least* likely among serious drug users to possess a dangerous weapon at the time of arrest.<sup>164</sup> Lastly, there is little geographic correlation between the areas identified by civilian complainants and the places where planned drug-delivery arrests occur.<sup>165</sup>

We believe that a less harmful approach to drug law enforcement is necessary. Community-based diversion programs provide a viable alternative to traditional drug law enforcement methods.<sup>166</sup> A more equitable enforcement of drug laws would immediately begin to address racial disproportionality, especially when illicit drug use is roughly equal

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156. *Id.*

157. BECKETT, *supra* note 14, at 48.

158. *Id.* (based on a four-month sampling period of May and June in 2005 and 2006); *see also* Beckett et al., *Race, Drugs, and Policing*, *supra* note 64, at 123–24.

159. BECKETT, *supra* note 14, at 2.

160. *Id.*

161. *Id.* at 3; *see also* Beckett et al., *Race, Drugs, and Policing*, *supra* note 64, at 129; Beckett et al., *Lessons from Seattle*, *supra* note 64, at 430–35.

162. BECKETT, *supra* note 14, at 20–21.

163. *Id.* at 433–34.

164. *Id.* at 433; *see also* BECKETT, *supra* note 14, at 96.

165. BECKETT, *supra* note 14, at 88–91.

166. MELISSA BULL, JUST TREATMENT: A REVIEW OF INTERNATIONAL PROGRAMS FOR THE DIVERSION OF DRUG RELATED OFFENDERS FROM THE CRIMINAL JUSTICE SYSTEM 23–26 (2003).

for each racial or ethnic group.

### 7. *Drug-Related Asset Forfeiture Distorts Law Enforcement Priorities in Washington State*

Drug-related asset forfeiture is an important tool for law enforcement. Forfeiture laws reduce the incentive for financially motivated crimes such as drug trafficking by removing the assets that help make such activities profitable.<sup>167</sup> Washington State allows local law enforcement agencies to retain 90% of the net proceeds from drug-related assets seized, but the state requires that these funds be used “exclusively for the expansion and improvement of controlled substances related law enforcement activity.”<sup>168</sup>

This allocation creates a conflict between a law enforcement agency's economic self-interest and traditional law enforcement objectives.<sup>169</sup> In particular, section 69.50.505 of the Revised Code of Washington creates a perverse dependence whereby law enforcement agencies rely on assets seized during drug investigations to fund their operations.<sup>170</sup> This dependence inevitably skews how law enforcement agencies allocate their resources, and it affects operational decisions regarding whether to target particular crimes and how to exercise discretion when making arrests.<sup>171</sup> Legitimate goals of crime prevention are compromised when

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167. The Washington State Legislature made several findings in 1989 when it was considering the asset forfeiture law, including the following:

[D]rug-related offenses are difficult to eradicate because of the profits derived from the criminal activities, which can be invested in legitimate assets and later used for further criminal activities; and the forfeiture of real assets where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking, and will provide a revenue source that will partially defray the large costs incurred by government as a result of these crimes.

Omnibus Alcohol and Controlled Substances Act, ch. 271, § 211, 1989 Wash. Sess. Laws 1266, 1298–99 (codified at WASH. REV. CODE § 69.50.505 note (2010)); *see also* United States v. Two Tracts of Real Prop., 998 F.2d 204, 213 (4th Cir. 1993) (“One of the most potent weapons in the government’s war on drugs is its ability to obtain the civil forfeiture of property that aids violations of the drug laws.”).

168. WASH. REV. CODE § 69.50.505(10). The remaining 10% of the net proceeds are deposited into the state general fund. *See id.* § 69.50.505(9).

169. Eric D. Blumenson & Eva Nilsen, *The Next Stage of Forfeiture Reform*, 14 FED. SENT’G REP. 76, 76 (2001).

170. *Cf.* MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 12 (2010), available at [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf) (noting that in a nationwide survey, hundreds of law enforcement executives admitted that “civil forfeiture proceeds were a *necessary* budget supplement”).

171. *Id.* at 12–13 (“One consequence of giving law enforcement a pecuniary interest in forfeiture



salaries, equipment, and departmental budgets depend on how many assets are seized during drug investigations.<sup>172</sup>

Additionally, the standard of proof in Washington State for the government to successfully claim property through asset forfeiture is one of the lowest in the country, and it is highly deferential to law enforcement.<sup>173</sup> Section 69.50.505 requires only that a law enforcement officer have “probable cause” to believe the property is linked to criminal activity in order to lawfully seize it.<sup>174</sup> Making matters worse, circumstantial evidence is sufficient to establish probable cause to seize a person’s property.<sup>175</sup> If a property owner challenges the seizure, the burden is only slightly increased to a “preponderance of the evidence” standard.<sup>176</sup> The low evidentiary threshold is troubling because many property owners whose assets are seized are never charged with a crime or are not convicted. Investigators at the *Seattle Post-Intelligencer* found that 20% of people whose property is seized are never charged with a crime, and that 40% of the time there is no conviction.<sup>177</sup> In fact, even in those cases where charges are filed, the case is dropped 23% of the time.<sup>178</sup>

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proceeds is that it can cause them to over-enforce crimes that carry the possibility of forfeiture to the neglect of other law enforcement objectives. This makes basic economic sense; as the return to enforcing certain crimes increases, one would expect law enforcement agencies to devote a higher percentage of their resources to those aims.”); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40 (1998) (“First, these [asset forfeiture] programs have distorted governmental policymaking and law enforcement. During the past decade, law enforcement agencies increasingly have turned to asset seizures and drug enforcement grants to compensate for budgetary shortfalls, at the expense of other criminal justice goals. We believe the strange shape of the criminal justice system today . . . is largely the unplanned by-product of this economic incentive structure.”).

172. Eric D. Blumenson & Eva S. Nilsen, *Contesting Government’s Financial Interest in Drug Cases*, CRIM. JUST., Winter 1999, at 4, 5.

