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Modern Hegemony – Implicit Bias, Media, and the Criminal Justice System

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MODERN HEGEMONY – IMPLICIT BIAS, MEDIA, AND THE CRIMINAL JUSTICE SYSTEM

Dylan Tucker

Table of Contents

I.	INTRODUCTION	125
II.	IMPLICIT BIAS	127
III.	PORTRAYALS OF BLACKS IN THE MEDIA	130
A.	BLACK CARICATURES	132
i.	SAMBO.....	133
ii.	THE SAVAGE.....	134
iii.	MAMMY AND SAPPHIRE	135
iv.	JEZEBEL	136
B.	STEREOTYPING IN THE NEWS.....	137
C.	HIP HOP CULTURE’S PRESERVATION OF COMMON STEREOTYPES	139
IV.	IMPLICIT BIAS AND THE CRIMINAL JUSTICE SYSSYTEM.....	143
A.	POLICE	143
i.	STOP-AND-FRISK.....	144
ii.	ARRESTS AND DECISIONS TO SHOOT.....	146
B.	PROSECUTORS	149
C.	JURIES	151
D.	JUDGES	152
V.	SOLUTIONS	154
A.	IMPLICIT BIAS TRAINING FOR POLICE, PROSECUTORS, JUDGES, AND JURORS.....	154
i.	ENCOURAGE RATIONAL DELIBERATION	155
ii.	NOTETAKING AND WRITTEN OR VERBAL ARTICULATION..	157
iii.	INCREASING CULTURAL EXPOSURE	158
B.	PROTESTING MEDIA STEREOTYPICAL PORTRAYALS	159
VI.	CONCLUSION	160

I. INTRODUCTION

While slavery and the age of Jim Crow have long since passed, the residue from those eras continues to stain American society. In the

past, explicit racism was socially acceptable, and thus, negative biases towards Blacks could be cultivated simply by existing in the society. Furthermore, prejudice toward Blacks had clear manifestations: Jim Crow, the Klu Klux Klan, lynchings, segregation, etc. Yet, while explicit racism in modern society is not extinct, it is far less common. Instead, racial bias has arguably shifted from explicit to unconscious, implicit biases. However, while the racism of old had clear influencers, modern implicit biases often develop from subtler sources. Moreover, while explicit racism had clear social and economic impacts, such as housing and voting rights, the impacts of implicit bias are not as clear. Thus, this begs the questions—how are racial implicit biases forged in contemporary American culture, and what impacts do they have on Black Americans?

This article examines media portrayals of Blacks and how those portrayals create and reinforce implicit biases in the society at large. More specifically, this article will focus on implicit biases in the criminal justice system. Implicit bias refers to an unconscious preference or dislike for a group of people.¹ Thus, the primary argument is that media portrayals of Blacks help create and reinforce implicit

¹ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 948–55 (2006).

biases in police officers, prosecutors, jurors, and judges, which leads to unequal rates of arrests, convictions, and sentencing disparities.

Although implicit bias arises from sources outside of the media (i.e. education, parenting, or culture), media has become a primary source of exposure to outside groups for many people. In fact, unless people live in a diverse community, the media may provide the only exposure to Blacks. Thus, news, television shows, movies, and music are the leading modes of promoting racial stereotypes that create and reinforce implicit bias.

II. IMPLICIT BIAS

Are all White people racist? This question may arise when discussing prejudice and implicit bias. While the contention is not that most White people are racist, it is nevertheless true that many maintain unconscious prejudices and biases. However, the tendency towards bias is not unique to a race or culture, but prevails throughout humanity. That is, humans tend to create groupings, categories, and stereotypes to gain a better understanding of the world and environment.² However, experience shapes how people categorize certain groups, what stereotypes they attach, and what associations are made between certain groups of people and traits.

² *Implicit Bias*, PERCEPTION INSTITUTE, <https://perception.org/research/implicit-bias/> (last visited Feb. 26, 2018).

Implicit bias is the “preference for (or aversion) to a . . . group of people[,]” which results from unconscious cognitive processes.³ The attitudes and behaviors that arise from implicit bias stem from automatic associations made between a certain group of people and a specific behavior or personality trait that becomes attributed to the group as a whole.⁴ Long-term exposure to media portrayals of Blacks exhibiting stereotypical behaviors can help cultivate implicit biases toward Blacks.⁵ For example, consistently seeing news that highlights Blacks committing crimes can create automatic associations between Blacks and criminality.⁶ Similarly, seeing Black women overwhelmingly in the role of “the angry Black woman” fosters automatic associations between Black women and cold-heartedness.⁷ Such associations create negative implicit biases in younger viewers and reinforce implicit biases already held by many. These associations have real impacts, particularly on the criminal justice system.

³ *Id.*

⁴ *Understanding Implicit Bias*, THE OHIO STATE UNIVERSITY: KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Feb. 26, 2018).

⁵ Melissa Carroll, *UH Study Finds News Media May Influence Racial Bias*, U. HOUS. (May 28, 2015), <http://www.uh.edu/news-events/stories/052815WatchingTVRacialBias.php>.

⁶ *Id.*

⁷ J. Celeste Walley-Jean, *Debunking the Myth of the “Angry Black Woman”*: An Exploration of Anger in Young African American Women, 3 *BLACK WOMEN, GENDER & FAMILIES* 68, 72 (Fall 2009).

