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# UNSHACKLING PLEA BARGAINING FROM RACIAL BIAS

ELAYNE E. GREENBERG\*

*“History, despite its wrenching pain, cannot be unlived, [but] if faced with courage, need not be lived again.”*

*Dr. Maya Angelou<sup>1</sup>*

*When an African American male defendant tries to plea bargain an equitable justice outcome, he finds that the deep-rooted racial bias that casts African American men as dangerous, criminal and animalistic, compromises his justice rights. Plea bargaining has become the preferred process used to secure convictions for upwards of 97 percent of cases because of its efficiency. This efficiency, however, comes at a cost. The structure and process of plea bargaining makes it more likely that the historical racial bias that exists against African American male defendants will taint the negotiation process and justice outcomes. The racial profiling by the police, the presumption of guilt rather than innocence for African American men, the prosecutor’s discretion when charging the defendant, and the justice negotiation’s speed all contribute to the harsher negotiated sentences that African American male defendants receive compared to white male*

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<sup>1</sup> MAYA ANGELOU, ON THE PULSE OF THE MORNING (1993). Angelou read the poem at President Bill Clinton’s January 21, 1993 inauguration. Francesca Trianni, *Watch Maya Angelou Read a Poem at Bill Clinton’s Inauguration*, TIME (May 28, 2014, 10:58 AM), <https://time.com/123204/maya-angelou-bill-clinton-inauguration/> [https://perma.cc/UD5E-VYGN].

*defendants accused of similar crimes. These racially tainted outcomes threaten the integrity of our justice system, and the core of our democracy.*

*This Article traces the origins of racial bias in plea bargaining by chronicling the historical relationship among three societal developments: slavery, the criminal justice system, and plea bargaining. The Article then explains how plea bargaining's structure, as it exists today, allows these historical racial biases to manifest and fester. Culling from the research of cognitive psychologists, dispute system design scholars, and anti-racism educators, this Article prescribes organizational and procedural reforms to unshackle plea bargaining from racial bias.*

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## INTRODUCTION

This Article prescribes structural and procedural reforms to debias the plea bargaining process and help mitigate the racialized presumption of guilt that deprives African American male defendants<sup>2</sup> of their justice rights.<sup>3</sup> Prosecutors use plea bargaining, our preeminent form of dispensing justice, to negotiate the resolution of upwards of 97 percent of our criminal cases because it is efficient.<sup>4</sup> However, when legal actors are negotiating the possible justice outcomes for African American male defendants, this efficient plea bargaining process also primes the deep-rooted racial biases of the legal actors to emerge and discriminatorily shape those outcomes.<sup>5</sup> These historically-rooted racial biases, known as implicit racial biases, then form a presumption of guilt for African American male defendants.<sup>6</sup>

Cognitive behavioral psychologists posit that legal actors involved in plea bargaining are more likely than other legal actors to have their implicit biases influence their decision-making process because of the confluence of three factors. First, the legal actors involved in plea bargaining are often unaware of their racial biases because such racial animus is counter to their

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<sup>2</sup> This Article focuses on African American male defendants because they have suffered from a deeply rooted racism that has stereotypically regarded African American men as dangerous and prone to criminality. This focus, however, is not to the exclusion of other forms of discrimination and unfair bias. The ideas expressed in this paper have something to offer more broadly beyond a particular understanding of an “African American male defendant.”

<sup>3</sup> See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 269 (2010) (noting how blackness is synonymous with criminality).

<sup>4</sup> Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/Y69J-65A3>].

<sup>5</sup> See, e.g., Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018) (finding racial disparities in plea bargaining outcomes between white and Black defendants, specifically that white defendants have a greater likelihood than Black defendants of having their initial charges reduced in plea bargaining); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) [hereinafter Smith & Levinson, *The Impact of Implicit Racial Bias*] (explaining how prosecutorial discretion contributes to racialized justice outcomes in plea bargaining).

<sup>6</sup> See, e.g., IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert L. Smith eds., 2012) [hereinafter IMPLICIT RACIAL BIAS ACROSS THE LAW]. Some scholars assert that the presumption of innocence until proven guilty is an ideal that does not reflect the presumption of guilt attached to all defendants as soon as they are arrested. See, e.g., Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (explaining how this presumption of guilt is stronger and harder to overcome if the defendant is an African American male).

motivation to work in the criminal justice system “to do good.”<sup>7</sup> Second, the speed of the plea-bargaining process allows the legal actors’ racial biases to remain unchecked.<sup>8</sup> Third, the broad, unfettered discretion of the legal actors involved in plea bargaining allows racial biases to shape charging and justice outcomes.<sup>9</sup>

Consequently, African American male defendants know all too well that our criminal justice system’s supposed guarantees of “justice for all” and “innocent until proven guilty” do not apply to them. Even though “presumption of innocence” is a legal<sup>10</sup> and human right,<sup>11</sup> the data show that African American male defendants suffer a racialized presumption of guilt in every part of the criminal system, including plea bargaining.<sup>12</sup> The data are bone-chilling. In the United States, African Americans are 5.9 times more likely to be incarcerated than whites.<sup>13</sup> By the end of 2017, eighteen- and nineteen-year-old Black males were about *twelve times* more likely to be

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<sup>7</sup> See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (explaining how we all, despite our best intentions, unconsciously absorb cultural biases); *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 6 (discussing how implicit racial bias adversely impacts the justice outcomes for black defendants to such an extent that black defendants have become synonymous with criminality); SHANKAR VEDANTAM, *THE HIDDEN BRAIN* (2010) (detailing how the part of our brain that is unconscious may shape our decision-making in a way that contradicts our stated values).

<sup>8</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 86–87 (2011) (explaining System 1 thinking in which fast, unconscious thinking allows biases to emerge).

<sup>9</sup> See Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5 (looking at how the broad discretion of prosecutors in charging defendants and in plea bargaining allows prosecutors’ implicit racial biases to emerge and shape prosecutors’ decision-making).

<sup>10</sup> See, e.g., John A. Seiff, *The Presumption of Innocence*, 25 J. CRIM. L. & CRIMINOLOGY 53 (1934); Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST: STUD. CHURCH L. & MINISTRY 106 (2003).

<sup>11</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 73 (Dec. 10, 1948).

<sup>12</sup> See Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288 (2015); BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, *PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY: TECHNICAL REPORT* (2014), [ncjrs.gov/pdffiles1/nij/grants/247227.pdf](https://ncjrs.gov/pdffiles1/nij/grants/247227.pdf) [<https://perma.cc/G7WK-P5F3>]; LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, *PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY* (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/R4KB-GK8R>]; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2* (2011) (citing discrimination against black suspects as one of the three causes for the dysfunction of our criminal justice system); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 155 (2017) (discussing how police presume black youth in “high-crime” black communities are guilty, reinforcing the stereotype of black people as criminals).

<sup>13</sup> JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., *PRISONERS IN 2017* 1 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/GW6C-KAW7>].

imprisoned than their white counterparts.<sup>14</sup> Substantiating the data, the real-life stories of the countless African American male defendants who have suffered discriminatory injustices in our criminal justice system plague our moral core and galvanize us to enact reforms. Professor Henry L. Gates,<sup>15</sup> the Central Park Five,<sup>16</sup> Michael Brown Jr.,<sup>17</sup> Eric Garner,<sup>18</sup> Freddie Gray,<sup>19</sup> Alton Sterling,<sup>20</sup> Tamir Rice,<sup>21</sup> Emmet Till,<sup>22</sup> and Anthony Ray Hinton<sup>23</sup> are among the long list of African American males who have suffered racial injustices in our criminal justice system.<sup>24</sup> In the few short months while this Article was readying for publication, Ahmaud Arbery, George Floyd, and

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<sup>14</sup> *Id.*

<sup>15</sup> Harvard Professor Henry Louis Gates was arrested and charged with robbery as he was trying to enter his own house. Elayne E. Greenberg, *Dispute Resolution Lessons Gleaned from the Arrest of Professor Gates and "The Beer Summit,"* 25 ST. JOHNS J. C.R. & ECON. DEV. 91 (2010).

<sup>16</sup> N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004).

<sup>17</sup> Timothy Williams, *Five Years After Michael Brown's Death, His Father Wants a New Investigation*, N.Y. TIMES (Aug. 15, 2019, 2:47 P.M.), [https://www.nytimes.com/2019/08/09/us/ferguson-michael-brown.html?rref=collection%2Fbyline%2Ftimothy-williams&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=7&pgtype=collection](https://www.nytimes.com/2019/08/09/us/ferguson-michael-brown.html?rref=collection%2Fbyline%2Ftimothy-williams&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=7&pgtype=collection) [<https://perma.cc/D85R-U3T7>] (“[His death] set into motion profound changes in policing, race relations and society that continue to reverberate.”).

<sup>18</sup> Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html?smid=pl-share> [<https://perma.cc/3NXU-ZDT4>].

<sup>19</sup> Camila Domonoske, *Prosecutors Drop All Remaining Charges Against Officers in Freddie Gray's Death*, NPR (July 27, 2016, 9:59 AM), <https://www.npr.org/sections/thetwo-way/2016/07/27/487606743/prosecutors-drop-all-remaining-charges-against-officers-in-freddie-grays-death> [<https://perma.cc/UX4Q-DFG2>].

<sup>20</sup> Jason Hanna, *No Charges Against Officers in Alton Sterling Death; Other Videos Are Coming*, CNN (Mar. 27, 2018, 6:22 PM), <https://www.cnn.com/2018/03/27/us/alton-sterling-investigation/index.html> [<https://perma.cc/H272-RSTC>].

<sup>21</sup> Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <https://www.gq.com/story/tamir-rice-story> [<https://perma.cc/6MG8-UFP9>].

<sup>22</sup> *Emmett Till*, BIOGRAPHY, <https://www.biography.com/crime-figure/emmett-till> [<https://perma.cc/VC5K-JDPE>] (last updated June 23, 2020).

<sup>23</sup> Anthony Ray Hinton, *How I Got 30 Years on Death Row for Someone Else's Crime*, GUARDIAN (Apr. 27, 2018), <https://www.theguardian.com/us-news/2018/apr/27/anthony-ray-hinton-death-row-a-legal-lynching-alabama-crime> [<https://perma.cc/S5H4-WWFN>].

<sup>24</sup> Unfortunately, the number of African American men who have suffered racial injustices in the criminal justice system extends far beyond the names listed.

Rayshard Brooks were added to the list of those African American men.<sup>25</sup> And the list keeps growing.

As the data and stories of injustice bring to light, this racialized presumption of guilt influences who the police profile as criminal suspects,<sup>26</sup> the manner in which law enforcement engages with criminal suspects and witnesses in the community,<sup>27</sup> the way in which the police interrogate suspects, the charges brought against defendants,<sup>28</sup> the plea bargaining negotiations, and the final sentence.<sup>29</sup> Looking back on U.S. history, this racialized presumption of guilt is anchored in the United States' deep, racially discriminatory roots that built a society, an economy, and a criminal justice system on slavery.<sup>30</sup> Under this discriminatory caste system, enslaved African American males were stereotypically regarded as dangerous, aggressive, animalistic, likely to use weapons, and prone to criminality.<sup>31</sup>

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<sup>25</sup> Elliott C. McLaughlin, *Ahmaud Arbery Was Hit with a Truck Before He Died and His Killer Allegedly Used a Racial Slur, Investigator Testifies*, CNN (June 4, 2020, 10:44 PM), <https://www.cnn.com/2020/06/04/us/mcmichaels-hearing-ahmaud-arbery/index.html> [<https://perma.cc/G3PP-U2KV>]; *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/F794-8YYN>]; Christina Maxouris, *Rayshard Brooks Was Killed a Day Before He Planned to Celebrate His Daughter's Birthday*, CNN (June 15, 2020, 9:02 PM), <https://www.cnn.com/2020/06/14/us/rayshard-brooks-atlanta-shooting/index.html> [<https://perma.cc/T6FW-7TST>].

<sup>26</sup> See, e.g., Roberts, *supra* note 6 (discussing how this presumption of guilt at the time of arrest is stronger and harder to overcome if the defendant is an African American male).

<sup>27</sup> See, e.g., Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 L. & SOC'Y REV. 960, 975 (2018) (finding that black civilians in New York face 27% higher odds of experiencing some form of force during a stop compared to white citizens and 28% higher odds of having an officer draw a firearm during the interaction); see also Devin W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 548 (2017) (detailing that the more law-abiding citizens in the community have contact with the police, the higher their risk becomes of being profiled).

<sup>28</sup> See, e.g., Berdejó, *supra* note 5, at 1215 (finding that black defendants in Wisconsin were nearly twenty-five percent less likely to have their top charge dropped or reduced than their white counterparts).