173. The highest standard is proof “beyond a reasonable doubt,” followed by proof upon “clear and convincing evidence.” The lowest standard is “probable cause,” which is used in fourteen states, including Washington. See WILLIAMS ET AL., *supra* note 170, at 22.

174. *Valerio v. Lacey Police Dep’t*, 39 P.3d 332, 339 (Wash. Ct. App. 2002) (Division II concluding that property may be seized if law enforcement has probable cause to suspect that the property in question was used in connection with illegal narcotics activity); *Escamilla v. Tri-City Metro Drug Task Force*, 999 P.2d 625, 630 (Wash. Ct. App. 2000) (Division III concluding the same); *Rozner v. City of Bellevue*, 784 P.2d 537, 540-41 (Wash. Ct. App. 1990) (Division I concluding that initial seizure of property under Washington’s asset forfeiture law requires a showing of probable cause that the property was used for illegal narcotics activity), *rev’d on other grounds*, 804 P.2d 24 (Wash. 1991).

175. *Adams County v. One 1978 Blue Ford Bronco*, 875 P.2d 690, 692 (Wash. Ct. App. 1994).

176. WASH. REV. CODE § 69.50.505(5) (2010).

177. Sam Skolnik, *Critics Target Drug Raid Seizures*, SEATTLE POST-INTELLIGENCER, Dec. 13, 2001, at A1, available at [http://o.seattlepi.com/frontpage/seattle\\_pima1x220011213.pdf](http://o.seattlepi.com/frontpage/seattle_pima1x220011213.pdf).

178. *Id.*

The evidence suggests that the combination of tremendous financial incentives and limited property rights distorts drug-related priorities and pressures police to make operational decisions to maximize perceived financial rewards.<sup>179</sup> Especially today, with budgets already stretched thin, Washington's police departments are increasingly dependent on prosecuting the drug war to ensure their economic survival. Washington's drug-related asset forfeiture laws reinforce drug-related law enforcement tactics that have a disparate impact on racial minorities.<sup>180</sup> As discussed above, two-thirds of those arrested for delivery of a serious narcotics offense in Seattle are black.<sup>181</sup> Because a drug arrest automatically renders much of a defendant's property seizable, section 69.50.505 of the Revised Code of Washington has a disparate impact on defendants of color.

Furthermore, despite the substantial property interests involved, indigent defendants do not have a right to appointed counsel when challenging an asset seizure.<sup>182</sup> Because indigent defendants tend to be people of color, minority property owners are at a distinct disadvantage and bear greater risk that their assets will be liquidated.

We believe that Washington State's drug-related asset forfeiture laws can be greatly improved with three simple reforms. First, we urge Washington State to end the direct profit incentive that allocates 90% of the net proceeds from asset forfeitures to law enforcement agencies.<sup>183</sup> So far, eight states have enacted reforms to end the direct profit incentive in their drug-related asset forfeiture laws by placing forfeiture revenue into a neutral account, such as education, drug treatment, or ideally, in the general treasury of the city, county, or state government that oversees the seizing agency.<sup>184</sup> This single measure could cure the

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179. See WILLIAMS ET AL., *supra* note 170, at 13 (“[T]his is not simply theory. Earlier research found that in states where agencies get to keep the lion’s share of forfeiture proceeds, drug arrests—which often have the potential of a related civil forfeiture—constitute a significantly higher percentage of all arrests.”); Blumenson & Nilsen, *supra* note 169, at 78–79 (discussing how police have an incentive to target buyers in reverse stings because it allows officers to seize the buyer’s cash).

180. Blumenson & Nilsen, *supra* note 171, at 39–40 (noting that traditional drug-enforcement strategy has “a self-perpetuating life of its own” because of the “lucrative rewards available to police and prosecutorial agencies that make drug law enforcement their highest priority”).

181. BECKETT, *supra* note 14, at 1.

182. See WASH. REV. CODE § 69.50.505 (2010). The statute provides only that a property owner may be entitled to attorneys’ fees if the owner “substantially prevails” in a proceeding to reclaim his or her property. *Id.* § 69.50.505(6).

183. *Id.* § 69.50.505(10).

184. See WILLIAMS ET AL., *supra* note 170, at 17. Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, and Vermont do not distribute any of the proceeds to law

forfeiture law of its most corrupting effects.<sup>185</sup>

Second, we recommend increasing the burden of proof required to seize property. Requiring seizing agencies to demonstrate with “clear and convincing” evidence that the assets seized were linked to criminal activity would help protect property owners from arbitrary seizures.

Finally, because of the important property interests at stake, we suggest that indigent persons be provided with counsel when their assets are seized. Providing counsel for indigent defendants would help protect property interests that are often key to indigent persons’ livelihood.

As long as police agencies can expect a financial reward for asset seizures, they will remain dependent on current tactics that have a disparate impact on racial minorities.

#### 8. *Racial Disparity in Traffic Enforcement*

Since 2000, the Washington State Patrol (WSP) has collected data on its traffic stops.<sup>186</sup> WSP requires its troopers to maintain data for every contact they have with a motorist, including whether the motorist is stopped, searched, and cited, as well as the driver’s race and ethnicity.<sup>187</sup> Studies based on this data have found no evidence of racial profiling or any observable racial disparity in traffic stops.<sup>188</sup> Although black, Native American, and Hispanic drivers are stopped at higher rates than white motorists, this appears to reflect differences in traffic violation rates.<sup>189</sup> There is some racial disparity, however, in the outcomes associated with these stops.

Citations are one such outcome. To assess whether higher citation rates among drivers of color are attributable solely to differences in

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enforcement. *Id.*; see also Blumenson & Nilsen, *supra* note 169 (discussing reform efforts around the country where voters have approved laws to end the “corrupting incentives” of asset-forfeiture allocation (quoting *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000))).