The Implicit Association Test (IAT) has been developed to measure associations between different groups and exhibited traits.⁸ The IAT requires test-takers to press a specific key when shown Black faces and pleasant words, and another key when shown White faces and unpleasant words.⁹ In the remaining task, the reverse is done—White faces are paired with pleasant words and Black faces with unpleasant words.¹⁰ “For American respondents taking the Race IAT, response speeds are often faster when [White faces] . . . [are] paired with pleasant words.”¹¹ This result points to the interpretation that the association between White and pleasantness is stronger than the association between Blacks and pleasantness.¹²

In a study conducted by McConnell and Leibold, White undergrad students were videotaped as they were interviewed by White or Black experimenters. The students also completed a race attitude IAT measure.¹³ “Subjects whose Race IAT scores indicated strong implicit preference for White relative to Black hesitated less and made fewer speech errors when speaking to the White experimenter than to the Black experimenter.”¹⁴ Similar to the response speeds when taking

⁸ Greenwald & Krieger, *supra* note 1, at 952.

⁹ *Id.*

¹⁰ *Id.* at 952–53.

¹¹ *Id.* at 953.

¹² *Id.*

¹³ *Id.* at 961.

¹⁴ *Id.*

the IAT, the results of this study highlight the preference and comfort with the White experimenters as opposed to the Black ones.¹⁵

III. PORTRAYALS OF BLACKS IN THE MEDIA

Throughout history, people have communicated, in large part, through storytelling. Through storytelling, people try to gain insight and direction from the portrayals of other people and their behavior in the story. However, through this storytelling, stereotypes are often formed. “Stereotypes are ‘cognitive structures that contain the perceiver’s knowledge, beliefs, and expectations about human groups.’”¹⁶ These constructs often develop from some amount of truth and then are exaggerated and distorted over time.¹⁷ Black-stereotyping in theater was first developed through the advent of Blackface minstrel shows.¹⁸ Starting in the early 19th century, White performers began darkening their faces, wearing black wigs, and painting exaggerated white mouths over their own.¹⁹ Over time the portrayals evolved and adapted, and even in modern society, movies and television continue to perpetuate some of the same stereotypes. Such stereotypes suggest

¹⁵ *Id.*

¹⁶ Laura Green, *Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, FERRIS ST. U., <https://ferris.edu/HTMLS/news/jimcrow/links/essays/vcu.htm> (last visited Mar. 8, 2018).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Blacks are lazy, aggressive, uneducated, hypersexual, and prone to criminality.

One of the fundamental tenants of the American value system is the freedom of speech and press. Concerned with governmental tyranny, the framers of the Constitution created the First Amendment to the Constitution, prohibiting legislation that limited the freedom of the press.²⁰ Yet, “freeing the press from . . . restraints” imposed by the government compelled it to “function as a business[,]” following the rules of capitalism.²¹ Thus, media grew to exclusively reflect the desires of the mass audience.²² As a result, media is geared for the majority society and racial minorities have traditionally “been either ignored . . . or portrayed in ways that made them palatable to the majority”—Whites.²³

From the inception of modern media platforms (i.e. television and radio), there was a need to communicate across different cultural lines—from farmers in Oklahoma to factory workers in New York.²⁴ Thus, “[t]he media needed to . . . develop a common content denominator to which all in the potential audience could relate.”²⁵

²⁰ CLINT C. WILSON & FÉLIX GUTIÉRREZ, *MINORITIES AND MEDIA: DIVERSITY AND THE END OF MASS COMMUNICATION* 36–37 (1985).

²¹ *Id.* at 37.

²² *Id.* at 37–38.

²³ *Id.* at 38.

²⁴ *Id.* at 40.

²⁵ *Id.*

Given this need for a “common content denominator,” the media relied on “symbols and stereotypes” to neatly box-in certain groups.²⁶ Blacks were among the groups portrayed by stereotypes in the entertainment and news media.²⁷ Seen by White society as dangerous, lazy, and only good at physical acts (i.e. dancing, running, and jumping), Black communities were rarely shown by the news media unless there was violence or they were involved in protests that might impact the established order.²⁸ Therefore, the majority audience, for many years, saw minority communities through a narrow lens—“one that did not jar their preconceptions of these groups.”²⁹ As such, throughout the development of American media, Blacks have been portrayed stereotypically to appeal to the mass audience.³⁰ Several basic personality and behavior types have emerged out of this stereotyping that, according to the media, capture the essence of Blacks in America.

A. Black Caricatures

The portrayals of Blacks in the media can be aptly summarized by a few characters first developed in the 19th century whose personalities and behavior represent modern-day Black stereotypes.

²⁶ *Id.* at 41.

²⁷ *Id.*

²⁸ *Id.* at 41–42.

²⁹ *Id.* at 41.

³⁰ *Id.*

i. Sambo

“Sambo” is “a simple-minded, docile, Black man” whose creation dates back to the colonization of America.³¹ “The Sambo stereotype flourished during the [slave era,]” whereby White slave owners believed that all Black males should fit this Sambo image—“jolly, overgrown child[ren] who [were] happy to serve [their] master.”³² Yet, while Sambo was seen as docile and jolly, he was also extremely lazy and relied on Whites for direction.³³ The Sambo stereotype was therefore used as a method to justify slavery.³⁴

It can be argued that Tracy Morgan’s character on “30 Rock” represents a modern-day portrayal of Sambo.³⁵ “In *30 Rock*, Tracy Jordan is the lead actor on a fictional . . . comedy series depicted as airing on NBC.”³⁶ While Jordan is the star of the fictional show, he also proves to be a nuisance to the producers.³⁷ Jordan acts similarly to an immature child who constantly needs supervision, lest he create trouble and headache for all the “adults” on the show.³⁸ “Only when alternately coaxed and controlled can Jordan be an actor; unattended, he only ‘acts