<sup>29</sup> A Georgia study found that murders with white victims are eleven times more likely to result in a death sentence than those committed against Black people. David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709 (1983).

<sup>30</sup> See, e.g., *The 1619 Project*, N.Y. TIMES MAG. (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/6K25-N4A2>].

<sup>31</sup> See, e.g., Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5, at 798, 808 (discussing how prosecutorial discretion allows the prosecutor's implicit biases to emerge and causes racially disparate charging and plea bargaining outcomes); PAMELA NEWKIRK, SPECTACLE: THE ASTONISHING LIFE OF OTA BENGA (2015) (chronicling how Ota Benga, an

This racialized presumption of guilt was reinforced during the 1920s when the criminal justice system, born and evolved from a society that discriminated against African Americans, developed into a more professional enterprise in which full-time police made arrests and prosecutors brought charges.<sup>32</sup> Scholars have observed that creating full-time police and prosecutors reinforced the presumption of guilt towards defendants.<sup>33</sup> The United States further reinforced the racialized presumption of guilt during the 1990s when it supported police racial profiling, unauthorized searches, and pretextual stops to promote its War on Drugs and Violence.<sup>34</sup> To the horror of many, this racialized presumption of guilt remains embedded in our culture,<sup>35</sup> economics,<sup>36</sup> politics,<sup>37</sup> and criminal justice system<sup>38</sup> and continues to be further stoked today.<sup>39</sup>

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African man, was captured, caged and shown, reinforcing the bias that African males were animalistic); JENNIFER L. EBERHARDT, *BIASED* 134–52 (2019); Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1135–37 (2012) [hereinafter *Implicit Bias in the Courtroom*]; HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 36 (2019) (chronicling with narration and illustrations the countless ways the freed slave was kept enslaved during the Reconstruction and Jim Crow era and its relevance today).

<sup>32</sup> See Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 *L. & SOC'Y REV.* 247, 257 (1979) [hereinafter Friedman, *Plea Bargaining*].

<sup>33</sup> *Id.* The public attributed a legitimacy to the action of professional police and prosecutors. After all, why would professional law enforcement arrest an individual and bring charges against them if there wasn't a legitimate reason?

<sup>34</sup> See, e.g., FORMAN, *supra* note 12, 167–71 (critically examining how the government's policies to combat crimes had racially disparate justice outcomes).

<sup>35</sup> Nikita Stewart, *'We Are Committing Educational Malpractice': Why Slavery is Mistaught—and Worse—in American Schools*, *N.Y. TIMES MAG.* (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html> [<https://perma.cc/27UF-GYWJ>].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 *CRIME & JUST.* 49 (2015) (calling for an overhaul of sentencing procedures such as the elimination or severely restricted use of the death penalty and sentencing those convicted of non-serious crimes to diversion programs to reduce racial disparities); Berdejó, *supra* note 5; IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 6 (discussing how implicit racial bias contaminates criminal justice decision-making).

<sup>39</sup> See, e.g., Spohn, *supra* note 38; Berdejó, *supra* note 5; IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 6; Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, *BROOKINGS INST.* (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [<https://perma.cc/4E5B-2T3X>] (noting how President Trump's racist rhetoric is causing an increase in hate crimes); Mark Peterson, Claudia Racine & James D. Walsh, *This Is America: The White Nationalists*



Legal scholars and criminal law activists have called for a total overhaul of the criminal justice system to put an end to this system of racialized injustice.<sup>40</sup> Although considered a laudable goal by many,<sup>41</sup> such reform takes time, and that delay maintains the status quo. This Article focuses instead on debiasing reforms in the plea-bargaining process as a more immediate and realistic approach to stopping the cycle of racialized justice.

There are three justifications for this choice. First, the proposed reforms target the plea-bargaining process—the primary form of criminal justice decision making<sup>42</sup> and a hub of racialized injustice—to readily yield improved justice outcomes for those African American male defendants whose cases will be plea bargained. Because of the racialized presumption of guilt, African American male defendants who plea bargain in state criminal courts are more likely to be presumed guilty—even when factually innocent.<sup>43</sup> Furthermore, those African American male defendants who are guilty of a crime and opt to plea bargain are often penalized with harsher outcomes because of their race.<sup>44</sup> This must change.

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*Among Us*, INTELLIGENCER (Dec. 19, 2019), <https://nymag.com/intelligencer/2019/12/white-supremacy-terrorism-in-america-2019.html> [<https://perma.cc/59QF-EVTC>] (documenting how the resurgence of white supremacy since President Trump's election is a continuation of the racism that has been institutionalized since the Civil War).

<sup>40</sup> See, e.g., STUNTZ, *supra* note 12; Spohn, *supra* note 38, at 49; NAT'L ASS'N CRIM. DEF. LAW., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 3 (2018) [hereinafter *THE TRIAL PENALTY*], <https://www.nacdl.org/trialpenaltyreport/> [<https://perma.cc/UEM5-5F89>] (explaining that fewer than 3% of criminal defendants exercise their Sixth Amendment right to trial because the prosecutor threatens the defendant with a higher sentence if the defendant refuses the offered plea bargain and proceeds with trial).

<sup>41</sup> See Spohn, *supra* note 38.

<sup>42</sup> See *THE TRIAL PENALTY*, *supra* note 40.

<sup>43</sup> See, e.g., Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/WYA7-BVXM>] (suggesting that greater information sharing between the prosecutor and defense attorney, and magistrate involvement before the plea bargaining process helped minimize the estimated two to eight percent of those innocent defendants who plead guilty); see also *NYCLA Justice Center Task Force: Solving the Problem of Innocent People Pleading Guilty*, 40 PACE L. REV. 1, 4 (2020) [hereinafter *NYCLA Justice Center Task Force Report*], <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=2016&context=plr> [<https://perma.cc/R5W5-U8FA>] (formulating recommendations to address the reasons why innocent defendants may plead guilty such as reducing the number of court appearances and creating protocols that would ease access and communication between incarcerated defendants and defense lawyers).

<sup>44</sup> E.g., M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1321 (2014) (finding that average sentences for black defendants in federal court were ninety months for black defendants and fifty-five months for

Second, the universe of legal actors that can reform the plea-bargaining process is discretely defined. These actors include defense lawyers, prosecutors, and their respective offices. Unlike other criminal reform ideas that require legislative changes and significant budgetary support, the reforms suggested here just require acceptance by prosecutors and defense attorneys.<sup>45</sup>

Third, prosecutors and defense attorneys, the primary plea-bargaining negotiators, are also the legal actors initially drawn to this practice area to “do justice.” This committed group is more likely to be receptive to reforming the plea-bargaining process and deliver more racially neutral justice than apathetic legal actors who accept the status quo.<sup>46</sup>

A threshold issue in developing this proposal for reform is understanding why prosecutors and defense counsel, legal actors committed to enforcing justice, still plea bargain in such a racially biased way. The “why” provides the foundational justification for the proposals recommended later in this Article. Cognitive behavioral scholars educate that our racialized history has also remained embedded in our culture and has become memorialized in an unconscious network of neurons that form our implicit biases about African American males.<sup>47</sup> All Americans have these implicit

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white defendants between 2008 and 2009); *see also* Berdejó, *supra* note 5, at 1215 (finding that black defendants in Wisconsin were nearly 25% less likely to have their top charge dropped or reduced than their white counterparts).

<sup>45</sup> As a part of effective dispute system design, the dispute system designer must identify the discretely defined universe of legal actors who are motivated and can take responsibility for implementing plea bargaining reforms to increase the likelihood that the prescribed recommendation will successfully be implemented. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009); *see also* Pon Staff, *What is Dispute System Design?*, HARV. L. SCH. PROGRAM ON NEGOT. DAILY BLOG (June 15, 2020), <https://www.pon.harvard.edu/daily/dispute-resolution/what-is-dispute-system-design/> [<https://perma.cc/9MT8-V3PD>].

<sup>46</sup> *See, e.g.*, Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, ABA J. (June 1, 2019), <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors>; ERIC GONZALEZ, BROOKLYN DISTRICT ATT’Y, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN (2019), <http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> [<https://perma.cc/2TKQ-XCLH>]; THE TRIAL PENALTY, *supra* note 40; Colyn Eppes, *TRR Partner Lew Tesser Chairs Plea-Bargaining Task Force*, TESSER RYAN BLOG (Apr. 12, 2019), <http://tesserryan.com/trr-partner-lew-tesser-chairs-plea-bargaining-task-force/> [<https://perma.cc/L54G-FXTJ>]; *see also* *Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjb/our-work-and-vision/> [<https://perma.cc/9RUV-FJSY>] [hereinafter FAIR & JUST PROSECUTION] (last visited Sept. 7, 2019) (explaining the mission of public prosecutors who wish to work together to develop innovations that will promote better justice outcomes).

<sup>47</sup> *See* BANAJI & GREENWALD, *supra* note 7 (explaining how implicit biases are formed).

biases.<sup>48</sup> Thus, even though we may explicitly reject the United States' discriminatory behavior, and it may appall us, we may still internalize the racially discriminatory messages the media and broader culture communicate to us.<sup>49</sup>

Relevant to this Article's point, these implicit biases influence the legal actors in our criminal justice system, including the prosecutors and defense attorneys who are the primary legal actors in plea bargaining.<sup>50</sup> Therefore, although prosecutors and defense attorneys may not be explicitly biased, they are still prone to unconsciously regard African American men as dangerous, aggressive, likely to use weapons, and prone to criminality.<sup>51</sup> Such implicit biases contaminate every aspect of the plea-bargaining process including the evidence relied upon,<sup>52</sup> the severity of the initial charges,<sup>53</sup> and the final sentencing agreement.<sup>54</sup> This implicit bias infects defense attorneys and prosecutors alike, as well as the organizations that employ them.<sup>55</sup>

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<sup>48</sup> See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 970–71 (2006).

<sup>49</sup> See BANAJI & GREENWALD, *supra* note 7; MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (explaining how our quick judgements or heuristics, such as the ones prosecutors make about African American defendants, are likely to reflect our biases); EBERHARDT, *supra* note 31.

<sup>50</sup> See, e.g., Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (calling attention to the unconscious racial biases of public defenders and suggesting how public defenders might mitigate their racial biases); Carly Will Sloan, *Racial Bias by Prosecutors: Evidence from Random Assignment* (Dec. 28, 2019), [https://github.com/carlywillsloan/Prosecutors/blob/master/191228\\_sloan\\_jmp.pdf](https://github.com/carlywillsloan/Prosecutors/blob/master/191228_sloan_jmp.pdf) [<https://perma.cc/R2Q3-F8Z4>]; *Implicit Bias in the Courtroom*, *supra* note 31.

<sup>51</sup> Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5, at 798, 808; see Duru, *supra* note 16, at 1357. Ironically, prosecutors and defense attorneys have their racial implicit biases reinforced when they are working in a justice system that arrests and convicts a disproportionate number of black defendants.

<sup>52</sup> See Berdejó, *supra* note 5, at 1237; Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 250 (1991).

<sup>53</sup> See Berdejó, *supra* note 5, at 1191.

<sup>54</sup> See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 306 (2001).

<sup>55</sup> See, e.g., Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (alerting criminal defense attorneys to develop heightened awareness of their own racial biases); Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST (June 7, 2016, 11:31 AM), <https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/> [<https://perma.cc/H9C3-9CRR>] (explaining how a public defender helps himself and office colleagues develop a heightened awareness of his own implicit racial biases).

The plea-bargaining process is particularly susceptible to becoming infected by implicit racial bias. During plea bargaining, the racialized presumption of guilt emerges, thrives, and shapes justice outcomes. Applying the research of implicit bias scholars, we can understand how legal actors' lack of self-awareness about their own racialized biases,<sup>56</sup> the justice system's driving need to use plea bargaining for efficient justice resolutions,<sup>57</sup> and attorneys' broad discretion in the plea bargain process<sup>58</sup> all contribute to make plea bargaining a process that enables implicit biases about African American male defendants.

Anti-racist educators contribute to this discussion by explaining that we will not be able to manage our implicit racial biases unless we are also prepared to take responsibility for how we benefit from maintaining the status quo.<sup>59</sup> Acknowledging our implicit biases is not an excuse for failing to own up to all the personal benefits we may have enjoyed from living in a racially discriminatory society.<sup>60</sup> Although awareness of our implicit biases is a first step, more must be done.<sup>61</sup> We must then own the deleterious impacts of bias, discard our defenses about our racist beliefs, and examine the ramifications of maintaining the status quo before we can effect meaningful societal change.<sup>62</sup>

This Article expands the scholarship about plea bargaining by “naming the elephant in the room” and tackling how to mitigate the implicit racial bias in plea bargaining.<sup>63</sup> The author prescribes organizational and individual

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<sup>56</sup> See Chris Chambers Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 BERKELEY LA RAZA L.J. 18, 43 (2018).