185. See WILLIAMS ET AL., *supra* note 170, at 14; Blumenson & Nilsen, *supra* note 169, at 80–81.

186. LOVRICH ET AL., 2003 STUDY, *supra* note 63, at 22. We note that stops by local law enforcement constitute the large majority of traffic stops that take place in the state. But very little empirical data have been collected on the stop, citation, and search practices of these local law enforcement agencies.

187. See Clayton Mosher et al., *The Importance of Context in Understanding Biased Policing: State Patrol Traffic Citations in Washington State*, 9 POLICE PRAC. & RES. 43, 45–46, 47–48 tbls.1 & 2 (2008).

188. *Id.* at 43–44.

189. Many of the most frequent violations—such as driving with a suspended license or broken tail light—occur when people cannot afford to pay traffic fines or repair their cars. Thus, higher violation rates among drivers of color may reflect socioeconomic factors. See *id.* at 45–46, 48.

traffic law violation rates, researchers compared the number of alleged violations in WSP stops that did and did not result in citation.<sup>190</sup> The results indicate that black, Native American, and Latino motorists were identified by WSP officers as having more traffic violations even in stops in which officers did not issue a citation.<sup>191</sup> This suggests that WSP officers were not “piling violations on” minority drivers to justify issuing citations to them. Nonetheless, comparison of citation rates for drivers with just one violation reveals some racial differences.<sup>192</sup> Specifically, black, Native American, Latino, and Asian drivers with one traffic violation were significantly more likely to be cited than white motorists with one traffic violation in a total of thirty-six jurisdictions, but less likely to be cited than comparable white drivers in just six jurisdictions.<sup>193</sup>

Additionally, researchers found that “race is clearly an important factor influencing the likelihood of a search.”<sup>194</sup> In particular, the data show that black, Native American, and Latino motorists are significantly more likely to be searched once stopped than are white drivers.<sup>195</sup> This disparity exists in both low- and high-discretion searches, and it persists after time of day and number of violations are taken into account.<sup>196</sup>

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190. *Id.* at 46, 48–49.

191. *Id.* at 53–54 tbl5.

192. *Id.* at 51, 52 tbl4.

193. The authors concluded that this difference “[d]id not indicate the operation of systemic bias in citing minorities who have only a single violation recorded by the WSP.” *Id.* at 51. It is not clear how the authors made this determination. Forthcoming research examines and critiques the methodologies that LOVRICH ET AL., *supra* note 63, employed in their 2007 report on the WSP. See Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 SEATTLE U. L. REV. (forthcoming 2012); Clayton Mosher & J. Mitchell Pickerill, *Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol*, 35 SEATTLE U. L. REV. (forthcoming 2012).

194. J. Mitchell Pickerill et al., *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL’Y 1, 15 (2009). We note that an overlapping group of researchers, using data from WSP traffic stops between 2005 and 2007, employed a different methodology to analyze the disproportionate search rates to conclude that the differences were not indicative of discrimination. See LOVRICH ET AL., 2007 STUDY, *supra* note 63, at 49–50. They state that because the relative disproportionality between groups is the same difference in magnitude for low- and high-discretion searches, that this reflects a lack of bias in searches by WSP. *Id.* (“We come to this conclusion by comparing the likelihoods of high discretion searches to low discretion searches, which suggest that officers do not act differently based on race when they have higher levels of discretion.”). But their analysis and conclusions are subject to important methodological criticism. See Barnes & Chang, *supra* note 193; Mosher & Pickerill, *supra* note 193.

195. Pickerill et al., *supra* note 194. Other driver characteristics also influence the likelihood of a search. See *id.* For example, females and older drivers are less likely to be searched than males and younger drivers. See *id.*

196. See Pickerill et al., *supra* note 194, at 15, 19, 21.

However, the “hit rate”—that is, the share of searches that result in seizures—is somewhat higher for whites.<sup>197</sup> For example, high-discretion searches of whites led to seizures 24.1% of the time.<sup>198</sup> But the hit rates for minority groups during high-discretion searches were all lower: 17.6% for Latinos, 22.1% for blacks, 18.1% for Native Americans, and 22.4% for Asians.<sup>199</sup> These findings suggest that minorities are subject to a higher rate of searches as compared to white drivers, but that this higher rate is not warranted by any policing purpose because whites are more likely to have items subject to seizure.

In short, WSP should be recognized as one of a few agencies studied nationwide that does not exhibit a pattern of disproportionate minority contact at the “stop level.”<sup>200</sup> The data and evidence demonstrate, however, that WSP officers are more likely to cite black, Native American, and Latino drivers with one violation than white drivers with one violation.<sup>201</sup> The evidence also shows that race is an important factor influencing the likelihood of a search.<sup>202</sup>

#### 9. *Racial Disparity in Driving While License Suspended (DWLS) Cases*

In many misdemeanor courts, Driving While License Suspended in the Third Degree (DWLS 3) cases constitute at least one-third of the caseload, and consume a dramatic percentage of misdemeanor court, prosecution, and public defense resources in a time of severe budget challenges.<sup>203</sup> Currently, there are an estimated 100,000 DWLS 3 cases in Washington per year,<sup>204</sup> many of which result from failure to pay a traffic ticket or to appear in court for the ticket.<sup>205</sup>

The costs of prosecuting DWLS 3 cases are staggering. It is estimated that Washington’s statewide average cost of arrest is \$334, cost of

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197. *Id.* at 13 & tbl.3.

198. *Id.*

199. *Id.*

200. Mosher et al., *supra* note 187, at 53, 56.

201. Pickerill et al., *supra* note 194, at 51.

202. *Id.* at 13. We disagree with the authors’ interpretations and conclusions.

203. John B. Mitchell & Kelly Kunsch, *Of Driver’s Licenses and Debtor’s Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 443, 460–61 (2005).