³¹ Green, *supra* note 16.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Zeeshan Aleem, *Is 30 Rock Racist?*, HUFFINGTON POST (July 8, 2010), http://www.huffingtonpost.com/zeeshan-aleem/is-em30-rockem-the-most-r_b_637300.html.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

out.”³⁹ Jordan is “the only [B]lack protagonist of the show” and is consistently shown as “hyper-sexual” or as an “irresponsible man-child.”⁴⁰

ii. The Savage

While the Sambo stereotype prevailed for quite some time, in 1915 the film "Birth of a Nation" brought about a new and darker portrayal of Blacks—specifically Black males.⁴¹ After slaves were freed and Whites no longer had protected property interests in Black flesh, the “savage” caricature was created to maintain White-superiority.⁴² As such, hate crimes not only became more common, the perpetrators were often seen as protagonists as fear of the Black savage grew in the American consciousness.⁴³

In contemporary media, the portrayal of young Black men as savages permeates movies, television, and news programs. For example, in a 2014 NFL playoff game, star corner back Richard Sherman, went on an excited rant proclaiming that he was the best in his position.⁴⁴ Certain news outlets and people on social media platforms

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Green, *supra* note 16.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Chris Greenburg, *Richard Sherman: Thug Is Now 'The Accepted Way of Calling Somebody The N-Word'*, HUFFINGTON POST (Jan. 22, 2014), http://www.huffingtonpost.com/2014/01/22/richard-sherman-thug-n-word-press-conference_n_4646871.html.

responded to his excited rant by calling him a “thug.”⁴⁵ In other words, what might have been seen as natural post-victory excitement was labeled as savagery—yet another angry and violent Black man. This example serves to highlight how the media can both create and reinforce negative stereotypes, which succeed in unconsciously influencing viewers.

iii. Mammy and Sapphire

Although the focus has primarily been on portrayals of males, Black females have not been overlooked when it comes to stereotypes perpetuated by the media. The Mammy character in early minstrel shows was a “large, independent woman” who treated Whites with respect, but was authoritarian in her own family.⁴⁶ The Mammy ruled over her husband (Sambo) with her size and short temper.⁴⁷ The portrayal of a Black woman dominating her husband furthered the idea of White males being more masculine and superior.⁴⁸

Similarly, the “Sapphire” stereotype bleeds together with the Mammy character.⁴⁹ This stereotype came into being through the television show “Amos 'n' Andy.”⁵⁰ The Sapphire character was

⁴⁵ *Id.*

⁴⁶ Green, *supra* note 16.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

depicted as domineering, as she constantly belittled and argued with “Kingfish”—her weak husband.⁵¹ Sapphire, like the Mammy, was extremely independent and had a fiery temper, which lent itself to her role as the matriarch.⁵²

The Mammy and Sapphire stereotypes of Black women have been presented to the public in literature and movies for decades. Possibly the most notable modern example is “Madea”—a character created by filmmaker Tyler Perry.⁵³ Madea is an overweight matriarch who is not afraid to put anyone in their place.⁵⁴ Moreover, Madea is constantly belittling and emasculating her brother, with whom she lives.⁵⁵

iv. Jezebel

The last traditional stereotype is that of Jezebel—the floozy.⁵⁶ Sexuality has played a large role in how Whites have viewed Blacks, even dating back to the inception of slavery.⁵⁷ Fear of Black men raping White women was used as justification for lynching and other forms of brutality.⁵⁸ Moreover, White men were often absolved from their

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Briana McKoy, *Tyler Perry and the Weight of Misrepresentation*, 5 MCNAIR SCHOLARS RES. J. 127, 136 (2012).

⁵⁴ *Id.* at 138.

⁵⁵ *Id.* at 142.

⁵⁶ Green, *supra* note 16.

⁵⁷ *Id.*

⁵⁸ Amy Karen Phillips, *Gender and Legal History Paper Summary*, GEO. L. LIBR., <https://www.law.georgetown.edu/library/collections/gender-legal-history/glh->

relations with Black women because they were simply seen as victims of the seduction of the "bad Black girl."⁵⁹ Thus, Jezebel represents the hyper-sexual nature of Black women.⁶⁰ The traditional Jezebel closely resembled White beauty standards, as she was light-skinned, had straight hair and a small figure.⁶¹

Media producers and executives are not entirely to blame for various portrayals of Blacks on television or movies. Hip hop culture, for example, is dominated by Blacks and glorifies violence and sex.⁶² Figures like Nicki Minaj and others help contribute to the "Jezebel" or hyper-sexual stereotypes that are often attached to attractive Black women.⁶³

B. Stereotyping in the News

It is important to uncover sources that influence implicit associations or biases. As such, one of the main sources that people go to find accurate and reliable information is the news.⁶⁴ However, this becomes problematic when the news depicts minorities in a negative

summary.cfm?glhID=665D185E-C879-8527-AFFBFD667C727BF9 (last visited Mar. 9, 2018).

⁵⁹ Green, *supra* note 16.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² James Cullen Evans, *A Criminal Justice System Without Justice: The News Media, Sports Media, & Rap's Influence on Racial Crime Disparities*, 5 U. MIAMI RACE & SOC. JUST. L. REV., 117, 134 (2015).

⁶³ Tyler Stephens, *How Do We Battle the Jezebel Stereotype?*, ODYSSEY (Dec. 28, 2015), <https://www.theodysseyonline.com/women-defying-image-reoccurring-presence>.