<sup>57</sup> See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 189 (2014).

<sup>58</sup> See, e.g., Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018); Rakoff, *supra* note 43.

<sup>59</sup> See, e.g., ROBIN DIANGELO, *WHITE FRAGILITY* (2018); EBERHARDT, *supra* note 31; IBRAM X. KENDI, *STAMPED FROM THE BEGINNING* (2016). These authors call for whites to accept responsibility and take steps to develop a self-awareness of their implicit racial biases and how this racism has advantaged them at the expense of black Americans.

<sup>60</sup> DIANGELO, *supra* note 59, at 140–54.

<sup>61</sup> *Id.* (discussing steps to address racism and white fragility).

<sup>62</sup> See, e.g., DIANGELO, *supra* note 59, at 141–48.

<sup>63</sup> Surprisingly, there is a paucity of scholarship about the negotiation process in plea bargaining, and the initial scholarship that does exist has suggested how plea bargaining could be improved by using a more interest-focused approach. See Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 (2007); Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445 (2016) (commenting on the lack of plea bargaining

reforms for prosecutors, defense attorneys, and the organizations they work within to address this implicit racial bias in plea bargaining. The suggested reforms create a more intentional plea-bargaining process, heighten awareness of the implicit racial bias of the legal actors involved in plea bargaining, and incentivize greater accountability for racialized justice outcomes in plea bargaining. The proposals integrate the work of cognitive behavioral psychologists,<sup>64</sup> anti-racism educators,<sup>65</sup> dispute system designers,<sup>66</sup> negotiation scholars,<sup>67</sup> and criminal justice reformers.<sup>68</sup>

This discussion will take place in four parts. Part I chronicles the racialized roots of our country and our evolving criminal justice system, within which plea bargaining has emerged and evolved. This Part puts forward the dominant theories that explain why this racial animus has persisted. Part II looks at plea bargaining practice today. Shifting to the lens of implicit bias and anti-racist scholars, this Part shows how our racially discriminatory history has shaped prosecutors' and defense attorneys' implicit racial biases and the racialized presumption of guilt. Part III prescribes remedial organizational and individual interventions to help district attorneys' offices, public defenders' organizations, and individual defense attorneys and prosecutors contain their racialized implicit biases as they negotiate justice for African American male defendants. The Article concludes that the goal of the proposed reforms is to ensure that African American male defendants who negotiate their justice outcomes do so unshackled from racial bias.

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training for defense lawyers); Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377 (2016) [hereinafter Alkon, *Plea Bargain Negotiations*]; Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019) [hereinafter Schneider & Alkon, *Bargaining in the Dark*]; Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, CARDOZO L. REV. (forthcoming 2021) (offering empirical research comparing and contrasting the different plea bargaining approaches between prosecutors who negotiated in the "shadow of the trial" and defense attorneys who negotiated in the "shadow of the client").

<sup>64</sup> See, e.g., BANAJI & GREENWALD, *supra* note 7; *Implicit Bias in the Courtroom*, *supra* note 31; Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5.

<sup>65</sup> See, e.g., DIANGELO, *supra* note 59; EBERHARDT, *supra* note 31; KENDI, *supra* note 59; IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019).

<sup>66</sup> See, e.g., Smith & Martinez, *supra* note 45.

<sup>67</sup> See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2011).

<sup>68</sup> See, e.g., Schneider & Alkon, *Bargaining in the Dark*, *supra* note 63.

## I. THE HISTORICAL ETIOLOGY OF RACISM IN PLEA BARGAINING AND THE U.S. CRIMINAL JUSTICE SYSTEM

One can best understand plea bargaining as a component of the U.S. criminal justice system through the racialized societal values, objectives, and cultural forces in which plea bargaining was born and has matured.<sup>69</sup> There are three sociological theories of causation that help us understand why racism began and persists.<sup>70</sup> Critical race theorists such as Richard Delgado postulate that U.S. legislators hierarchically structured our laws to maintain white privilege and Black inferiority.<sup>71</sup> Through a critical race theorist lens, these legislators based our laws and criminal justice policies on a racism intended to maintain this biased social hierarchy.<sup>72</sup> Through a slightly different lens, conflict theorists such as Austin Turk assert that persistent racism is about the dominant group maintaining social control.<sup>73</sup> According to conflict theorists, our criminal justice system applies law to reinforce the power of the politically and economically dominant group while simultaneously controlling the power of racial minorities who threaten the dominant group's social control.<sup>74</sup> Proposing a third theory about why racism persists, attribution theorists assert that, when there is inadequate objective information, criminal justice enforcers such as police, probation officers, and judges make racist decisions based on heuristics that African American defendants are prone to criminality.<sup>75</sup> For attribution theorists, the defendant's race evokes criminal justice enforcers implicit biases about African American men and biases justice decision making.<sup>76</sup>

Whether you read this Section through the lens of any of these three sociological theories or just for historical interest, you will find each frame complements the others and expands our understanding about pernicious racism in our criminal justice system. Historical racism has also created a racial implicit bias that contaminates the plea-bargaining process today. This first part of this Section chronicles the evolution of the racialized

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<sup>69</sup> Friedman, *Plea Bargaining*, *supra* note 32, at 258.

<sup>70</sup> Spohn, *supra* note 38, at 52–54.

<sup>71</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 27–29 (2d ed. 2012); see also Spohn, *supra* note 38, at 52.

<sup>72</sup> See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (explaining how the law accepted race as a biological fact and reinforced black subjugation).

<sup>73</sup> AUSTIN T. TURK, CRIMINALITY AND LEGAL ORDER (1969) (focusing on how those in authority assert control when there are legal violations); Spohn, *supra* note 38, at 53.

<sup>74</sup> TURK, *supra* note 73; Spohn, *supra* note 38, at 53.

<sup>75</sup> Darnell F. Hawkins, *Explaining the Black Homicide Rate*, 5 J. INTERPERSONAL VIOLENCE 151, 154 (1990); Spohn, *supra* note 38, at 53.

<sup>76</sup> Hawkins, *supra* note 76, at 160–61; Spohn, *supra* note 38, at 53.

presumption of guilt in plea bargaining by examining how the history of the criminal justice system and the history of discrimination against African Americans are inextricably linked. *Who are targeted as criminal? What behavior is criminalized? How are laws disparately applied? How is justice delivered?* Race determines the answers to all these questions. The second part of this Section narrates the evolution of plea bargaining. As part of that discussion, the reader will see how our criminal justice history and the United States' history of discrimination against African Americans converged to shape the racialized presumption of guilt that exists in plea bargaining today.

#### A. THE INEXTRICABLE LINK BETWEEN THE U.S. CRIMINAL JUSTICE SYSTEM AND THE HISTORICAL DISCRIMINATION AGAINST AFRICAN AMERICANS

From its inception, our criminal justice system evolved within a country that was founded on the dehumanization of and discrimination against African Americans.<sup>77</sup> Expectedly, this discriminatory animus contaminated every aspect of the criminal justice system, biasing the interpretation and application of racially-neutral legal codes.<sup>78</sup> Ironically, while the citizenry embarked on developing a criminal justice system that was meant to be fair and just, it simultaneously embraced its racist legacy and discriminatory beliefs against African Americans. Sadly, that same struggle continues today.

The American Revolution galvanized the colonists to create a criminal justice system that was fairer and more just than the oppressive British system.<sup>79</sup> This goal was evident from the multiple safeguards the colonists incorporated into their developing criminal justice system. For example, both the Bill of Rights and state constitutions reinforced the importance of fair trials and just punishments that were proportional to the crime committed.<sup>80</sup> Criminal codification, the process by which crimes would be “open, transparent and easy to know,” was also viewed as a necessary safeguard to protect the colonists against a reoccurrence of the abuse they had endured under the King's rule.<sup>81</sup> The goal was to create a criminal justice system that could not be misused for retaliating against those taking unpopular political stances.<sup>82</sup> Another safeguard that protected against the harms they

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<sup>77</sup> See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 433–53 (3d ed. 2005) [hereinafter FRIEDMAN, HISTORY OF AMERICAN LAW] (narrating how the developing criminal justice system reflected the discriminatory values of the time).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 207.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 215.

<sup>82</sup> See *id.*

experienced was to disfavor the death penalty as a punishment for theft and only to use it as a last resort.<sup>83</sup> Instead, some colonists considered the restitution of property and hard labor as more appropriate punishments for theft.<sup>84</sup>

The goal of labeling a behavior as “criminal” was to reinforce the social and economic hierarchy and to maintain control of those on the bottom.<sup>85</sup> Thus, the decision to label a behavior as “criminal” was and remains a fluid concept. During the colonial era of the 1700s, the citizenry viewed crime as a public wrong that hurt society.<sup>86</sup> The primary goal of criminal law was to enforce the existing social morality.<sup>87</sup> Although fornication and drunkenness were the most frequently punished crimes, behavior such as gaming, idleness, and lying were also considered criminal.<sup>88</sup> At that time, the public considered crime a symptom of societal ills such as family problems, poverty, or inappropriate companions, and, as a social problem, they could not be remedied by the death penalty.<sup>89</sup> Rather, the purposes of punishment were “to deter crime and rehabilitate the criminal.”<sup>90</sup>

Moreover, the public elite criminalized these activities to maintain economic control.<sup>91</sup> For example, society criminalized fornication to maintain the accepted morality of the time and because it was concerned with who would support any children that resulted from such a “sinful act.”<sup>92</sup> Times change, and with them, so did criminal justice’s priorities. After the Revolution, as economic crimes increased, the criminal justice system’s focus shifted more to protecting property and less to proscribing fornication.<sup>93</sup>

Even though the colonists wanted to create a fair and just criminal justice system, the safeguards they adopted to protect against unfair prosecution and tyranny did not apply to Black people in the South.<sup>94</sup> Rather, society subjected enslaved people and those disfavored in the lower social

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<sup>83</sup> *See id.* at 33.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 36, 37.

<sup>86</sup> *Id.* at 37.

<sup>87</sup> *Id.* at 35.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 208.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 37.

<sup>92</sup> *Id.* at 36.

<sup>93</sup> *Id.* at 218.

<sup>94</sup> *Id.* at 436.



order to the uneven and biased enforcement of criminal laws<sup>95</sup> and disproportionate capital sentences.<sup>96</sup> Slave codes further reinforced the community biases against African Americans.<sup>97</sup> In the slave codes, as well as other laws, enslaved African Americans were considered chattel and forbidden to learn to read.<sup>98</sup> Those free African Americans who were living in the North also experienced discrimination as a result of the deeply entrenched racist ideas that America was founded on and were subjected to the racially disparate application of criminal laws.<sup>99</sup>

At about the same time as our criminal justice system was beginning to develop after the Revolutionary War, the first vigilante or self-help justice groups were also forming.<sup>100</sup> These vigilante groups proliferated in the West buoyed by the conviction that “swift and terrible retribution is the only preventive course, while society is organizing in the far West.”<sup>101</sup> A variant of these vigilante groups were the slave patrols made up of local citizens.<sup>102</sup> These patrols would catch and whip enslaved people who were on the streets past curfew or without the requisite pass from their owners.<sup>103</sup> In 1767, the

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<sup>95</sup> See *id.* at 35.

<sup>96</sup> *Id.* at 209.

<sup>97</sup> See *id.* at 36.

<sup>98</sup> See generally John M. Mecklin, *The Evolution of Slave Status in American Democracy*, 2 J. NEGRO HIST. 229, 250 (1917) (discussing how the slave codes treated slaves as “irrational” chattel while denying them the opportunity to learn to read and write); see also Rachel L. Swarns, *The Nuns Who Bought and Sold Human Beings*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/opinion/sunday/nuns-slavery.html> [<https://perma.cc/UE5B-KNM2>] (describing the history of racism in the Catholic Church and how one group of nuns sold their slaves and separated slave families to fund their commitment to free education for the poor).

<sup>99</sup> See, e.g., Mecklin, *supra* note 98; see also SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE 21<sup>ST</sup> CENTURY* (2018).