204. JOANNE I. MOORE & DAVID K. CHAPMAN, WASH. STATE OFFICE OF PUB. DEF., DRIVING WHILE LICENSE SUSPENDED 3RD DEGREE: SURVEY OF COURTS OF LIMITED JURISDICTION 1 (2008), available at [http://www.opd.wa.gov/TrialDefense/090602\\_DWLS3Survey.pdf](http://www.opd.wa.gov/TrialDefense/090602_DWLS3Survey.pdf).

205. Mitchell & Kunsch, *supra* note 203, at 443.

conviction is \$757, and cost per jail day is \$60.71.<sup>206</sup> Even though most first-time DWLS 3 convictions do not result in jail time, many people are jailed on the second or third offense or for failing to complete probationary requirements.<sup>207</sup> The single largest factor responsible for driving up the costs of the criminal justice system has been the increased incarceration rate since 1980.<sup>208</sup> Even if the DWLS 3 cases proceed on the basis of tickets and not arrests, and there is no actual jail time imposed, the costs of prosecuting and defending those cases approaches \$75 million annually.<sup>209</sup> Worse still, this cost does not take into account the impact on individual defendants and their family.

Additionally, the evidence shows that this facially neutral policy—treating driving while license suspended as a misdemeanor offense—has racially disparate effects. Most people charged with DWLS 3 are poor. A 1999 Seattle study found that of 184 people with suspended licenses, the average person had \$2095 in unpaid fines and a monthly income of \$810.<sup>210</sup> Because of economic status and police deployment decisions—and possibly because of racial profiling in some situations—people of color are more likely to have suspended licenses for failure to pay a ticket. For instance, in 2000, a *Seattle Times* investigation found that black drivers in Seattle receive more tickets and are more likely to be cited for defective headlights than are white drivers.<sup>211</sup> In some misdemeanor courts, there is no counsel available for indigent persons at

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206. STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 41 exhibit B.2 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>. Figures were adjusted for 2007 dollars utilizing the Implicit Price Deflator (GDP) rate; these computations were performed using the calculator at Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1774 to Present*, MEASURINGWORTH (Mar. 2011), <http://www.measuringworth.com/uscompare>.

207. See Mitchell & Kunsch, *supra* note 203, at 440–42.

208. WASH. STATE INST. FOR PUB. POLICY, THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE: INCARCERATION RATES, TAXPAYER COSTS, CRIME RATES, AND PRISON ECONOMICS 4 & fig.5 (2003), available at <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf>.

209. This figure is based on the average cost of a DWLS 3 conviction (\$757) and the estimated number of DWLS 3 cases per year (100,000). See AOS ET AL., *supra* note 206; MOORE & CHAPMAN, *supra* note 204.

210. MUN. COURT OF SEATTLE, PARTNERS IN SERVICE TO THE COMMUNITY 1999–2000, at 7 (2001), available at <https://www.seattle.gov/courts/pdf/smcreport.pdf>.

211. Andrew Garber, *Seattle Blacks Twice as Likely to Get Tickets*, SEATTLE TIMES (June 14, 2000), <http://community.seattletimes.nwsourc.com/archive/?date=20000614&slug=4026674> (“A *Seattle Times* analysis of more than 324,000 citations issued in the past five years also found blacks get more tickets per stop than whites and are more likely to be cited for certain offenses, such as defective headlights. For example, the number of tickets issued to blacks for blocking traffic is four times the proportion of blacks in the driving population.”).

first appearance or arraignment hearings, and in other courts, public defense attorneys are too overwhelmed with cases to provide meaningful assistance. As a result, people of color are more likely to be charged with DWLS 3.

In response to this worsening problem, court-initiated relicensing programs have arisen. These programs allow individuals to have their license reinstated in exchange for continued payment on outstanding fines.<sup>212</sup> King County District Court, for example, schedules at least two days per month in which an individual may enroll in the program.<sup>213</sup> Participants have the option to perform community service at the rate of \$10 for each hour worked.<sup>214</sup> The district court holds are released once the court receives written proof of community service hours performed.<sup>215</sup>

In addition, the program offers participation in work crews and credit toward King County District Court fines at the rate of \$150 for every eight-hour day worked.<sup>216</sup> Yet another option is to make a 10% down payment on fines and monthly payments for the remaining balance.<sup>217</sup> A community-based organization, Legacy of Equality, Leadership and Organizing, assists individuals with the process and refers them to the relicensing program.<sup>218</sup> These programs both entice the payment of outstanding fines and reduce the costs of prosecution, public defense, and jail associated with DWLS 3 defendants.<sup>219</sup> The King County District Court relicensing program is estimated to save two dollars for every dollar spent.<sup>220</sup> King County is not alone in its efforts to address this crisis. Recently, the City of Spokane Prosecutor's Office established

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212. Cooper Offenbecher, *DWS: A Ticket to Debtor's Prison?*, KING COUNTY B. BULL. (Apr. 2008), <http://www.kcba.org/newsevents/barbulletin/archive/2008/08-04/article1.aspx> (on file with Washington Law Review); see also Mitchell & Kunsch, *supra* note 203, at 463.

213. Offenbecher, *supra* note 212; *Relicensing Program*, KING CNTY., <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx> (last updated Jan. 20, 2012).

214. *Relicensing Program*, *supra* note 213.