⁶⁴ Evans, *supra* note 60, at 121.

light, creating a false narrative that people view as true. Black criminality is one of the main stereotypes that continues to prevail in American society.⁶⁵ Associating Blacks with mischief is especially problematic in the context of the criminal justice system. That is, police who associate Blacks with criminality will be more likely to stop, arrest, and perhaps be overly aggressive towards Black citizens.⁶⁶

In 2014, four major broadcast television stations in New York City were analyzed. The analysis showed that these broadcast stations “gave disproportionate coverage to crime stories involving African-American suspects. . . .”⁶⁷ The stations' news broadcasts “covered murder, theft, and assault cases. . . .”⁶⁸ In these cases, the broadcasts reported on Black subjects at a significantly higher rate than that at which Blacks were actually arrested for those crimes.⁶⁹

Despite the exaggerated reports of Black criminality, “[i]n 2013, only 13.6 percent of [W]hite victims were killed by [Black] offenders.”⁷⁰ This alludes to the idea that Whites are far more likely to be killed by a White perpetrator than Black, despite the impression the

⁶⁵ See Christine Reyna et. al, *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GROUP PROCESSES INTERGROUP REL. 361, 362 (2009).

⁶⁶ See Evans, *supra* note 60, at 120.

⁶⁷ Todd Gregory et. al, *Report: New York City Television Stations Give Lopsided Coverage to Black Crime*, MEDIA MATTERS (Aug. 26, 2014), <https://mediamatters.org/research/2014/08/26/report-new-york-city-television-stations-give-1/200524>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Evans, *supra* note 60, at 123–24.

media gives about race and crime.⁷¹ Moreover, statistics from 1980–2008 showed that “[B]lack offenders were less likely to be involved in sex-related killings (43.4%), workplace homicides (25.8%) or homicides of elders age 65 or older (41.9%).”⁷² This data suggests that “[t]he media’s portrayal of the ‘typical criminal offender’ as [Black] is inaccurate.”⁷³ In fact, “arrest statistics for all offenses . . . shows that the typical offender is oftentimes [W]hite.”⁷⁴

To compound the issues of misleading reporting, “[Blacks] have historically been excluded from roles in mainstream news [media],” preventing the advancement of a more accurate race-crime narrative.⁷⁵ Further, Blacks “own only 1.3 percent of the televisions stations[,]” despite representing approximately 13 percent of the population.⁷⁶ Thus, Blacks are unable to infiltrate the news media to correct the improper reporting and flip the script on Blacks and criminality.⁷⁷

C. Hip Hop Culture’s Preservation of Common Stereotypes

While Blacks have often been victims of unfair portrayals in the media, many stereotypes are unknowingly perpetuated, in some ways, by Blacks themselves.⁷⁸ Hip hop debuted in the 1970s in New York

⁷¹ *Id.* at 124.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See Id.* at 133–34.

City.⁷⁹ This style of music was used as an artistic outlet through which Blacks in the inner city could express themselves.⁸⁰ Since the 1970s, hip hop has not only spread wildly throughout the United States becoming one of the most popular music styles in America.⁸¹ Moreover, hip hop has expanded beyond just a music genre and has become a culture of sorts. That is, hip hop has created new styles of clothing, speech, and even values.⁸²

The allure of “sex, drugs, and violence” makes songs related to these topics high-sellers.⁸³ Additionally, because hip hop artists often start their artistic journey in poorer areas, these topics reflect their experiences.⁸⁴ As such, hip-hop lyrics glorifying drugs, the mistreatment of women, violence, and materialism can “create a direct association with African Americans and ‘thug’ characteristics.”⁸⁵ In addition, hip hop artists have created a new style of dress involving tattoos, extravagant jewelry, grills, baggy clothes, and sagged pants.⁸⁶ Because this style is connected with hip hop, when Black people adopt

⁷⁹ *Id.* at 133.

⁸⁰ *Id.* at 133–34.

⁸¹ Paul Resnikoff, *What Are the Most Popular Music Genres In America?*, DIGITAL MUSIC NEWS (Apr. 7, 2016), <http://www.digitalmusicnews.com/2016/04/07/most-popular-music-genres-america/>.

⁸² Evans, *supra* note 60, at 133–35.

⁸³ *Id.* at 134.

⁸⁴ See Reyna et. al., *supra* note 63, at 362.

⁸⁵ Evans, *supra* note 60, at 134.

⁸⁶ *Id.* at 135.

this style, they become associated with drugs, misogyny, violence, and materialism.⁸⁷

Observations of a person's dress, body language, and overall demeanor are used in "judgment formation," in order to decide how to feel about that person—whether to be fearful or friendly and respectful.⁸⁸ "Music videos, televised concerts, and media appearances" capture artists' dress, thereby establishing the standard for what is new and cool for those who look up to these musicians.⁸⁹ Given that hip hop was developed in Black communities, it still serves as a cultural centerpiece in many communities around the country. In these communities, hip hop artists are often idolized and seen as an image of true success.⁹⁰ Thus, Blacks entrenched in hip hop culture mimic their idols, and face the same stereotypes.⁹¹ While stereotypes that Blacks who dress a certain way are prone to criminality is unwarranted, it is also true that some violent and aggressive Blacks do subscribe to the dress and values of hip hop culture.⁹² Therefore, the fact that some Blacks fit the stereotype works to reinforce it, giving the Black-criminality stereotype continued life.⁹³

⁸⁷ *Id.* at 135–36.

⁸⁸ *Id.* at 135.

⁸⁹ *Id.* at 134.