<sup>101</sup> See FRIEDMAN, *HISTORY OF AMERICAN LAW*, *supra* note 77, at 440; cf. Anna North, “*The Oppression Doesn’t End It, It Adapts*”: America’s History of Lynching and Its Resonance Today, VOX (updated June 20, 2020, 12:23 PM), <https://www.vox.com/21295670/robert-fuller-malcolm-harsch-hanging-history-lynching> [<https://perma.cc/2NSE-SCRZ>]; Ben Yakas, *NYPD Investigating Suicide of Black Man Found Hanging from Tree in Manhattan Park*, GOTHAMIST (June 17, 2020, 4:03 PM), <https://gothamist.com/news/nypd-investigating-suicide-black-man-found-hanging-tree-manhattan-park> [<https://perma.cc/87LB-7RQK>]; Jake Offenhartz, *Report of Nooses in Van Cortlandt Park Met by NYPD Indifference, Bronxites Allege*, GOTHAMIST (June 19, 2020, 4:27 PM), <https://gothamist.com/news/reports-nooses-van-cortlandt-park-met-nypd-indifference-bronxites-allege> [<https://perma.cc/PEN3-23EZ>] (showing how lynching continues in 2020).

<sup>101</sup> FRIEDMAN, *HISTORY OF AMERICAN LAW*, *supra* note 77, at 440 (quoting THOMAS J. DIMSDALE, *THE VIGILANTES OF MONTANA* 13 (1953)).

<sup>102</sup> *Id.* at 213.

<sup>103</sup> *Id.*

first American vigilante group, the South Carolina Regulator, emerged.<sup>104</sup> After 1850 and abolition, vigilante groups proliferated and came in different iterations.<sup>105</sup> For example, there were the claims clubs in the Midwest, miners' courts,<sup>106</sup> the Ku Klux Klan,<sup>107</sup> and Judge Lynch<sup>108</sup> in the southern border states. Although all these vigilante groups were about delivering their own form of extrajudicial justice, the Southern lynch mobs were known as the most brutal because "their law and order was naked racism, no more."<sup>109</sup>

At the conclusion of the Civil War, the United States abolished slavery, and all African Americans were ostensibly free. However, the Supreme Court countered and muted the Thirteenth,<sup>110</sup> Fourteenth,<sup>111</sup> and Fifteenth<sup>112</sup> Amendments, laws intended to reinforce African Americans' rights to freedom, by limiting their application to state action.<sup>113</sup> Jim Crow Laws, southern codes that sought to preserve the hierarchal status quo between white land owners and enslaved people, reaffirmed that African Americans were still "less than."<sup>114</sup> The Reconstruction period that was supposed to free enslaved people just continued slavery in a different form.<sup>115</sup> For example, formerly enslaved people who worked for a share of profits on the same plantation that they worked when they were enslaved often were deprived of

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<sup>104</sup> *Id.* at 440.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (resolving disputes over mining rights).

<sup>107</sup> *Id.* at 430 (maintaining white supremacy).

<sup>108</sup> *Id.* at 440 (perpetuating black men's enslavement by burning and hanging those who were accused of crimes).

<sup>109</sup> *Id.*

<sup>110</sup> U.S. CONST. amend. XIII, §§ 1–2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.").

<sup>111</sup> U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>112</sup> U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

<sup>113</sup> See Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.C.L. L. REV. 481, 481–82 (2006).

<sup>114</sup> See, e.g., FORMAN, *supra* note 12, at 66.

<sup>115</sup> STUNTZ, *supra* note 12, at 105–11 (describing the Reconstructionist massacres by white citizens and law officials against black people); see also GATES, *supra* note 31.

the profits that they should have rightly earned.<sup>116</sup> As Bryan Stevenson elegantly states:

In many ways, you can say that the [N]orth won the Civil War, but the [S]outh won the narrative war. If the urgent narrative that we're trying to deal with in this country is a narrative of racial difference. If the narrative that we have to overcome is a narrative of white supremacy, the south prevailed . . . [A]nd that's what we were dealing with at the beginning of the 20th century when we began an era where white supremacy, racial subordination, racial hierarchy is going to be enforced in a new way: lynching.<sup>117</sup>

After Reconstruction and continuing into the mid-twentieth century, African Americans found that the type and quality of justice they received depended on which part of the country was dispensing the justice.<sup>118</sup> For example, African Americans in the South found that the criminal justice system was augmented by mob rule.<sup>119</sup> Similarly, justice in the West for African Americans was an amalgam of a somewhat effective justice system aided by vigilantism.<sup>120</sup> In the Northeast and Midwest, however, African Americans had a greater likelihood of receiving fairer justice outcomes because these justice systems were relatively more stable and less punitive.<sup>121</sup> Still, researchers reported that African Americans received greater sentences than whites for similar crimes throughout the United States during the 1930s through the '60s.<sup>122</sup>

For those formerly enslaved people who remained in the South, many increasingly found life in the South intolerable. During the Great Migration, formerly enslaved people sought greater opportunity in the North, free from the racial animus of the South. But many African Americans who migrated soon realized that, even in the North, they faced discrimination, just in a different form.<sup>123</sup> For example, employers gave preference to European

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<sup>116</sup> See, e.g., ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010) (explaining that during Reconstruction many formerly enslaved people remained de facto enslaved because they worked on the same land, were charged for the land and living expenses, and either got little profits, no profits or in the worst scenario, owed a debt to the landowner).

<sup>117</sup> *TRUE JUSTICE: BRYAN STEVENSON'S FIGHT FOR EQUALITY* (HBO 2019) [hereinafter *TRUE JUSTICE DOCUMENTARY*].

<sup>118</sup> STUNTZ, *supra* note 12, at 130.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 134.

<sup>122</sup> Spohn, *supra* note 38, at 73 (noting that researchers' methodology and degree of actual racism was challenged).

<sup>123</sup> FORMAN, *supra* note 12, at 88 ("No facet of African American life was exempt from the stranglehold of racism.").

immigrants for many of the jobs African Americans sought.<sup>124</sup> Further, as Historian Isabel Wilkins observed:

“The century between Reconstruction and the end of the Great Migration perhaps may be seen as a necessary stage of upheaval. It was a transition from an era when one race owned another; to an era when the dominant class gave up ownership but kept control over the people it once owned, at all costs, using violence even; to the eventual acceptance of the servant caste in the mainstream.”<sup>125</sup>

Not only was there a racial divide between Black and white communities, a class divide also emerged between poor Black people and upper-middle class Black people.<sup>126</sup> In poor Black neighborhoods, where there remains a higher crime rate than in white neighborhoods, society victimized—and continues to victimize—both Black criminals and Black victims.<sup>127</sup> The police racially profile Black people as criminal suspects.<sup>128</sup> Because the crime rate is higher in Black neighborhoods, Black victims find that the police are less likely to respond seriously to their requests for help than to white victims.<sup>129</sup> In this “racial tax,” police see Black citizens “first as potential criminals who need punishing, not as possible victims who need protecting.”<sup>130</sup> Exacerbating this problem, Black communities, until recently, did not have the political power to elect officials who would advocate for them and remedy this problem.<sup>131</sup> The result of the police’s discriminatory perception is that Black communities often do not receive the policing they need.

During the 1960s, the Civil Rights Movement called attention to the pervasive racial discrimination that African Americans suffered in every aspect of their lives, including the racist treatment by police departments.<sup>132</sup> Fed up with such discriminatory treatment, Black citizens protested in the cities and demanded change.<sup>133</sup> During these protests, Black citizens publicized the widespread police corruption and the police’s flagrant disregard of legal criminal procedures, especially towards Black people, such

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<sup>124</sup> See, e.g., *id.* at 89.

<sup>125</sup> WILKERSON, *supra* note 116, at 538 (2010).

<sup>126</sup> See, e.g., FORMAN, *supra* note 12, at 139 (talking about black-on-black crime).

<sup>127</sup> STUNTZ, *supra* note 12, at 22.

<sup>128</sup> See, e.g., FORMAN, *supra* note 12, at 212.

<sup>129</sup> STUNTZ, *supra* note 12, at 22.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 7.

<sup>132</sup> FORMAN, *supra* note 12, at 98.

<sup>133</sup> *Id.* at 104.

as arresting suspects without warrants.<sup>134</sup> Police abuse without any accountability and retribution had to change.<sup>135</sup> Did it?

During the '70s and '80s, the drug epidemic and gun violence plagued the country and threatened the viability of Black communities and their citizenry. Black communities referred to crack cocaine as "the worst thing to hit us since slavery."<sup>136</sup> Black leaders analogized the crack epidemic to the savagery Black people experienced at the hands of the Klan. Jesse Jackson asserted, "[n]o one has the right to kill our children . . . I won't take it from the Klan with a rope; I won't take it from a neighbor with dope."<sup>137</sup>

The United States fought back against the drug epidemic and gun violence with its War on Drugs. During the War on Drugs, the United States enacted punitive policing policies, stricter drug laws that penalized drug possession with the same severity as drug dealing, and mandatory minimum sentencing.<sup>138</sup> The Comprehensive Crime Control Act of 1984, which included the Sentencing Reform Act, was one such sweeping criminal justice reform to accomplish these ends.<sup>139</sup> The Violent Crime Control and Law Enforcement Act of 1994 was another.<sup>140</sup> All of these criminal interventions had a racially disparate impact on African Americans. War was being waged, and African Americans were now presumed guilty, rather than innocent.<sup>141</sup> They endured repeated unprovoked searches and pretextual traffic stops.<sup>142</sup> African American imprisonment rates were greater than those of Stalin's Soviet Union.<sup>143</sup>

The push for these criminal policies came not only from white politicians and their constituents, but also from Black officials and the Black middle class.<sup>144</sup> What does it say about our country that the response to this drug crisis was with criminal solutions rather than root-cause solutions?<sup>145</sup> Both white and Black supporters failed to predict that these measures would

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<sup>134</sup> *Id.* at 98.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 151 (quoting the president of the NAACP).

<sup>137</sup> *Id.* at 157.

<sup>138</sup> *Id.* at 156.

<sup>139</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

<sup>140</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

<sup>141</sup> FORMAN, *supra* note 12, at 155; *see also* Marcia G. Shein, *Racial Disparity in Crack Cocaine Sentencing*, 8 CRIM. JUST. 28, 61–62 (1993).

<sup>142</sup> FORMAN, *supra* note 12, at 198.

<sup>143</sup> STUNTZ, *supra* note 12, at 253.

<sup>144</sup> FORMAN, *supra* note 12, at 134 (detailing how government policies to combat crime had a disparate impact on the black community).

<sup>145</sup> *Id.* at 157.

have such a racially disparate impact on poor, Black communities.<sup>146</sup> Many consider these draconian criminal measures a leading cause of the racialized mass incarceration that exists today.

William J. Stuntz reminds us that the mass incarceration of Black people today is, in fact, slavery.<sup>147</sup> First, “incarceration is a form of slavery.”<sup>148</sup> The Thirteenth Amendment provides, “[n]either slavery, nor involuntary servitude, except as punishment for crime whereof *the party shall have been duly convicted*, shall exist in the United States.”<sup>149</sup> However, because African American male defendants are forced to navigate a racialized criminal justice system, too many are deprived of a fair and just process and often unduly convicted. Second, prisoners, like enslaved people, are subjugated to the will of their jailers.<sup>150</sup> Prison is all about subjugation, not rehabilitation. Third, incarceration, like slavery, is a way of controlling the poorest, least educated.<sup>151</sup> Part of the subjugation is keeping the incarcerated poor and uneducated. A disproportionate number of black prisoners who are incarcerated do not receive the adequate training or education necessary to reenter the world as contributing citizens. Fourth, prisoners, like enslaved people, are unable to vote and decide who is chosen to rule. Even when Black people are finished serving their prison sentences, they remain shackled to their incarcerated status.<sup>152</sup> Finally, as with the fear that surrounded ending slavery, a fear exists about reform efforts to reduce the number of incarcerated people.<sup>153</sup> Thus, prison reform efforts to end the mass incarceration of Black men are blocked by entrenched, racialized fears.

Professor Sheldon Evans offers a different analogy to illustrate how the racialized justice outcomes of our criminal justice system are a continuation of the discriminatory values underlying slavery. Professor Evans notes a

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<sup>146</sup> This failure to predict the harsh, disparate racial outcomes has been a topic of intense debate particularly in the midst of the 2020 Democratic primary debates. *See, e.g.*, Shaquille Brewster & Adam Edelman, *Kamala Harris Hits Biden Over ‘Mass Incarceration’ from Crime Bill*, NBC NEWS (May 15, 2019, 2:55 PM), <https://www.nbcnews.com/politics/2020-election/kamala-harris-disputes-joe-biden-s-claims-about-1994-crime-n1006106> [https://perma.cc/26BW-9G3M]. Senator Kamala Harris attacked Vice President Biden for drafting the 1994 crime bill that resulted in the mass incarceration of black people. While defending the bill’s preventative measures, Biden asserted that his intent was good, and the context in which the ‘94 bill was passed was different than today.