215. *Id.*

216. *Id.*

217. *Id.*

218. LELO—LEGACY OF EQUALITY, LEADERSHIP & ORGANIZING, <http://www.lelo.org> (last visited Dec. 31, 2011). The organization also conducts its own DWLS education programs. See *id.*

219. Offenbecher, *supra* note 212.

220. *Id.*; Corinna Harn, Chief Presiding Judge, King Cnty. Dist. Court, & Tricia Crozier, Chief Admin. Officer, King Cnty. Dist. Court, Costs & Benefits of the King County District Court Relicensing Program, Presentation of Findings from a Study by Christopher Murray & Associates (May 12, 2004) (PowerPoint slides available at DEFENDER ASS'N, [old.defender.org/files/archive/Relicensing\\_Presentation.ppt](http://old.defender.org/files/archive/Relicensing_Presentation.ppt) (last visited Dec. 31, 2011)).

a diversion program for DWLS 3 cases that it believes will reduce the municipal court criminal caseload by 35%.<sup>221</sup>

Because most people charged with DWLS 3 have their licenses suspended for not paying a fine or for missing a court hearing, we believe that if these individuals had the means and the knowledge to navigate the court system, they could have their licenses reinstated. Local prosecutors and courts should work with defenders and community groups to establish precharging diversion and relicensing programs where they do not now exist. Additionally, the legislature should amend section 46.20.289 of the Washington Revised Code so that drivers' licenses are not suspended for failure to pay a ticket or attend a court hearing.<sup>222</sup>

### 10. Summary

In conclusion, the evidence shows a wide variety of policies and practices that facilitate racial disparity in Washington's criminal justice system. In the nine aforementioned areas—juvenile justice, prosecutorial discretion, confinement sentencing outcomes, LFOs, pretrial release, drug law enforcement, asset forfeiture, traffic enforcement, and DWLS—research has revealed that race matters at various stages in the disposition of criminal cases. Similarly situated persons are treated differently along racial lines in the studied contexts. These findings raise serious concerns regarding other criminal justice contexts yet to be examined, and they demonstrate how structural racism can and does affect outcomes in Washington's criminal justice system.

### C. Bias

Many of us harbor explicit and implicit racial biases, regardless of our professed commitments to racial equality. If we have these biases, how many of us will admit them to ourselves, let alone to others? Even then, how do we know if these feelings in fact affect our behavior? Finally, if we admit that these feelings can affect our behaviors, are there ways to prevent racialized outcomes that are inconsistent with our shared commitment to equality? This section explores evidence regarding bias,

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221. Robert C. Boruchowitz, AM. CONSTITUTIONAL SOC'Y, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 9 (2010), available at <http://www.acslaw.org/files/Boruchowitz%20-%20Misdemeanors.pdf>.

222. WASH. REV. CODE § 46.20.289 (2008), *invalidated on other grounds by In re Nichols*, 211 P.3d 462 (Wash. Ct. App. 2009), *aff'd*, 256 P.3d 1131 (Wash. 2011).



the relationship between bias and behavior, and the potential for solutions to prevent racially disparate outcomes.

### 1. *Explicit Bias as Reflected in Survey Data*

One of the best sources of survey data on racial attitudes comes from the General Social Survey conducted by the National Opinion Research Center at the University of Chicago, which has collected data from face-to-face surveys since 1942.<sup>223</sup> The survey has revealed, over time, that white attitudes toward blacks, as measured by expressed principles, have shifted dramatically. For example, in 1964, 60% of white respondents were in favor of laws against intermarriage between blacks and whites.<sup>224</sup> By 2002, the number had dropped to 10% in favor of such laws, though 35% still opposed intermarriage between whites and blacks.<sup>225</sup> Similar trend data show that when white respondents were asked in 1977 about black inequality and its causes, 27% reported that it was due to blacks having less ability.<sup>226</sup> By 2006, this number had dropped to 7% and, by 2010, it had settled at 9%.<sup>227</sup> Interestingly, in 1977, 66% of white respondents asked about black inequality stated that blacks lack motivation.<sup>228</sup> In 2008, 52% of white respondents said that blacks had no motivation and 60% agreed somewhat or strongly that blacks should try harder.<sup>229</sup> Some negative views, such as the attribution of no motivation, seem to persist at a very high rate. It is also worth noting that a large percentage of white respondents believe that blacks are treated unfairly by police, with 36% holding this view in both 1997 and 2007.<sup>230</sup>

The survey data show a significant diminishment in white negative

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223. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 59 (rev. ed. 1997).

224. *Id.* at 106 tbl.3.1B.

225. Compare *id.*, with 2011 Update to Table 3.1B of *Racial Attitudes in America: Trends and Interpretations*, INST. OF GOV'T & PUB. AFFAIRS (Oct. 2011), [http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes\\_3-1B.pdf](http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes_3-1B.pdf).

226. SCHUMAN ET AL., *supra* note 223, at 156–57 tbl.3.4A.

227. 2011 Update to Table 3.4A of *Racial Attitudes in America: Trends and Interpretations*, INST. OF GOV'T & PUB. AFFAIRS (Oct. 2011), [http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes\\_3-4A.pdf](http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes_3-4A.pdf).

228. SCHUMAN ET AL., *supra* note 223, at 156–57 tbl.3.4A.

229. 2011 Update to Table 3.4A of *Racial Attitudes in America: Trends and Interpretations*, *supra* note 227.

230. 2011 Update to Table 3.4B of *Racial Attitudes in America: Trends and Interpretations*, INST. OF GOV'T & PUB. AFFAIRS (Oct. 2011), [http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes\\_3-4B-Sup.pdf](http://igpa.uillinois.edu/system/files/Trends%20in%20Racial%20Attitudes_3-4B-Sup.pdf).

racial attitudes toward blacks in many areas, but even this outcome should be taken with a grain of salt. Any survey is subject to the problem of response bias.<sup>231</sup>

## 2. *Implicit Bias Distorts Decisions Throughout the Criminal Justice System*

### a. *Overview on Implicit Bias*

The criminal justice system involves numerous actors—such as police officers, prosecutors, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants. A great deal of research has shown that race significantly affects the decisions and judgments of most people. Some of this research has been conducted on particular actors within the criminal justice system. For example, the research on bias tends to show that a juror who associates blacks (as opposed to whites) with a particular crime will be more likely to convict blacks (as opposed to whites) of that crime on the same evidence.<sup>232</sup> These biases are subtle phenomena that have some influence in any given case, but which have their most substantial effects over time. Biased decision-making artificially inflates the proportion of minorities in the criminal justice system, which likely creates more stereotypes and associations, thus resulting in a negative feedback cycle.