⁹⁰ *Id.* at 135.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

One of the main issues with hip hop in the media, apart from perpetuation of stereotypes, is that it gives those harboring prejudicial sentiments an easy rationalization for their biases.⁹⁴ That is, it becomes easier to legitimize prejudice when members of the stereotyped group perpetuate the stereotype.⁹⁵ In other words, Black hip hop artists' glorification of sex, drugs, and violence plays into the idea that Blacks are fully responsible for their lower social standing. In fact, research has demonstrated that the belief that Blacks are responsible for their own negative stereotypes "may be the most potent predictors of opposition to group-based policies."⁹⁶ Thus, when a stereotype is viewed to have been created by a purposeful encroachment on societal values like traditionalism, education, or hard work, people are more likely to blame any negative attitudes associated with the stereotype on the stereotyped group itself.⁹⁷

Stereotypes like Black hyper-sexuality and hyper-aggression that lead to prejudice and anti-Black attitudes are rationalized by the idea that they are self-imposed. Even though hip hop certainly did not invent the portrayal of Blacks as violent or misogynistic, it nevertheless contributes to the assertion that these stereotyped behaviors are not only

⁹⁴ See Reyna et. al., *supra* note 63, at 363.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 364.

true, but are willfully undertaken throughout the Black community.⁹⁸ Moreover, the assumption that the lyrics and images of rappers represent the beliefs of the Black community at large “allows the dominant group . . . to disregard accusations of racism” and unfair prejudice with a clear conscience.⁹⁹ Lawmakers, fact-finders, and law enforcement are more accepting of zero-tolerance laws, racial profiling, and unequal treatment of Blacks in the justice system given their willful glorification of criminality throughout hip hop culture.¹⁰⁰

IV. IMPLICIT BIAS AND THE CRIMINAL JUSTICE SYSTEM

A. Police

While police officers receive extensive training, they are unfortunately not immune to the effects of implicit bias brought on, in large part, from years of exposure to negative Black stereotypes. While education and culture contribute to these stereotypes, the primary source of reinforcement in the modern era is the media.¹⁰¹ As discussed above, portrayals of Blacks in the media perpetuate harmful stereotypes, including that Blacks are prone to criminality and aggressive behavior. Many officers internalize these stereotypes and implicitly associate

⁹⁸ *Id.* at 364.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Transforming Perception: Black Men and Boys*, PERCEPTION INST., <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Mar. 8, 2018).

Blacks with crime and aggression.¹⁰² Moreover, implicit bias may cause police officers to feel uneasy or agitated around Blacks, especially if they are not used to working in high-Black population areas. Such associations can lead to police being disproportionately suspicious of Blacks.¹⁰³ As follows, police stop and arrest Blacks at higher rates than Whites.¹⁰⁴ These feelings, combined with pre-existing hostile relationships between police and many Black communities,¹⁰⁵ often lead to higher incidents of police brutality.

i. Stop-and-Frisk

For many years, New York City allowed police to stop-and-frisk any person without reasonable suspicion of criminal activity.¹⁰⁶ This policy led to racial disparities in who was stopped by police.¹⁰⁷ In fact, a 2011 report found that the primary factor in police stops was race.¹⁰⁸ Subsequently, “[i]n 2011 . . . 685,724 people were stopped, 84 percent

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Mar. 8, 2018).

¹⁰⁵ Otis S. Johnson, *Two Worlds: A Historical Perspective on the Dichotomous Relations Between Police and Black and White Communities*, 42 HUMAN RIGHTS MAGAZINE, <https://www.americanbar.org/publications/crsj-human-rights-magazine/vol--42/vol-42-no-1/two-worlds--a-historical-perspective-on-the-dichotomous-relation.html> (last visited Mar. 8, 2018).

¹⁰⁶ See, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

¹⁰⁷ See *2011 NYPD Stop and Frisk Statistics*, CCR JUSTICE, <https://ccrjustice.org/sites/default/files/assets/files/CCR-Stop-and-Frisk-Fact-Sheet-2011.pdf> (last visited Mar. 8, 2018).

¹⁰⁸ *Id.*

of whom were” people of color.¹⁰⁹ This is significant given that people of color only make up roughly 23 percent of New York’s population.¹¹⁰

When patrolling, officers come into contact with people of various races—especially in New York City. While most officers do not go “hunting” for Blacks, race often plays a role in who they view as suspicious.¹¹¹ Simply having implicit biases is not necessarily problematic, however, these biases can become problematic when they influence behavior. As such, implicit biases may, for example, cause officers to stop-and-frisk Black males disproportionately, which is not only problematic on its face, but may also cause officers to overlook crimes perpetrated by Whites. To further explain, data shows that White New Yorkers were more likely than Blacks to have weapons and/or contraband.¹¹² The New York Police Department (NYPD) uncovered a weapon in one out every 49 stops of Whites.¹¹³ By contrast, one out of 93 stops of Blacks contained a weapon.¹¹⁴ Similarly, the NYPD uncovered contraband in one out every 43 stops of Whites and only one out of every 61 stops of Blacks.¹¹⁵ While stop-and-frisk’s have been

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Transforming Perception: Black Men and Boys*, *supra* note 99.

¹¹² Aviva Shen, *White People Stopped by New York Police are More Likely to Have Guns or Drugs than Minorities*, THINK PROGRESS (May 22, 2013), <https://thinkprogress.org/white-people-stopped-by-new-york-police-are-more-likely-to-have-guns-or-drugs-than-minorities-9bf579a2b9b3>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

deemed unconstitutional absent reasonable suspicion,¹¹⁶ police reliance on implicit biases prevails throughout police-citizen interaction.

ii. Arrests and Decisions to Shoot

In addition to implicit bias affecting police officers' decisions regarding stop-and-frisk, it also plays a role in determining who gets arrested. A stop does not necessarily lead to a formal arrest, as some people may be issued only warnings or citations. However, a 2016 report found that in at least 70 police departments across the country, Blacks were arrested at a rate 10 times higher than non-Blacks.¹¹⁷ Notably, Blacks are far more likely to be arrested for low-level drug offenses.¹¹⁸ In fact, in New York, 85 percent of people arrested for possession of small amounts of marijuana were Black or Latino.¹¹⁹ Such arrests provide little value to overall public safety, yet have significant impacts on the offender's life and future employment opportunities.¹²⁰

When confronted with evidence of racial disparities in arrests, police departments often argue that such disparities are caused by the

¹¹⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

¹¹⁷ Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 18, 2014 5:13 PM), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>.