<sup>147</sup> STUNTZ, *supra* note 12, at 44.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

sobering link between how society perpetuated slavery and our modern law enforcement system.<sup>154</sup> “So, like the ‘slave catcher’ roots of our modern police force, law enforcement are incentivized to catch ‘criminals’ in African American communities, as their slave catching predecessors were, to return them to the racial hierarchy that maintained what they saw as a proper balance in society.”<sup>155</sup> The modern system of criminal justice enforcement in the United States is in many ways a continuation of a slavery system that fosters racialized discrimination against African American male defendants. In the following part of this Section, the author will explain how the racialized presumption of guilt took hold in the plea-bargaining process.

#### B. THE EVOLUTION OF PLEA BARGAINING AND THE RACIALIZED PRESUMPTION OF GUILT

Plea bargaining is when a criminal defendant offers to plead guilty in return for concessions in the offenses charged and the sentences imposed.<sup>156</sup> This Part chronicles the evolution of plea bargaining. When plea bargaining finally became the primary justice resolution process for criminal cases, the legal actors involved continued to be influenced by the discriminatory animus that historically contaminated the criminal justice system. This discriminatory animus helped to shape the presumption of guilt towards African American male defendants and involve it in plea bargaining.

Plea bargaining scholars disagree about when plea bargaining began to be used in the criminal justice system.<sup>157</sup> One reason for this disagreement is that it is difficult to ascertain if a guilty plea before trial was a result of a plea bargain.<sup>158</sup> Moreover, during the early 1800s, courts disfavored and discouraged guilty pleas.<sup>159</sup> There were multiple reasons for the distrust of guilty pleas. First, from as far back as the 1600s, guilty pleas were often

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<sup>154</sup> Comments from Professor Sheldon Evans to author (Oct. 27, 2019) (on file with author) [hereinafter Comments from Professor Sheldon Evans]; see also Gloria J. Browne-Marshall, *Stop and Frisk: From Slave-Catchers to NYPD, A Legal Commentary*, 21 TROTTER REV. 98 (2013) (analogizing NYC Police Department’s stop and frisk policy to the Black Codes); Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 PHYLON 42 (2016) (drawing the link between slave patrols and oppressive policing in black communities).

<sup>155</sup> Comments from Professor Sheldon Evans, *supra* note 154.

<sup>156</sup> Albert W. Alschuler, *Plea Bargaining and Its History*, 13 COLUM. L. REV. 211, 213 (1979).

<sup>157</sup> See, e.g., Friedman, *Plea Bargaining*, *supra* note 32, at 248; Alschuler, *supra* note 156, at 215; GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 4 (2003).

<sup>158</sup> Alschuler, *supra* note 156, at 214.

<sup>159</sup> *Id.* at 215–16.

coerced by the King.<sup>160</sup> Second, there were concerns that the guilty plea might be entered by an innocent person who just was fearful, hopeless, or forgetful.<sup>161</sup> Third, many defendants did not have attorneys.<sup>162</sup> Fourth, at that time, the punishment for committing a felony was death, so defendants were less likely to voluntarily plead guilty to felony charges.<sup>163</sup>

Another reason it is difficult to determine the exact moment plea bargaining began is that it is difficult to distinguish between *implicit* and *explicit* plea bargaining.<sup>164</sup> Implicit plea bargain refers to when “there is no actual bargaining but defendants realize they are better off if they plead guilty.”<sup>165</sup> “Hence defendants who plead guilty strike a kind of bargain even though no word of a ‘deal’ has been spoken.”<sup>166</sup>

The first regular use of plea bargaining is said to have taken place during the attempted resolution of Massachusetts liquor cases in 1824.<sup>167</sup> The structure of the liquor law provided a defined dollar penalty for each enumerated offense, depriving judges of any sentencing discretion.<sup>168</sup> Prosecutors, however, had discretion. Unlike judges, prosecutors were able to use that discretion and charge defendants with lesser offenses that came with a lower dollar penalty.<sup>169</sup>

Yet, during the 1800s there was no pressing need to mainstream plea bargaining. During that time, the criminal system was not yet professionalized and rendering justice was simpler than it is today. Public prosecutors worked part-time, and during the course of the 1800s, the police were first introduced as part of law enforcement.<sup>170</sup> Even during the late 1800s, the trial process was still simple and brief.<sup>171</sup> A trial would last less than thirty minutes.<sup>172</sup> During the trial, each side could present one or two witnesses before a jury rendered a verdict.<sup>173</sup> There were still part-time prosecutors and no fingerprint or ballistic technology.<sup>174</sup>

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<sup>160</sup> See *id.* at 240–41, 241 n.35.

<sup>161</sup> *Id.* at 225.

<sup>162</sup> *Id.* at 217.

<sup>163</sup> *Id.*

<sup>164</sup> Friedman, *Plea Bargaining*, *supra* note 32, at 253.

<sup>165</sup> *Id.* (emphasis omitted).

<sup>166</sup> *Id.*

<sup>167</sup> See FISHER, *supra* note 157, at 25.

<sup>168</sup> *Id.* at 24.

<sup>169</sup> *Id.* at 25–26.

<sup>170</sup> See Friedman, *Plea Bargaining*, *supra* note 32, at 257.

<sup>171</sup> See *id.* at 257–58.

<sup>172</sup> *Id.* at 257.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*



It was not until the 1920s that explicit plea bargaining took hold.<sup>175</sup> Multiple reasons contributed to plea bargaining's acceptance. First, the criminal justice system became more professionalized with the increased prevalence of police, prosecutors, and defense lawyers.<sup>176</sup> This contributed to the court's greater comfort with guilty pleas. Second, criminal law was also being shaped by the introduction of "the bondsman, the ward politician, the newspaper reporter, the jailer, and the fixer."<sup>177</sup> Third, there was an expansion of the criminal law.<sup>178</sup> Fourth, with growing urbanization, there was a concomitant growth in crime.<sup>179</sup> Particularly, there was a growth of victimless crimes such as liquor-prohibition cases that were harder to convict.<sup>180</sup> Fifth, as political corruption infiltrated the criminal justice system, a "fixer" of some political influence, police officers, and court officers were all instrumental in helping procure pleas.<sup>181</sup> Sixth, and finally, trials became longer and more complicated, making pleas a more efficient option.<sup>182</sup>

One significant and unexpected change caused by the professionalization of our criminal justice system is that the presumption of innocence that had always existed until a defendant was proven guilty at the conclusion of a trial was replaced with a presumption of guilt when an arrest was made by the police and prosecutors who brought charges.<sup>183</sup> This presumption of guilt, combined with racial animus towards African American defendants, made plea bargaining for African American men a

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<sup>175</sup> Alschuler, *supra* note 156, at 229.

<sup>176</sup> *Id.* at 242.

<sup>177</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 924 (1994).

<sup>178</sup> Alschuler, *supra* note 156, at 234.

<sup>179</sup> *Id.* at 242.

<sup>180</sup> *Id.* at 230.

<sup>181</sup> *Id.* at 228.

<sup>182</sup> Alschuler, *supra* note 156, at 240.

<sup>183</sup> See Friedman, *Plea Bargaining*, *supra* note 32, at 257. This is an "unexpected" outcome because citizens supported the legitimacy of police and believed that police officers would not arrest an individual without cause. Intuitively, however, one could understand why the professionalization of criminal justice actors undermines the presumption of innocence writ large. By creating an entire workforce dedicated to the capture and incarceration of individuals, it stands to reason that police, prosecutors, and judges face pressure to 'do their jobs' by investigating, prosecuting, and convicting guilty parties. Conversely, these pressures may not be present for the exoneration of innocent defendants; if the defendant were to be found innocent, then one of these professional bodies would have erred somehow in its duties. This asymmetry, while potentially prejudicial to all defendants, may be especially prejudicial to poorer, African American male defendants, who, as discussed earlier, are more likely to be perceived as dangerous and, vis-à-vis, guilty.

risky justice choice. Thus, the danger of plea bargaining is that the “factually innocent may be convicted” because they have negotiated away the protection of their trial rights.<sup>184</sup>

Not only did plea bargaining grow, but so did guilty pleas. Researchers note that during the 1920s more convictions came from guilty pleas than bench or jury trials.<sup>185</sup> There were several reasons that defendants pleaded guilty. First, prosecutors promised those already in jail that their case would be dealt with quickly if they pleaded guilty. If they did not, they would suffer long delays. Second, defendants were often represented by young, appointed lawyers who lacked experience and received little compensation.<sup>186</sup> Thus, these lawyers encouraged their clients to plead guilty rather than suffer through a trial. Third, “court officers,” also known as “plead getters,” would frighten defendants who were already in prison to plead guilty or face the horrors of trial and a longer sentence.<sup>187</sup>

As plea bargaining began to take hold, it attracted both supporters and critics.<sup>188</sup> Plea bargaining concerned the Progressives because it was ripe for prosecutorial corruption and allowed criminals a “pass” from receiving punishment that actually corresponded to the seriousness of their crimes.<sup>189</sup> The Realists, however, regarded plea bargaining as a necessary way to efficiently deal with burgeoning caseloads, and they prevailed.<sup>190</sup> Moreover, the U.S. Supreme Court’s decision in *Brady v. United States*, which came down at a time when it was estimated that 90 to 95 percent of convictions were the result of pleas, assuaged Progressives’ concerns and adopted protections to ensure that guilty pleas were voluntary and not coerced.<sup>191</sup> In *Brady*, the Court held that pleas were acceptable so long as the defendant had competent counsel, there were no threats or false promises made while

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<sup>184</sup> Mike McConville & Chester Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 SOC. PROBS. 216, 216 (1995).

<sup>185</sup> Friedman, *Plea Bargaining*, *supra* note 32, at 255.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See generally William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1459–65 (2020) (explaining why the supporters of plea bargaining favored its efficiency and individuation while its critics feared it was “a corruption of the prosecutorial function”).

<sup>189</sup> *Id.* at 1437.

<sup>190</sup> *Id.* at 1487–88 (The growing number of indictments compared with the number of available judges to hear these cases made it a “physical impossibility to try each case.”). The Katzenbach Commission said “our system of criminal justice has come to depend upon a steady flow of guilty pleas.” *Id.* at 1488.

<sup>191</sup> *Id.* at 1496 (citing *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970)).

negotiating the plea, and the defendant made the plea “intelligently.”<sup>192</sup> However, the line between what is coerced and what is voluntary is blurry<sup>193</sup> and has not been applied in a racially-neutral way.

In fact, a closer look at state and U.S. Supreme Court decisions shows that courts historically demeaned African American defendants and regarded them as “ignorant negroes” to justify providing African Americans with procedural justice protections during and after the 1960s.<sup>194</sup> For example, the Supreme Court’s decision in *Gideon v. Wainwright*, which recognized a defendant’s right to counsel in felony criminal cases, did not help African Americans combat the institutional racism that denied them equal justice under the law.<sup>195</sup> A lawyer was not sufficient protection to help African American defendants overcome their lack of an affluent family, social network, and credible witnesses—all of which are societal privileges that help defend against criminal charges and avoid conviction.<sup>196</sup>

From the 1970s onward, the U.S. criminal justice system established plea bargaining as vital because efficiency became a priority at the expense of rights.<sup>197</sup> McConville and Mirsky posited that plea bargaining’s usefulness was that it was a socially acceptable way of “imposing control and discipline” on those “highly visible sections of society, those who are perceived as dangerous because of their lack of involvement in an acceptable labor market and the intensity of their involvement with the criminal justice system.”<sup>198</sup> Under this model, the police are proactive, rather than reactive, using surveillance and sweeps to target people of color.<sup>199</sup> All the legal actors understand that there is a presumption of guilt.<sup>200</sup> Defense lawyers may not interview witnesses or conduct further negotiations if the system presumes their client is guilty.<sup>201</sup> “Subordination and degradation” were the tools used to convince defendants to plead guilty.<sup>202</sup>

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<sup>192</sup> *Brady*, 397 U.S. at 757.

<sup>193</sup> *Id.* at 750.

<sup>194</sup> Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 *YALE L.J.* 2236, 2241–42 (2013) (citing a litany of Supreme Court and state court decisions that referred to the “ignorant negro,” reinforcing the stereotype of an African American as an inferior person).

<sup>195</sup> 372 U.S. 335 (1963); Chin, *supra* note 194, at 2240.

<sup>196</sup> Chin, *supra* note 194, at 2255–57 (describing how white privilege is used to help the white defendant avoid charges).

<sup>197</sup> See Ortman, *supra* note 188, at 1495 n.397.

<sup>198</sup> McConville & Mirsky, *supra* note 184, at 217.

<sup>199</sup> See *id.* at 219.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 230.