The research and studies discussed below are either well-recognized meta-analyses<sup>233</sup> or particular studies selected for their relevance, elegance, clarity, and methodological rigor. Unfortunately, much of the research to date has evaluated race as a white-black dichotomy.<sup>234</sup> Nevertheless, the studies that have expanded the race evaluation to other minority groups have tended to show similar results.<sup>235</sup> Thus, no

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231. Response bias can be produced by such things as question wording, question context, race of the interviewer, and privacy. See SCHUMAN ET AL., *supra* note 223, at 78–79 (addressing the wording of questions); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 PUB. OPINION Q. 506, 525, 536 (1998) (addressing the privacy effect); Cynthia Webster, *Hispanic and Anglo Interviewer and Respondent Ethnicity and Gender: The Impact on Survey Response Quality*, 33 J. MARKETING RES. 62, 63, 70 (1996) (addressing the race and ethnicity of interviewers and respondents).

232. See *infra* note 266 and accompanying text.

233. We use the term “meta-analysis” to mean an evaluation of large collections of similar studies that is used to determine the general state of knowledge regarding a particular issue.

234. See, e.g., SCHUMAN ET AL., *supra* note 223.

235. Compare William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 83 (2004) (comparing reactions to black and white faces

distinction between minority groups is drawn here, and further treatment of that issue is beyond the scope of this report.

*b. Implicit Biases Are Pervasive*

Survey data often fail to reflect “true” attitudes, especially when people wish to conceal their motives or if they have unconscious biases. In one carefully designed experiment, researchers found that when offered a choice of two rooms in which movies were playing, people avoided the room with a disabled person, but only when doing so could masquerade as movie preference.<sup>236</sup> This experiment and others like it<sup>237</sup> suggest that if people can act in a biased matter with plausible deniability, they will do so.

The gap between true attitudes and what is expressed is exacerbated by the problem of unconscious or implicit bias. Much of this research is done in connection with the Implicit Association Test (IAT), discussed below, which measures reaction times in response to certain visual stimuli.<sup>238</sup> Other methodologies include testing subjects while “measuring cardiovascular response, micro-facial movements, or neurological activity.”<sup>239</sup>

The general findings, confirmed by hundreds of articles in peer-reviewed scientific journals, are that “[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind.”<sup>240</sup>

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and finding bias in favor of white faces), and Nilanjana Dasgupta et al., *Automatic Preference for White Americans Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL & SOC. PSYCHOL. 316 (2000) (comparing reactions to photos of black and white Americans and finding implicit bias in favor of white Americans), with Jaihyun Park et al., *Implicit Attitudes Toward Arab-Muslims and the Moderating Effects of Social Information*, 29 BASIC & APPLIED SOC. PSYCHOL. 35 (2007) (comparing reactions to Arab and Muslim names and white names and finding strong bias in favor of white names).

236. Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 2297, 2297 (1979).

237. *Id.* at 2304 (discussing bystander intervention experiments varying race of victim).

238. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998).

239. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 471 (2010) (footnotes omitted).

240. *Id.* at 473.

c. *Implicit Bias Research on Race and Crime*

Individuals in our society generally associate minorities with criminality;<sup>241</sup> they also exhibit implicit bias against minorities<sup>242</sup> and display divergent behavior in experiments based on the manipulation of race as a variable (such as the race of a face in a photograph, the race of a character in a vignette, or even the race of an experimenter).<sup>243</sup> Researchers have shown that whites tend to exhibit relatively increased levels of activation in the amygdala—an area of the brain that is associated with emotional stimulation and fear—when presented with black as opposed to white faces.<sup>244</sup> This effect has been correlated with performance on the IAT, which measures implicit conceptual associations and has been used by researchers to measure implicit bias in individuals.<sup>245</sup> The IAT presents individuals with words or images from two distinct dichotomies (such as good-bad and white-black), asks individuals to sort the words and images according to assigned pairings (e.g., hit one button for each good word or black image presented, and hit another button for each bad word or white image presented), and then measures the speed and accuracy with which the individuals are able to sort the paired concepts. Whites generally exhibit implicit bias against blacks under the IAT.<sup>246</sup> Namely, whites tend to exhibit less speed and accuracy when asked to associate positive concepts with black (as opposed to white) faces or names. In certain studies, the IAT in particular also has been correlated with biased behavior and decision-making.<sup>247</sup>

Researchers have made other findings regarding mental associations

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241. Harris et al., *supra* note 129, at 241; *see also infra* notes 253–257 and accompanying text. *See generally* Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276 (2007).

242. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955–56, 957–58 tpls.1 & 2 (2006); *see also infra* notes 246–247 and accompanying text.

243. *See* discussion *infra* Part III.C.2.d–f.

244. Phelps et al., *supra* note 18, at 729–33.

245. *See id.*

246. *Id.* at 730–31; *see also* Greenwald et al., *supra* note 238, at 1474.