¹¹⁸ The Editorial Board, *Race and Marijuana Arrests*, N.Y. TIMES (Nov. 25, 2016), https://www.nytimes.com/2016/11/25/opinion/race-and-marijuana-arrests.html?_r=0.

¹¹⁹ *Id.*

¹²⁰ *Id.*

fact that people of color often live in high-crime areas and therefore have more interaction with police.¹²¹ While this argument may have some merit, it does not fully account for the level of disparity that exists.¹²² Police still wrongly charge people of color and often “turn a blind eye to marijuana use” in White communities, focusing instead on minority communities.¹²³

Choosing to ignore marijuana use in White communities while over-arresting for use in Black communities is not solely a result of increased police presence and interaction. Instead, associations between skin color and likelihood of drug use or inclination towards criminal behavior influence officers’ decisions to arrest.¹²⁴ Furthermore, such associations also influence how officers perceive the attitude, tone, and level of aggression a person is exhibiting in an interaction.¹²⁵ People who have negative implicit biases towards Blacks often view neutral behavior as more aggressive than Whites exhibiting the same behavior.¹²⁶ As follows, the more uncooperative or aggressive an officer

¹²¹ See, e.g., *id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Sharad Goel, Justin M. Rao, & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-And-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 379 (2016).

¹²⁵ See Tom Jacobs, *Black Male Faces More Likely to be Seen as Threatening*, PAC. STANDARD (July 22, 2009), <https://psmag.com/economics/black-male-faces-3571>.

¹²⁶ *Id.*

perceives a suspect behavior, the more likely it is that the officer will arrest them.

While disproportionate arrest rates are troubling, disparities in police shootings present a deeper concern. With the wide use of social media as well as the nearly universal ownership of phones with video capabilities, police shootings have become increasingly publicized. Thus, people have taken a serious interest in police accountability and preventing police abuse.¹²⁷ While anger and pain often lead people to espouse ideas of nationwide police corruption and overt racism, the actual cause of many unarmed shootings, implicit bias, remains ill-addressed. Police officers regularly face high-stress situations where they are confronted with the decision to use deadly force or to risk serious injury to themselves or others.¹²⁸ Unfortunately, these decisions are not immune to media-reinforced implicit bias.

To highlight the dangers of implicit bias in policing, officers were presented with images of White or Black people holding weapons

¹²⁷ See, e.g., Mayer Brown, *Police Accountability Task Force Calls for Sweeping Changes*, CIVIC CONSULTING ALLIANCE, <https://www.ccachicago.org/impact/all-projects/police-accountability-task-force-calls-for-sweeping-changes/> (last visited Mar. 9, 2018); Antonio Ginatta, *A Call for Police Accountability*, HUM. RTS. WATCH (Sept. 30, 2015, 12:00 AM), <https://www.hrw.org/news/2015/09/30/call-police-accountability>; Caitlyn Whyte, *Group Calls for Police Accountability Board, Has Concerns About Independent Report*, WXXI NEWS (Feb. 20, 2018), <http://wxxinews.org/post/group-calls-police-accountability-board-has-concerns-about-independent-report>.

¹²⁸ Art Markman, *Shooter Bias and Stereotypes*, PSYCHOL. TODAY (Oct. 12, 2012), <https://www.psychologytoday.com/blog/ulterior-motives/201210/shooter-bias-and-stereotypes>.

or neutral objects.¹²⁹ The officers were then instructed to shoot anyone holding a weapon.¹³⁰ The results showed that officers were more likely to shoot Blacks holding neutral objects and less likely to shoot Whites who were armed.¹³¹ This research was inspired by the 1999 New York City shooting of Guinean immigrant Amadou Diallo: Police officers fired 41 rounds and killed Diallo as he pulled out his wallet.¹³²

B. Prosecutors

After an arrest has been made, much of the decision-making responsibility shifts to the prosecutor. Such decisions include whether a suspect will be charged, and if so, with what crime.¹³³ Moreover, prosecutors have discretion in many other pre-trial and trial strategies, such as whether to contest bail, whether to offer a plea bargain, which jurors should be selected, and how to portray the defendant to the jury.¹³⁴ These decisions are contingent on how the prosecutor perceives the suspect's attitude, behavior, and likelihood of future criminality.¹³⁵ Therefore, if a defendant is implicitly associated with hyper-aggression,

¹²⁹ Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in *RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM* 39, 49 (Michael J. Lynch, E. Britt Patterson, & Kristina K. Childs, eds., 2008).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 39–40.

¹³³ Michael B. Hyman, *Implicit Bias in the Courts*, 102 *ILL. B.J.* 40, 43 (2014).

¹³⁴ *Id.*

¹³⁵ *Id.*

criminality, drug-use, or overall dangerousness, the likelihood that a prosecutor will act more harshly in her decision-making increases.¹³⁶

Evidence of prosecutorial implicit bias is demonstrated through disparities in charging, types of plea bargains offered, and characterizations of defendants in opening and closing statements.¹³⁷

For example, prosecutors are more likely to charge Black suspects while simultaneously offering more favorable plea bargains to White suspects.¹³⁸ Similarly, prosecutors are more likely to dehumanize a Black defendant by referring to her as an animal in closing arguments.¹³⁹

Prosecutors are not immune to media and societal influence. As such, prosecutors, like police, are exposed to years of negative images of Blacks in the media and subsequently form automatic associations. These implicit biases are harmful to Blacks in the criminal justice system as Blacks continue to be arrested and convicted at much higher rates than Whites.¹⁴⁰ In fact, in the year 2000, one in nine young Blacks were incarcerated, compared to three in 200 young Whites.¹⁴¹ While many factors may contribute to such large racial disparities, it is indisputable that implicit bias plays a significant role.¹⁴²

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Criminal Justice Fact Sheet*, *supra* note 102.