By the 1990s, certain scholars characterized the U.S. criminal justice system “a steroid era in criminal justice.”<sup>203</sup> When Congress adopted mandatory minimum sentences and sentencing guidelines, it made plea bargaining an even more attractive option.<sup>204</sup> Today, plea bargaining *is* the criminal justice system for many, with little constraint or oversight. Three recent Supreme Court cases cast a crumb of hope that the Court recognizes the need for court guidance on plea bargaining.<sup>205</sup> Yet, as we saw with *Gideon* and other laws and decisions, these decisions will not help African American defendants claim their justice rights if these decisions are applied in a racially biased way.

## II. THE PERPETUATION OF IMPLICIT RACIAL BIAS IN PLEA BARGAINING TODAY

This Section discusses how the United States’ historical legacy of racial discrimination has formed our implicit biases about African Americans and fuels the presumption of guilt in plea bargaining practice today. Even though some consider implicit biases less blameworthy because they are unconscious, implicit biases still have a pernicious impact on justice outcomes. In this discussion, the author will explain how the plea-bargaining process, as it operates today, allows the racialized presumption of guilt to emerge and adversely shape the justice outcomes of African American male defendants. Three conditions of the negotiating process prime the emergence of implicit bias: the negotiation process’s speed; the prosecutors’ and defense attorneys’ unawareness about their own implicit biases against African American male defendants; and defendants’ and prosecutors’ discretion in deciding the justice outcome.

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<sup>203</sup> Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1350 (2016).

<sup>204</sup> *Id.* at 1352.

<sup>205</sup> See *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (extending a defendant’s Sixth Amendment right to counsel to include a defendant’s right to have competent counsel in the plea bargaining process); *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *Lee v. United States*, 137 S. Ct. 1958, 1967–68 (2017) (allowing the retraction of a plea because the attorney failed to inform the defendant that a guilty plea could result in deportation); see also Alkon, *Plea Bargain Negotiations*, *supra* note 63 (advocating that the Court expand its examination of lawyer competence in plea bargaining beyond the counseling phase to the preparation and negotiation phase); Cynthia J. Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 565 (2014) [hereinafter Alkon, *Failure to Fix Plea Bargaining*] (opining that *Lafler* and *Frye* fail to address the systemic modifications that are needed in plea bargaining presented by the Indigent Defense Structures and Prosecutorial Power Structures).

A. OVERVIEW OF THE PROCESS<sup>206</sup>

When an African American man gets arrested, the district attorney's office then has to decide whether to charge him, and if so, with what offense.<sup>207</sup> The prosecutor on the case will make this decision, in large part, based on the information the arresting officer gives the prosecutor.<sup>208</sup> Among the country's many district attorneys' offices, the rules and procedures about whether to charge a defendant are not uniform, and, if the accused is charged, the rules about deciding what charges are appropriate are not uniform either.<sup>209</sup> In some offices, the case prosecutor alone will make the decision within twenty-four hours.<sup>210</sup> In other offices, the case prosecutor will consult with a supervisor about what, if any, charges are appropriate.<sup>211</sup> If the prosecutor decides to charge the accused, the accused has a right to be represented by a lawyer.

Once a prosecutor brings charges, the defense attorney and prosecutor usually have an opportunity to plea bargain.<sup>212</sup> Prior to the plea-bargaining meeting, the defense attorney is likely to meet with her client to gather information about what, if anything, happened and to understand her client's

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<sup>206</sup> Please note that there is a paucity of law controlling the "rules" and "practices" of plea bargaining. *See, e.g.,* *Brady v. United States*, 397 U.S. 742, 751 (1970) (upholding a prosecutor's right to threaten defendants with a trial penalty); *Lafler*, 566 U.S. at 162; *Frye*, 566 U.S. at 145; *Lee*, 137 S. Ct. at 1967–68.

<sup>207</sup> For certain criminal cases, a grand jury will decide whether charges should be brought against the defendant. *See, e.g.,* CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, *NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT* 39–45 (2019) [hereinafter ALKON & SCHNEIDER, *NEGOTIATING CRIME*].

<sup>208</sup> The arrests and consequently the information about the arrests are often racially biased. *See, e.g.,* Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 296–97 (2015) (detailing how the racial biases of police contribute to the racial disparities in drug arrests and thus the information police provide prosecutors about the arrests are racially-biased); SENTENCING PROJECT, *REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM* 2 (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/F8RB-NCKQ>] (reporting on the racial disparities that exist in every aspect of the criminal justice system in direct contravention of Article 2 and Article 26 of the International Covenant on Civil and Political Rights).

<sup>209</sup> *See, e.g.,* Crespo, *supra* note 58, at 1334–39.

<sup>210</sup> Joan E. Jacoby, *The Prosecutor's Charging Decision: A Policy Perspective*, NAT'L INST. L. ENF'T & CRIM. JUST. (Jan. 1977), <https://www.ncjrs.gov/pdffiles1/Digitization/35832NCJRS.pdf> [<https://perma.cc/QC6M-NY8S>].

<sup>211</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2126 (1998).

<sup>212</sup> *Id.* at 2125 (noting that it is often in a prosecutor's interest to hear defense counsel's arguments).

goals.<sup>213</sup> The meeting may take place in the defense attorney's office, in jail, or in the courthouse when the client is brought to be arraigned. If the client is in jail, the attorney may have to navigate many security procedures that make it harder to meet with her client. This attorney–client meeting may be perfunctory; the two may review the client's past criminal history, discuss what happened and any extenuating circumstances, and clarify the client's goals.<sup>214</sup> In rarer circumstances, the attorney–client meeting may involve a fuller understanding of the client as a human being, not just as a defendant, and might conduct a follow-up investigation of the facts learned from the client. It is likely that this client is one of many in an overflowing number of cases the defense attorney is responsible for managing.<sup>215</sup> Adding to the defense attorney's challenges of preparing for plea bargaining, she may not have access to the same information as the prosecutor.<sup>216</sup>

Prior to the plea-bargaining meeting between the attorneys, the prosecutor will have information from the arresting officer or officers about the alleged reason for the defendant's arrest. The prosecutor will also have information available about the defendant's prior criminal history, if any exists. When reviewing this information and assessing what, if any, charges will be brought, the prosecutor will likely be guided by whatever the prevailing rules, procedures, and politics are within the district attorney's office in which they work. It is also likely that this will be one of many cases in an overflowing caseload that the prosecutor must manage.

Based on this limited information and the other caseload demands, the prosecutor is compelled to make a snap judgment about whether or not this case is likely winnable at trial and what are the acceptable parameters of any plea bargain.

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<sup>213</sup> Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: The Systemic Approach*, in ALKON & SCHNEIDER, *NEGOTIATING CRIME*, *supra* note 207, at 214–15.

<sup>214</sup> *See id.* at 215.

<sup>215</sup> *See, e.g.*, Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/HDU5-MSN3>] (highlighting how one public defender in Louisiana did not have the requisite time needed to provide an adequate defense for each client because of his large case load).

<sup>216</sup> Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 417 (2014) [hereinafter Alkon, *The Right to Defense Discovery*]; Schneider & Alkon, *Bargaining in the Dark*, *supra* note 63 (highlighting the information asymmetry between defense attorneys and prosecutors and how this asymmetry challenges the integrity of plea bargaining).

Defense attorneys and prosecutors usually engage in plea bargaining with this limited information and no other preparation.<sup>217</sup> District attorneys have an obligation to share exculpatory evidence with the defense.<sup>218</sup> But, in some district attorney's offices, there is disagreement about what evidence is exculpatory and what is not. This gives the prosecutor an advantage during plea bargaining because of the asymmetry of available information to each side.<sup>219</sup> Recently, there has been a movement to require prosecutors to share all evidence—not just exculpatory evidence—related to the case with defense attorneys.<sup>220</sup> Although some district attorneys, like Eric Gonzalez in the Brooklyn District Attorney's office, require that good practice and transparency mandates that evidence be shared, this practice is not the norm.<sup>221</sup>

The defense attorney is usually the one who initiates the meeting, even though the prosecutor may do so, too.<sup>222</sup> It is not uncommon for the plea negotiation to be an impromptu meeting in a corner of the courtroom or a hallway or during an impromptu phone call and to last under five minutes.<sup>223</sup> During this brief negotiation, the conversation between the prosecutor and defense attorney is usually dominated by charges, proposals for counter charges, and disposition options. When the negotiation concludes, either after the meeting or after the defense attorney has followed-up and consulted with her client, there is a strong likelihood that the defendant will accept the plea

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<sup>217</sup> See, e.g., McConville & Mirsky, *supra* note 184, at 221.

<sup>218</sup> Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

<sup>219</sup> Alkon, *The Right to Defense Discovery*, *supra* note 216; Schneider & Alkon, *Bargaining in the Dark*, *supra* note 63.

<sup>220</sup> See, e.g., Gonzalez, *supra* note 46; Christian Nolan, *New York Removes the Blindfold*, N.Y. ST. B. ASSN J. 12–13 (May 2019), [https://nysba.org/NYSBA/Publications/Bar%20Journal/PastIssues2000present/2019/NYSBA\\_Journal\\_MAY19\\_WEB.pdf](https://nysba.org/NYSBA/Publications/Bar%20Journal/PastIssues2000present/2019/NYSBA_Journal_MAY19_WEB.pdf) [<https://perma.cc/LM2Q-ZSAL>] (describing N.Y. law that requires prosecutors to share information within days of arraignment and allows defendants to see all information that prosecutors have before pleading guilty).

<sup>221</sup> See N.Y. C.P.L.R. § 245.25 (MCKINNEY 2019); see also Gonzalez, *supra* note 46 (Brooklyn District Attorney Eric Gonzalez's criminal justice initiative).

<sup>222</sup> In many jurisdictions, including in Fort Worth, the first offers are often made electronically when defense attorneys first get discovery in the case. Some jurisdictions set aside days and times for plea offers and negotiations. Complicating this issue further, there is no good data about who makes the first offer and whether these offers are accepted. See, e.g., Alkon, *Plea Bargain Negotiations*, *supra* note 63, at 402–03 (describing the plea-bargaining process).

<sup>223</sup> Yoffe, *supra* note 4; see also Ronald F. Wright, Jenny Roberts & Betina Wilkinson, *The Shadow Bargainers*, CARDOZO L. REV. (forthcoming 2021) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3577322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577322).\ (discussing how little time is spent on the plea-bargaining process).

and a justice agreement will be reached. After all, approximately 97 percent of federal cases are resolved by plea bargaining.<sup>224</sup>

Even if the African American male defendant is innocent, he may opt to plead guilty.<sup>225</sup> In cases where the prosecution charges the defendant with a misdemeanor, he may plead guilty to just get out of court and resume his life.<sup>226</sup> However, pleading to a misdemeanor, even though this may appear to be a realistic option under the circumstances, may come at a high cost.<sup>227</sup> In the event the defendant is arrested again and tries to plea bargain a justice resolution, the original misdemeanor plea may be viewed as a strike against him in this contemporary plea bargain.<sup>228</sup> Prosecutors will likely charge him with more serious crimes and, ultimately, offer him a harsher sentence.<sup>229</sup>

If he is innocent and prosecutors charge him with a felony, the defendant may still opt to plead guilty and forego constitutional protections offered by a jury trial. The defendant may fear the possibility of a higher post-trial sentence and may agree to the lower sentence prosecutors offered during the plea bargain.<sup>230</sup> Moreover, the prosecutor knows how to exercise discretionary powers to intimidate the defendant about the dire consequences

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<sup>224</sup> *Id.*

<sup>225</sup> *See, e.g.*, THE TRIAL PENALTY, *supra* note 40, at 17 (“[A]nywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent.”); Spohn, *supra* note 38, at 49; Rakoff, *supra* note 43 (estimating that approximately 20,000 are in prison for pleading guilty for crimes they did not commit); TRUE JUSTICE DOCUMENTARY, *supra* note 117; MALCOLM M. FEELEY, THE PROCESS IS PUNISHMENT (1979) (explaining why the court process itself is a form of punishment that compels some defendants to plea); STUNTZ, *supra* note 12 (discussing how innocent persons who are charged with misdemeanors are unfairly treated in the criminal justice system and compelled to plead guilty without awareness of the long-term consequences of such pleas); Crespo, *supra* note 58, at 1306; Yoffe, *supra* note 4; ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (documenting how the broken windows policy was actually a form of social control because those accused of low-level crimes were deprived of procedural justice and punished with the life-long consequences of being branded a criminal).

<sup>226</sup> KOHLER-HAUSMANN, *supra* note 225, at 245; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 78 (2018); FEELEY, *supra* note 225.