247. *See* Jeremy D. Heider & John J. Skowronski, *Improving the Predictive Validity of the Implicit Association Test*, 9 N. AM. J. PSYCHOL. 53, 71–72 (2007) (examining the extent to which IAT measures of racial attitudes predict social behaviors); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440 (2001) (using IAT to measure intergroup prejudice between white and black undergraduates).

of blacks with criminality. In one study, individuals primed<sup>248</sup> with crime-related concepts more quickly identified computer imposed “dot-probe[s]” on black faces than white faces.<sup>249</sup> The individuals primed with crime-related concepts also identified the dot probe more quickly than their nonprimed counterparts,<sup>250</sup> an effect that was replicated among a group of police officers.<sup>251</sup> Further, when asked whether faces “looked criminal,” a racially diverse group of police officers judged black faces to be much more criminal-looking.<sup>252</sup>

*d. Criminal Investigations and Arrests Are Influenced by the Race of Potential/Actual Suspects, and Often Are Based on a Faulty Application of Majoritarian Cultural Norms*

The racial component of a given case may influence judgments of character and guilt, expectations of recidivism, and decisions to arrest and charge. In one study, priming police and probation officers with black-related concepts significantly influenced responses to race-neutral vignettes of juveniles committing theft and assault.<sup>253</sup> Specifically, the officers were more likely to rate the juveniles negatively, to expect recidivism, and to recommend arresting the juveniles if primed with black-related concepts, such as “homeboy” or “minority.”<sup>254</sup> Another study observed that white store employees were more likely to monitor and follow black (as opposed to white) customers who asked to try on sunglasses with a security sensor removed.<sup>255</sup>

Additionally, researchers have conducted many deadly force simulations in which subjects must decide quickly whether to shoot or not shoot figures appearing on a screen who are carrying either a gun or an innocuous object (such as a wallet). Whites have been shown to

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248. “Priming” occurs when a subject is shown an image or word so quickly that the image or word is not registered in consciousness, but nevertheless has a subconscious impact and affects behavior. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 880 (2004); Erin J. Strahan et al., *Subliminal Priming and Persuasion: Striking While the Iron Is Hot*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 556, 556 (2001). This is a common and accepted method of investigating underlying mental processes in the field of social psychology.

249. Eberhardt et al., *supra* note 248, at 882–83.

250. *Id.*

251. *Id.* at 885–87.

252. *Id.* at 889.

253. Graham & Lowery, *supra* note 17, at 487–88, 494, 499.

254. *Id.* at 489, 491–97.

255. George E. Schreer et al., “*Shopping While Black*”: *Examining Racial Discrimination in a Retail Setting*, 39 J. APPLIED SOC. PSYCHOL. 1432, 1439 (2009).

commit more errors regarding black (as opposed to white) target figures.<sup>256</sup> Another such deadly force study was conducted at the University of Washington with similar results.<sup>257</sup> This bias effect increased in one study when subjects read newspaper articles involving black (as opposed to white) criminals prior to testing—once again showing the power of underlying stereotyping.<sup>258</sup>

Researchers have also studied whether nonverbal cues used by police officers to identify likely suspects, such as eye contact and body language, are accurate across races.<sup>259</sup> Research has shown that minorities—including minorities who have not been engaging in criminal activity—disproportionately exhibit many of these nonverbal cues (such as pauses in speech or avoidance of eye contact).<sup>260</sup> These same behaviors also have been shown in foreign language speakers.<sup>261</sup>

*e. Determinations of Guilt and Sentencing Likely Are Influenced by the Race of Defendants, in Conjunction with Other Extra-Legal Factors*

Researchers have conducted some substantial meta-analyses regarding mock juror studies involving race. In these studies, subjects are provided with trial materials and asked for judgments of guilt and sentencing, and defendant race is manipulated. These studies are limited in various ways—for example, they generally evaluate individual mock jurors, as opposed to mock juries engaged in group decision-making—but they appear useful nonetheless.

One meta-analysis focused on sentencing decisions made by white mock jurors found a narrow racial bias in sentencing against people of color.<sup>262</sup> Another meta-analysis evaluated verdict and sentencing decisions made by mock jurors (including black mock jurors) in mock cases involving minority defendants, finding no significant effect of racial bias (although there were apparent effects within particular types

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256. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002).

257. Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 399–402 (2003).

258. Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1114 (2007).

259. Engel & Johnson, *supra* note 17; Johnson, *supra* note 17, at 280, 286.

260. Engel & Johnson, *supra* note 17, at 612 tbl.3.

261. *Id.* at 613.

262. Sweeney & Haney, *supra* note 17, at 191–93.

of crime).<sup>263</sup> A subsequent meta-analysis collected more studies and evaluated the effect of out-group bias, including bias by black mock jurors against white mock defendants.<sup>264</sup> That meta-analysis found a “small, but significant” effect of race on mock juror verdict and sentencing decisions, which was substantially tempered both by jury instructions and use of binary responses regarding guilt (guilty or not guilty, as opposed to a scale measuring likelihood of guilt).<sup>265</sup> These tempering conditions are more realistic and reflective of actual courtroom processes, and thus, based on mock juror research to date, the effect of racial bias on jury decisions in general appears to be fairly insignificant.

However, subsequent research has shown that race may play a significant role in particular types of criminal cases, or when combined with other factors. For instance, some studies have found a substantial effect of racial bias for crimes stereotypically associated with a particular race—for example, relatively higher guilty ratings for whites charged with embezzlement or blacks charged with motor vehicle theft.<sup>266</sup> Another study evaluated the interaction of defendant race, socioeconomic status, and attorney race on mock juror evaluations. Although no factor was individually significant, the three factors combined were highly significant; all else being equal, the Mexican, poor defendant with a Mexican attorney was judged guilty by 55% of jurors, while the white, rich defendant with a white attorney was judged guilty by only 32% of jurors.<sup>267</sup>

*f. Cross-Racial Eyewitness Identification Is Substantially Less Accurate, and Cross-Racial Lineup Construction Is Less Fair*

The “cross-race bias” eyewitness phenomenon is the finding that “[e]yewitnesses are more accurate when identifying members of their

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263. Mazzella & Feingold, *supra* note 17, at 1325.

264. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 621 (2005).

265. *Id.* at 629.

266. Randall A. Gordon et al., *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191, 195 (2001); Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 BASIC & APPLIED SOC. PSYCHOL. 1, 5–7, 9 (2003).