¹⁴¹ *Id.*

¹⁴² *Id.*

C. Juries

Unlike police officers and prosecutors who may have had some sort of racial sensitivity training, juries are typically comprised of laypersons. Therefore, implicit biases surely influence jurors at a comparable, or perhaps greater rate than police officers and prosecutors. In fact, a study on death penalty cases involving White victims showed that the more “stereotypically Black” a defendant, the more likely that the jury will impose a death sentence.¹⁴³ Moreover, research has shown that jurors may actually recall facts of the case differently depending on whether the defendant was Black or White.¹⁴⁴ In one study, participants were asked to read legal stories with Black and White characters.¹⁴⁵ Next, participants were momentarily distracted, and subsequently tested on their memory of the facts in the stories.¹⁴⁶ When the character was Black and involved in a fight, participants were more likely to remember acts of aggression.¹⁴⁷

In addition to conclusions made by social scientists, the judicial system has also generally recognized the influence of implicit bias on

¹⁴³ Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006).

¹⁴⁴ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 837 (2012).

¹⁴⁵ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

juries.¹⁴⁸ That is, the Supreme Court has conceded implicit biases' prevalence in juries and its conceivable impact on the assessment of evidence and verdict decisions.¹⁴⁹ For example, in the dissent of *Turner v. Murray*, Justice Brennan stated, “[I]t is certainly true, as the Court maintains, that racial bias inclines one to *disbelieve and disfavor* the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to *deny fairness* to the person despised[.]”¹⁵⁰

D. Judges

The idea that judges are neutral decision-makers, not influenced by irrelevant facts like a defendant's skin color, is fundamental to the American justice system. However, the goals and aspirations of judges do not shield them from their susceptibility to racial bias.¹⁵¹ In fact, U.S. District Judge Mark Bennett noted that he “knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge—one with a lifelong commitment to egalitarian and anti-discrimination values”¹⁵² he was confident that he would “pass.”¹⁵³

¹⁴⁸ Roberts, *supra* note 152, at 836; *see also* *Turner v. Murray*, 476 U.S. 28, 42 (1986) (Brennan, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Turner*, 476 U.S. at 42 (Brennan, J., dissenting).

¹⁵¹ Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

¹⁵² *Id.*

¹⁵³ *Id.*

To his surprise, however, his results showed the existence of implicit bias.¹⁵⁴

Studies that use the Race IAT to test judges show that White judges typically display a White preference, while Black judges do not demonstrate any clear race preference.¹⁵⁵ When White-preferred judges were primed with Black-associated words in a pre-test story, they were more likely to rule more harshly than when judges that were primed with neutral words.¹⁵⁶ Moreover, not only do judges harbor implicit racial bias, they also make decisions in such a way that makes these biases more impactful.¹⁵⁷ That is, research has highlighted the fact that judges often rely on intuition more so than deliberative judging in decision-making.¹⁵⁸ This heightens the impact of implicit bias because intuition is often influenced by automatic judgments, whereas slower deliberation involves more conscious awareness and may lessen the influence of racial bias.¹⁵⁹

Despite judges having implicit bias that influence their decision-making, studies have shown that they are able to mitigate its impact.¹⁶⁰ Simply recognizing that they have implicit bias seems to allow judges

¹⁵⁴ *Id.*

¹⁵⁵ Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

¹⁵⁶ *Id.* at 1216.

¹⁵⁷ Bennett, *supra* note 159, at 157.

¹⁵⁸ *Id.* at 156.

¹⁵⁹ *Id.* at 157.

¹⁶⁰ *Id.*

to make conscious efforts to avoid relying on automatic associations and decreases their bias ratings on the IAT.¹⁶¹ This provides some hope for counteracting the impact of implicit bias and lowering racial disparities in sentencing.

V. SOLUTIONS

Reliance on implicit bias has a negative impact on Blacks in the criminal justice system. Disparities in arrest, convictions, and sentences place Blacks at greater risks of mistreatment and imprisonment. Moreover, Black lives are impacted long after interaction with the criminal justice system as it becomes more difficult to find employment and other opportunities for advancement. The stereotypes reinforced by the media often help foster automatic associations between Blackness and criminality. Police, prosecutors, jurors, and judges all encounter the stereotypes shown in the media and often develop implicit biases, arising from unconscious internalization of the portrayed stereotypes. Given the known impacts such bias has on Blacks in the criminal justice system, it is important that social scientists, scholars, and those in the legal and law enforcement community work to resolve the issues surrounding implicit racial bias.

A. Implicit Bias Training for Police, Prosecutors, Judges, and Jurors

¹⁶¹ *Id.*

Many of the solutions to avoid and counteract implicit bias first require awareness of the existence of implicit bias. In fact, conscious awareness of one's own implicit bias can go a long way in counteracting its effect.¹⁶² In addition to bias awareness, other tactics can be implemented to reduce reliance on automatic associations as well as increase exposure to anti-stereotypical portrayals of Blacks. Thus, the suggestions put forth should be disseminated through deliberate implicit bias training courses that take place on a recurring basis.

While implicit bias training for those working in the criminal justice system seems self-explanatory, such training for jurors is less straightforward—although it does not have to be. It is feasible to have a training session after voir dire where jurors are informed about relevant implicit bias research and strategies to avoid it. Alternatively, judges could provide jury instructions before and after a trial which outline the impacts of implicit bias and strategies to avoid it. Thus, just as police officers, prosecutors, and judges should undergo implicit bias training, so too should jurors—even if it is less extensive.

i. Encourage Rational Deliberation

Reliance on implicit bias often arises in situations which call for rushed or distracted decision-making.¹⁶³ Police, prosecutors, judges,

¹⁶² *Id.*

¹⁶³ Greenwald & Krieger, *supra* note 1.

and even jurors are often confronted with situations that call for hurried decisions. Analyzing a particular situation is made easier by relying on automatic associations between groups and behavior.¹⁶⁴ For example, if a police officer is confronted with a choice to stop a Black person without clear reasonable suspicion that a crime has been committed, the decision becomes inwardly justifiable if the officer relies on automatic associations between Blacks and crime. Yet, such reliance may result in an officer judging a person's conduct as suspicious when it actually is not.