<sup>227</sup> *See, e.g.*, ALEXANDRA NATAPOFF, *supra* note 226, at 78 (2018) (discussing how the misdemeanor system compels innocent defendants to plead guilty and deprives those pleading to a misdemeanor of knowing the long-term consequences); *see also* NYCLA Justice Center Task Force Report, *supra* note 43 (highlighting the reasons why innocent defendants plead guilty and suggesting reforms to minimize the likelihood that innocent defendants will plead guilty); Ronald F. Wright, Jenny Roberts & Betina Wilkinson, *The Shadow Bargainers*, CARDOZO L. REV. (forthcoming 2021) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3577322](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577322). (discussing how little time is spent on the plea-bargaining process).

<sup>228</sup> NATAPOFF, *supra* note 226, at 78; NYCLA Justice Center Task Force Report, *supra* note 43.

<sup>229</sup> *Id.*

<sup>230</sup> THE TRIAL PENALTY, *supra* note 40, at 17.



that will result if the defendant does not accept a guilty plea. First, the prosecutor is likely to preview the defendant's fate if he turns down the plea bargain, piling on charges and concomitant sentences and overreaching when interpreting the facts to the law.<sup>231</sup> Then the prosecutor will "slide down" to an offer that more realistically fits the alleged facts and is likely to incentivize the defendant to plead guilty, even if the defendant is factually innocent.<sup>232</sup>

If the African American male defendant is guilty of a crime, the deal his attorney negotiates for him in plea bargaining is likely to be less favorable than the plea bargain of a white male defendant for a similar crime.<sup>233</sup> Prosecutors will initially charge him with more serious crimes, make fewer concessions during the plea bargain, and ultimately cause the judge to sentence him to longer prison time than a similarly situated white defendant.<sup>234</sup>

As explained below, the existing plea-bargaining process allows the implicit biases of defense attorneys and prosecutors to emerge and shape the plea-bargaining process. The speed of the process, the unawareness of or lack of acknowledgment about the legal actors' own biases, and the discretion of prosecutors and defense attorneys all contribute to the negative outcomes for African American male defendants.

#### B. CHARACTERISTICS OF PLEA BARGAINING PRIME RACIALIZED JUSTICE OUTCOMES

When we step back to examine the plea-bargaining process, it is not surprising that the implicit racial biases of both prosecutors and defense attorneys taint the justice outcomes for African American male defendants. The discussion continues by explaining how the nature of implicit biases, the speed of the plea-bargaining process, and the unfettered discretion of prosecutors prime racialized justice outcomes.

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<sup>231</sup> Crespo, *supra* note 58, at 1315 (discussing prosecutorial discretion and raising whether unconstitutional procedural reforms could be employed to moderate such discretion).

<sup>232</sup> See, e.g., STUNTZ, *supra* note 12 (explaining that guilty pleas, and the bargaining that leads to them, are largely invisible and that guilty pleas and quick bargains have become the system's primary means of judging a defendants' guilt or innocence); Spohn, *supra* note 38 (calling for an overhaul of the sentencing system including the "trial penalty"); THE TRIAL PENALTY, *supra* note 40, at 15 (explaining that fewer than 3% of criminal defendants exercise their Sixth Amendment right to trial because the prosecutor has threatened them with the "trial penalty" if the defendant refuses the prosecutor's plea bargaining offer and proceeds to trial).

<sup>233</sup> See, e.g., *Implicit Bias in the Courtroom*, *supra* note 31, at 1142–46 (discussing how implicit racial bias contaminates the criminal legal system).

<sup>234</sup> *Id.* at 1146–52.

*1. Prosecutors and Defense Attorneys Fail to Own Their Implicit Biases—  
Unaware, Unacknowledged, Unexamined*

Prosecutors and defense attorneys have an ethical obligation to acknowledge and manage their own racial biases.<sup>235</sup> Even though social science research indicates that we all have implicit biases, prosecutors and defense attorneys—even African American prosecutors and defense attorneys<sup>236</sup>—are often unaware of their own implicit biases towards African

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<sup>235</sup> See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, (AM. BAR ASS'N 2017) [hereinafter ABA CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION], [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) [<https://perma.cc/T7AJ-WF77>]. Standard 3-1.6 Improper Bias Prohibited provides:

(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

(b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction and eliminate those impacts that cannot be properly justified.

The ABA's Criminal Justice Standards for the Defense Function Standard 4-1.6 Improper Bias Prohibited provides:

(a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority.

(b) Defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of counsel's work. A public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office's jurisdiction, and eliminate those impacts that cannot be properly justified.

CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION, (AM. BAR ASS'N 2017) [hereinafter ABA CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION], [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) [<https://perma.cc/FX6G-RYZJ>].

<sup>236</sup> See, e.g., Luca Guido Valla & Davide Rivolta, *Stereotypical Biases in Black People Toward Black People*, SOC'Y FOR PERSONALITY & SOC. PSYCH. (Mar. 28, 2019), <http://www.spsp.org/news-center/blog/valla-rivolta-biases> [<https://perma.cc/A7SW-5SGX>]; see also Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 359–61 (2015); Joshua Correll, Bernadette Park, Charles M. Judd, & Bern Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314,

American male defendants.<sup>237</sup> Many prosecutors and defense attorneys choose to pursue legal careers in the criminal justice system “to do justice.”<sup>238</sup> How could they be racially biased? Even though these legal actors may understand that everyone has implicit biases, they may be more defensive about acknowledging that they have implicit biases against African American male defendants.

Sociologist Robin DiAngelo explains that white people are uncomfortable admitting that they are racist even though everybody is racist.<sup>239</sup> After all, the term “racist” connotes that the person is bad, and “not racist” connotes the person is good.<sup>240</sup> Anti-racist educator Ibram X. Kendi educates that African Americans can be racist, too, because they struggle with a “dueling consciousness” between wanting to assimilate into the broader white culture, while still striving to be anti-racist.<sup>241</sup> Cognitive behavioral psychologists have opened up the conversation by differentiating between explicit and implicit biases.<sup>242</sup> If it is unconscious, it is “not my fault.” DiAngelo further clarifies that racism is more complicated, and it is not uncommon for individuals to resist examining the benefits that have inured to them just from being white.<sup>243</sup> Those who have white identity may unconsciously absorb the stereotypical values of a white collective society that has based their white identity on viewing Black people as inferior.<sup>244</sup>

Rather than acknowledging the moral trauma and guilt that comes with examining the physical and psychological subjugation the white collective<sup>245</sup> has inflicted on African Americans, the white collective projects onto African Americans these dehumanizing behaviors that the the white collective has historically inflicted on them and then blames African

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1325 (2002) (detailing a video game study that demonstrates greater proclivity of both white and black participants to shoot black faces); FORMAN, *supra* note 12 (explaining how both black and white people developed and enforced racially discriminatory criminal policies).

<sup>237</sup> See, e.g., Adachi, *supra* note 55; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 760 (2012); Smith & Levinson, *The Impact of Implicit Racial Bias* *supra* note 5, at 802.

<sup>238</sup> Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007) (prosecutors take great pride in viewing themselves as “ministers of justice”); Adachi, *supra* note 55.

<sup>239</sup> DIANGELO, *supra* note 60, at 73.

<sup>240</sup> *Id.* at 72.

<sup>241</sup> KENDI, *supra* note 59 (explaining how the desire to assimilate is racist because it perpetuates a bias about those blacks who are not assimilated).

<sup>242</sup> See, e.g., BANAJI & GREENWALD, *supra* note 7; KAHNEMAN, *supra* note 8.

<sup>243</sup> See, e.g., DIANGELO, *supra* note 59, at 73.

<sup>244</sup> *Id.* at 122.

<sup>245</sup> The term “white collective” refers to a perspective of how white people as a group have benefitted from systemic racism.

Americans for the white collective's racism.<sup>246</sup> Such projection manifests itself in the way we punish African Americans,<sup>247</sup> the way we mass incarcerate them,<sup>248</sup> and the way we execute them.<sup>249</sup>

Of course, there are enlightened prosecutors and defense attorneys who have acknowledged their implicit biases.<sup>250</sup> That is an important first step, but more needs to be done. As DiAngelo explains, white people need to examine not only their individual responsibility, but also the many ways the perpetuation of white dominance—including through the subjugation of Black people—continues to allow racial discrimination in our world and in plea bargaining.<sup>251</sup> Society must recognize that defenses such as, “I have Black friends,” or, “I was in the Peace Corps,” are unhelpful rationalizations that prevent them from beginning to engage in a more racially-neutral manner that is less influenced by their implicit biases.<sup>252</sup> Only when white people acknowledge how they benefit from the status quo and take full responsibility for their contributions to maintain the status quo can real reform take place.

## 2. Speed

The speed of the plea-bargaining process itself makes it more likely that the implicit biases towards African American men will emerge. Daniel Kahneman explains we think in two ways: System 1, a faster, reactive process, and System 2, a more thoughtful process.<sup>253</sup> System 1 thinking includes our implicit biases and stereotypes about African American male defendants.<sup>254</sup> When we rush to judgment, as in plea negotiations, more often than not, our System 1 thinking will guide that decision making. To manage our implicit biases, Kahneman recommends that negotiators slow down the process so that negotiators will instead rely on System 2 information.<sup>255</sup>

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<sup>246</sup> DIANGELO, *supra* note 59, at 91.

<sup>247</sup> FORMAN, *supra* note 12, at 218.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*; see also *Race and the Death Penalty*, ACLU, <https://www.aclu.org/other/race-and-death-penalty> [<https://perma.cc/X3EU-CW5X>] (last visited Aug.17, 2020) (stating that a disproportionate number of imprisoned black people are executed).

<sup>250</sup> As an example, Fair and Just Prosecution is a group of forward-thinking prosecutors dedicated to enhancing fairness in the justice system. See, e.g., *21 Principles for the 21st Century Prosecutor*, FAIR & JUST PROSECUTION (2018), [https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP\\_21Principles\\_Interactive-w-destinations.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf) [<https://perma.cc/WA77-N63P>].

<sup>251</sup> DIANGELO, *supra* note 59, at 72–73.

<sup>252</sup> *Id.* at 78.

<sup>253</sup> KAHNEMAN, *supra* note 8, at 86.

<sup>254</sup> *Id.*

<sup>255</sup> See, e.g., *id.*; see also Jolls & Sunstein, *supra* note 48, at 975.

Negotiation theory also teaches that effective negotiation requires preparation.<sup>256</sup> Part of that preparation involves perspective-taking, including the management of the negotiator's own biases.<sup>257</sup> Once the negotiator has adequately prepared for the negotiation, effective negotiators also know the importance of scheduling the negotiation so that there is adequate time to have a meaningful conversation during which there is a thoughtful sharing of perspectives, an exchange of relevant information, and a common understanding.<sup>258</sup>

The plea-bargaining process, however, is akin to justice proceedings on steroids.<sup>259</sup> There may be little preparation prior to the meeting.<sup>260</sup> This leaves the legal actors little time to acknowledge and manage their own implicit biases about the defendant and get to know the defendant as a human being.<sup>261</sup> Who is the defendant? What are the extenuating circumstances? How credible are the witnesses? How reliable is the evidence? These are the types of questions that do not get answered even though they should, because implicit racial biases obscure the truth.

Two of the more important questions above left unanswered by this lack of preparation are what does the evidence objectively show, and how reliable are the witnesses.<sup>262</sup> As stated earlier, African Americans are more likely than whites to be profiled as criminals and arrested on a biased hunch.<sup>263</sup> Prior to charging a defendant, and again during the preparation to plea bargain, prosecutors have a unique opportunity to assess this information and decline to go forward with the case if the police based the arrest on racial bias and not merit.<sup>264</sup> Without taking the time to assess the accuracy of this arresting information, however, the prosecutors may unintentionally be putting the offices' imprimatur on racially-biased information and further decreasing the likelihood that the African American male defendant will get an equitable justice resolution during plea bargaining.

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<sup>256</sup> See, e.g., WILLIAM URY, *GETTING PAST NO 15–16* (2007) (explaining that preparation is crucial to a successful negotiation).

<sup>257</sup> See, e.g., *id.* at 52–75; FISHER & URY, *supra* note 67, at 24.

<sup>258</sup> See, e.g., URY, *supra* note 256, at 48–50.

<sup>259</sup> See ALKON & SCHNEIDER, *NEGOTIATING CRIME*, *supra* note 207, at 212–16 (explaining how efficiency, and interest of plea bargaining, may lead to unfair justice outcomes).

<sup>260</sup> *Cf. id.* at 215 (discussing methods of strong preparation for effective plea bargaining).

<sup>261</sup> See, e.g., Richardson & Goff, *supra* note 50, at 2632; Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38 (2017); *Implicit Bias in the Courtroom*, *supra* note 31, at 1159.

<sup>262</sup> Adam M. Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U.L. REV. 261, 279–82 (2011).