267. Russ K.E. Espinoza & Cynthia Willis-Esqueda, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 364, 367–68 tbls.1 & 2 (2008).

own race than members of other races.”<sup>268</sup> In a survey of sixty-four eminent experts on eyewitness research, 90% agreed that the cross-race bias phenomenon is reliable enough to be presented in court.<sup>269</sup> Further, a comprehensive and well-regarded meta-analysis of studies regarding cross-racial eyewitness identification found that cross-racial identifications are 1.56 times more likely to be erroneous than same-race identifications.<sup>270</sup> Considering the important role that eyewitness testimony plays in criminal trials, this incongruity is disturbing. Similarly, another study found that cross-racial lineup constructions (lineups constructed by individuals of a different race than the suspect) are likely to be done with less time and attention to detail in selecting foils and are therefore less fair.<sup>271</sup>

### 3. *Bias and Outcomes*

Research also demonstrates that bias, whether conscious or unconscious, affects behaviors. In one study, résumés were sent to 1250 employers who had advertised that they were hiring.<sup>272</sup> The résumés were altered so that some résumés had stereotypically white-sounding names while others had stereotypically black-sounding names. Each prospective employer received four résumés from the researchers: “an average white applicant, an average black applicant, a highly skilled white applicant, and a highly skilled black applicant.”<sup>273</sup> Much to the surprise of the researchers,

the résumés with white-sounding names triggered 50 percent more callbacks than résumés with black-sounding names. Furthermore, the researchers found that the high-quality black résumés drew no more calls than the average black résumés. Highly skilled candidates with white names got more calls than average white candidates, but lower-skilled candidates with white names got many more callbacks than even highly skilled

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268. Saul M. Kassir et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 408 tbl.1 (2001).

269. *Id.* at 407, 410.

270. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3, 15 (2001).

271. John C. Brigham & David J. Ready, *Own-Race Bias in Lineup Construction*, 9 LAW & HUM. BEHAV. 415, 422–23 (1985).

272. Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12, available at <http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html>.

273. *Id.*



black applicants.<sup>274</sup>

While this study involved fictitious black and white applicants in an employment setting, its implications are of significant concern for the criminal justice system, where a significant body of research has confirmed the presence of bias and disparate outcomes.

A difficulty remains, though, with connecting bias to behavior to particular outcomes. Absent an admission from an officer who was motivated by bias, blacks, Latinos, and Native Americans who are stopped and searched while driving their cars cannot prove discrimination. Yet more blacks, Latinos, and Native Americans are searched, even though statistically, those individuals are less likely to be in possession of narcotics.<sup>275</sup>

Because of the cumulative effect of facially neutral policies that have disproportionate impacts, and because of the subtle operation of bias at various decision points, a disproportionate number of people of color in Washington State find themselves incarcerated or otherwise involved with the criminal justice system—a disproportion that cannot be fully accounted for by involvement in crime.

Further, due to the difficulties in proving intent and the limits of current antidiscrimination laws,<sup>276</sup> many of the solutions to the problem of bias in the criminal justice system will have to come from outside of the courtroom. The research shows that implicit racial bias is not an unavoidable component of human decision-making. Substantial research has begun to determine the most effective methods of minimizing such bias.<sup>277</sup> Implicit-bias research should inform policymaking and training within the criminal justice system, albeit with great care and consideration.<sup>278</sup>

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274. *Id.*

275. Pickerill et al., *supra* note 194, at 13 tbl.3.

276. Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020*, at 94, 94–99 (Jack M. Balkin & Reva B. Siegel eds., 2009).

277. See, e.g., Sophie Lebrecht et al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, PLOS ONE, Jan. 2009, at e4215, at 1, 4–5 (concluding that training in distinguishing other-race faces decreases bias shown in IAT); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803, 804 fig.1 (2001) (concluding that exposure to images of liked and disliked members of racial groups affects performance on IAT).

278. See, e.g., Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 169 (2010) (“[M]ake the IAT universal in jury assembly rooms . . . and test jurors for the categories most likely to generate bias that could play a role in the cases scheduled for the day . . . .”); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*,

## IV. CONCLUSION

A time comes when silence is betrayal.

—Martin Luther King, Jr., 1967

There is a problem in our justice system.

In this Report, we find that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that increase disparity in incarceration rates, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system. We have presented evidence of racial and ethnic disproportionality and disparities in the criminal justice system. Arrest and conviction rates do not correlate precisely with criminal behavior rates and cannot serve as a proxy for criminality. Much of the disproportionality cannot be explained by legitimate race-neutral factors.

Put simply, we have found disparity and mistrust. Together, we must fix it for the sake of our democracy.

Our democracy is based on the rule of law and faith in the fairness of the justice system. This faith is undermined by disparity and by high-profile incidents of violence toward people of color by law enforcement.<sup>279</sup> The problem is not a “people of color” problem. It is our problem as a society to address.

We, the Task Force on Race and the Criminal Justice System, are devoted to reducing racial disparity in the justice system. Existence would be intolerable were we never to dream. We dream of completely eliminating bias in criminal, civil, juvenile, and family law matters. But there is a long history of overpromising and underdelivering. We ask that you join us with energy and goodwill, so we are not added to this list of failures. We prefer the folly of enthusiasm to the indifference of wisdom from those who purport to know better.

We ask that you trust only action because progress happens at the level of events, not of words. Please join our effort to address bias in the justice system at every level. We have hope because we are united and committed to working collaboratively despite our differences. We celebrate the efforts of this Task Force to work together to build a community based on trust, equality, and respect.

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7 PSYCHOL. PUB. POL'Y & L. 230, 241–43 (2001) (suggesting more lineup foils and own-race lineup construction in cases of other-race eyewitness identification).

279. Steve Miletich, *SPD Officer Charged with Assault in Videotaped Kicking*, SEATTLE TIMES (Apr. 13, 2011), [http://seattletimes.nwsources.com/html/localnews/2014766865\\_officercharged14m.html](http://seattletimes.nwsources.com/html/localnews/2014766865_officercharged14m.html).