Reliance on implicit bias is able to be overcome, to some extent, by slowing down and reflecting on the situation and their decision-making.¹⁶⁵ For instance, if a police officer takes a moment to analyze a situation more thoroughly, she is better able to consciously formulate her reasoning, and not rely on automatic associations. Similarly, prosecutors who take time to thoroughly consider what pre-trial and trial strategies to take for a defendant may be more inclined to make unbiased decisions based on conscious deliberation. While this strategy may not work for all decisions, such as those requiring split-second choices, it is nevertheless applicable to a large quantity of choices made by those in the legal profession.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 962–63.

ii. Notetaking and Written or Verbal Articulation

Similar to the theory behind rational deliberation, notetaking and outward articulation of thoughts and decisions may help curb the reliance on implicit bias.¹⁶⁶ This strategy may be particularly appropriate for judges and jurors; however, it may also be relevant for police and prosecutors. For example, given the fact that implicit bias may alter the way in which people remember facts,¹⁶⁷ taking notes during a trial could allow judges and jurors to have a more accurate memory of the facts, counteracting the influence of implicit bias on memory.¹⁶⁸

Rule-makers may be wise to require or suggest that judges and jurors have notepads during all trials. Furthermore, the influence of implicit bias may be significantly reduced simply by handing each juror a notepad and by judges reading a simple instruction to the jury about the importance of notetaking and the influence of implicit bias.

¹⁶⁶ *Strategies to Reduce the Influence of Implicit Bias*, NAT'L CTR. FOR ST. CTS., https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf (last visited Mar. 8, 2018).

¹⁶⁷ See Levinson, *supra* note 143.

¹⁶⁸ *Id.* at 410.

iii. Increasing Cultural Exposure

Police officers, prosecutors, and judges should especially be encouraged, or perhaps required, to interact with Blacks in the local communities.¹⁶⁹ People often tend to separate themselves from people that are seen as “out-group” members, especially in more homogenous areas.¹⁷⁰ Without diverse interactions, many form their understandings about other groups from the media.¹⁷¹ As such, implicit bias is heightened when there are limited opportunities to experience non-stereotypical members of the out-group (i.e. Blacks), and debunk the portrayed stereotypes.¹⁷² Thus, it is important for those working in the criminal justice field to interact with Black people whose behavior and personalities go against the stereotyped portrayals in the media.¹⁷³ Such interaction may be fostered through required attendance at community events or meetings. Exposure to anti-stereotypical Blacks may help decouple automatic associations between Blacks and negative behavior and personality traits.¹⁷⁴

¹⁶⁹ See *id.* (noting that exposure to “minority exemplars . . . might help reduce implicit memory bias.”); *Strategies to Reduce the Influence of Implicit Bias*, *supra* note 164.

¹⁷⁰ Greenwald & Krieger, *supra* note 1 at 952, 964.

¹⁷¹ Green, *supra* note 16.

¹⁷² Levinson, *supra* note 143, at 415–16.

¹⁷³ *Id.*; see also Green, *supra* note 16.

¹⁷⁴ Levinson, *supra* note 143, at 410, 415–16; *Strategies to Reduce the Influence of Implicit Bias*, *supra* note 176.

In addition to increased personal contact with people, implicit bias can be reduced by simply viewing images of Black figures who are inspirational or role models.¹⁷⁵ Thus, an easy solution is to place pictures of inspirational Black men and women up around courthouses, police departments, prosecutor offices, and jury deliberation rooms. These strategies are meant to expose people to portrayals of Blacks that run counter to stereotypical portrayals in the media and change negative associations to more accurate and positive ones.

B. Protesting Media Stereotypical Portrayals

While rational deliberation, notetaking, and increased contact may all help reduce implicit bias to some extent, they do not attack one of the foundational sources and perpetrators of implicit bias—media portrayals. Because television and movies are relatively free from governmental restraint, it is unlikely that any change in media portrayals of Blacks can come through force. As such, the best way to change how media portray Blacks is to protest stereotypical portrayals of Blacks by not watching or by actively speaking out on social media platforms.

Television networks may not intentionally portray Black characters stereotypically and, therefore, may be willing to change if they recognize that their programming is problematic. However,

¹⁷⁵ *Id.*

regardless of media intent, portrayals are sure to change if ratings drastically decrease. Thus, by realizing the impact media can have on societal perceptions of Black Americans, protesting extremely violent or sexual hip-hop songs, writing to local news stations to complain about over-coverage of Black suspects, and not watching or supporting bias-inducing TV shows and movies may influence how media sources choose to depict Blacks.

VI. CONCLUSION

Although admitting racial bias may prove uncomfortable given the social unacceptability of racism, it is nevertheless an important step in criminal justice reform. Police officers, prosecutors, judges, and jurors are all influenced by media portrayals of Blacks, which often reinforce negative stereotypes. This influence manifests itself in the form of implicit bias.

The impacts of implicit bias on Blacks exposed to different stages of the criminal justice system are troubling. However, with collaboration between social scientists, professionals in the criminal justice system, and American citizens in general, it is possible to counteract natural reliance on implicit bias. Moreover, through active protesting of media sources that spread negative stereotypes, the dissemination of these negative portrayals may drastically decrease.