<sup>263</sup> See *supra* notes 26–29 and accompanying text.

<sup>264</sup> Sloan, *supra* note 50, at 10–12.

Plea bargaining, as it is practiced today, defies the tenets of good negotiation practice, ignores the guidance of cognitive behavioral psychologists, and allows the legal actors involved to be influenced by their implicit biases. Too often, the prosecutor and defense attorney may view the other as opponents, instead of negotiators with different perspectives, working toward a common goal, each seeking to do justice.<sup>265</sup> Moreover, the prosecutor and defense attorney may each have their own racialized implicit bias about the defendant that shapes their perception of the defendant's guilt, the plea offers, and the agreed-upon justice disposition.<sup>266</sup> As noted above, with little or no preparation, the actual meeting, whether in-person or telephonic, may take less than five minutes.

### 3. Discretion<sup>267</sup>

The prosecutor has a large amount of discretion to decide whether or not to dismiss the case, what crimes to charge the defendant with, and the range of possible resolutions to consider.<sup>268</sup> “Discretionary justice too often amounts to discriminatory justice.”<sup>269</sup> No one checks this prosecutorial discretion, and there are few office rules and little judicial oversight, too. As would be expected, this discretion allows a prosecutor's implicit racial biases

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<sup>265</sup> Cf. ABA CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 235, at 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”); ABA CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION, *supra* note 235, at 4-1.2(b), (e) (“The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion: to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity . . . . Defense counsel should seek to reform and improve the administration of criminal justice.”).

<sup>266</sup> See, e.g., Richardson & Goff, *supra* note 50, 2634–41; Sloan, *supra* note 50, at 22–26; *Implicit Bias in the Courtroom*, *supra* note 31, at 1142; Maurice Chammah, *Do Public Defenders Spend Less Time on Black Defendants?*, MARSHALL PROJECT (May 2, 2016), <https://www.themarshallproject.org/2016/05/02/do-public-defenders-spend-less-time-on-black-clients> [<https://perma.cc/99EY-9V7H>] (discussing how defense attorneys may be biased).

<sup>267</sup> STUNTZ, *supra* note 12, at 5 (“Discretionary justice too often amounts to discriminatory justice.”).

<sup>268</sup> See, e.g., *id.*; Spohn, *supra* note 38, at 78; THE TRIAL PENALTY, *supra* note 40, at 7; Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5, at 807 (stating that empirical research shows that Americans implicitly connect African Americans with aggression, hostility, guns, and weapons).

<sup>269</sup> STUNTZ, *supra* note 12, at 5; see also Richard Delgado, Chris Dunn, Pamela Brown & Helena Lee, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359 (1985) (discussing how the lack of structure and rules are more likely to allow prejudice to emerge).

to emerge. It colors how the prosecutor selectively processes the available evidence about the crime and the defendant and influences the prosecutor's estimate about the success of securing a conviction at trial.<sup>270</sup>

As one example, there is empirical research that shows that individuals are prone to favoring and empathizing with individuals like themselves.<sup>271</sup> This bias is known as "in-group favoritism." This becomes evident when a white prosecutor is prone to be lenient to white defendants. However, when a white prosecutor makes an equivalent assessment of an African American man accused of a similar crime, and is thus assessing the African American man's guilt, remorse and the appropriate plea to offer, there is no "in-group favoritism." Instead, the prosecutor may be unconsciously influenced by implicit biases of African American men as hostile, aggressive, likely to use weapons, and prone to criminality.<sup>272</sup> Unless there is oversight, rules, and procedures to check against such bias, it is likely that such racialized bias will contaminate the justice outcomes of plea bargaining.

Thus, the process of plea bargaining allows the implicit racial biases of prosecutors and defense attorneys to emerge and shape unjust outcomes for African American male defendants. The status quo must change. The next Section prescribes organizational and individual affirmative steps prosecutors and defense attorneys can take to help racially debias plea bargaining.

### III. ORGANIZATIONAL AND PROCEDURAL PRESCRIPTIONS TO RACIALLY DEBIAS PLEA BARGAINING

Readers may be wondering how such a racialized presumption of guilt could be allowed to continue for so long without criminal justice reformers intervening and demanding affirmative steps to ameliorate this bias.<sup>273</sup> This Section takes those overdue steps and prescribes organizational and procedural debiasing strategies for district attorneys' offices and public defenders' offices and for the prosecutors and defense attorneys who actually conduct the plea bargaining. The suggested reforms will help contain the racialized implicit bias of prosecutors and defense attorneys by targeting the three conditions of plea bargaining that allow racialized implicit biases to emerge: the lack of self-awareness about one's racialized implicit biases; the

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<sup>270</sup> Burke, *supra* note 238, at 196.

<sup>271</sup> Smith & Levinson, *The Impact of Implicit Racial Bias*, *supra* note 5, at 816.

<sup>272</sup> *Id.* at 818.

<sup>273</sup> There has been a floodgate of recommendations to limit prosecutorial discretion in plea bargaining, increase judicial oversight of plea bargaining, and get rid of plea bargaining in its entirety. However, this author has been unable to locate any formal debiasing reforms for the plea bargaining process.

speed of the plea-bargaining process; and the unfettered discretion of prosecutors. These prescriptions build on the growing support for prosecutors and defendants to work together for better justice outcomes<sup>274</sup> and culls from the existing debiasing research.<sup>275</sup> Combined, the recommendations will: provide legal actors involved in plea bargaining with the skills to manage their racialized implicit biases; establish a more deliberative plea bargaining process in which parties share objective information to minimize the reactive decision making that evokes implicit racial bias; and help implement procedural safeguards to check the prosecutorial discretion that may be racially applied.

#### A. ORGANIZATIONAL DEBIASING REFORMS: WHAT THE DISTRICT ATTORNEYS' AND PUBLIC DEFENDERS' OFFICES CAN DO

Dispute system design specialists teach us that when organizations are implementing a new goal, the organization should also enact rules, procedures, and supporting structures that will help achieve that goal.<sup>276</sup> Thus, those district attorneys' and public defenders' offices that are committed to unshackling implicit and explicit racism from plea bargaining can begin by first voicing this policy goal. Then the organizations' directors should reinforce that policy goal with an organizational structure, rules, and procedures that align and support the goal of minimizing the racialized presumption of guilt in plea bargaining. The following are specific suggestions about how organizations may make racial debiasing an organization goal, operationalize that goal with specific strategies, and measure the success of the organization's racial debiasing efforts.<sup>277</sup>

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<sup>274</sup> See, e.g., THE TRIAL PENALTY, *supra* note 40, at 3 (calling for the end of the trial penalty as a threat to coerce criminal defendants into accepting pleas); Eppes, *supra* note 46 (explaining how the task of preventing innocent defendants from pleading guilty was comprised of prosecutors, public defense attorneys, and judges); FAIR & JUST PROSECUTION, *supra* note 46 (discussing public prosecutors who wish to work together to develop innovations that will promote better justice outcomes).

<sup>275</sup> See, e.g., Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 22 (2015); Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. REV. 393, 393 (2018); Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 903 (2015).

<sup>276</sup> See Smith & Martinez, *supra* note 45, at 129–33.

<sup>277</sup> The goal is to mitigate racially disparate outcomes. Thus, African American male defendants who are guilty should not get harsher punishments than similarly situated white defendants. Moreover, those African American male defendants who are factually innocent should have their charges dropped as part of the plea bargain, similar to those similarly situated white defendants.



*Make race debiasing an organizational goal. Explicitly state in your employee manuals that delivering justice for all means justice without any racialized presumptions of guilt.*

Some readers may be scratching their heads and saying, “Duh! Of course we don’t support racialized justice.” There is value in stating the obvious.<sup>278</sup> Take the extra step and identify debiased justice as a priority to help make all legal actors aware that deracialized justice is an office priority that is front and center in delivering justice.

*Each organization should develop an operational plan that identifies measurable goals with specific action steps to achieve those goals.*<sup>279</sup>

Now that debiasing the racialized presumption of guilt is a priority, each organization needs to operationalize that goal and detail how this plan will be executed during the everyday workings of the office. This involves identifying the specific steps that must be taken, when to expect to achieve measurable results, and how those results will be measured.

*Organizations should create a unified organizational structure, organizational culture, and office policies that provide attorneys with adequate time and reinforcement to prepare, conduct, and debrief about plea bargaining. This allows attorneys to defend against their own and their counterpart’s racialized bias.*

Adequate preparation by the attorney should include time to fully interview, investigate, and assess the evidence’s relative strength to defend against their own and their counterpart’s racialized bias. This recommendation presents a challenge for the already underfunded and under-

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<sup>278</sup> Teresa Colón, *The Value of Stating the Obvious*, MEDIUM (Apr. 30, 2018), <https://medium.com/personal-growth/the-value-of-stating-the-obvious-e500451125fd> [<https://perma.cc/8LFQ-EBKH>].

<sup>279</sup> See *Operationalize Your Strategic Plan*, PROF. GROWTH SYS., <https://www.professionalgrowthsystems.com/org-culture/operationalize-strategic-plan/> [<https://perma.cc/GD8K-TB3C>] (explaining how an organization’s goals need to be operationalized by having a specific day-to-day plan for how the goals will be executed and achieved); *Operationalizing Goals for Action: A Planning Workbook*, RIVERLAND CMTY. COLL., <https://www.riverland.edu/about-riverland/office-of-the-president/documents-reports/planning-workbook-operationalizing-goals-for-action/> [<https://perma.cc/9DXU-YE4S>] (last visited Sept. 23, 2019) (containing a workbook for use as a guide for operationalizing an organizational plan of action).

resourced defense attorneys.<sup>280</sup> However, the cost of effecting justice is well worth expending extra time and costs. Preparation prior to the plea bargaining allows the attorneys to gather and review information about the defendant and witnesses. Collecting this information, as well as assessing the evidence's quality, will help mitigate racialized implicit bias. For the prosecutor, there should be adequate time to review police information, assess its accuracy, and ferret out any bias before the prosecutor relies on it. As stated earlier, police profiling is about stereotyping.<sup>281</sup> The prosecutor should interview the victim to understand the victim's true justice interest. The prosecutor should provide the defense attorney with access to all evidence. The defense attorney should investigate the case, talk to witnesses, and visit the scene of the alleged crime prior to plea bargaining to gather objective information that will help defend against implicit racialized bias.

<sup>282</sup>

Defense attorneys should have adequate time to interview the defendant and get to know him as a human being. Humanizing the defendant will help dispel the defense attorneys' and prosecutors' racialized biases by talking about the defendant as an individual, not a stereotype. If the defendant is in jail, it is challenging for some attorneys to access the defendant and conduct the interview. The organizational leaders could work together to make access easier. If the attorney is having a hard time relating to her client, that is a sign to pause and examine if the attorney's implicit racialized biases are interfering with developing a workable attorney–client relationship.

The office can develop procedures for humanizing and developing empathy for the client. During regular office meetings, discuss race in every case debrief. Create teams to provide a check against bias and that support debiasing any information that will be used in plea bargaining. During case preparation, plea negotiations, and case debriefs, encourage attorneys to humanize the client by including other facts beyond the crime allegedly committed. Have a picture of the defendant other than a mugshot to help view the client as an individual, not just one more case file. If the defendant does not have a photo, ask friends or family for one, or, as a last resort, the lawyer can take a photo of her own.

For offices where each attorney has overflowing caseloads, the leadership needs to advocate for a more realistic budget that allows attorneys

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<sup>280</sup> Alkon, *Failure to Fix Plea Bargaining*, *supra* note 205, at 579–80.

<sup>281</sup> See *supra* notes 26–39 and accompanying text.

<sup>282</sup> Roberts & Wright, *supra* note 63, at 1465 (finding that defense attorneys prepare less for plea bargaining than for trial).

to have manageable caseloads so they can provide clients with justice.<sup>283</sup> Justice may not be cheap, but it is a legal imperative.<sup>284</sup> Furthermore, it is a preferable moral and economical alternative to spend adequate time representing a client rather than locking up innocent people or punishing guilty people with unfair sentences.<sup>285</sup>

*Organize annual joint plea-bargaining trainings for prosecutors' and defense attorneys' offices that incorporate debiasing strategies to remove the racialized presumption of guilt.*

Now is the time to take the lead and fill in the gap of self-awareness about racial bias by providing plea-bargaining training that helps prosecutors and defense attorneys address their racialized presumption of guilt and approach plea bargaining in a more racially-neutral stance.<sup>286</sup> Existing training and scholarship on plea bargaining focuses on the cognitive biases of prosecutors and defense attorneys, but not the implicit racialized bias.<sup>287</sup> This gap defies logic since an overwhelming critique of the system is about the racialized justice results!<sup>288</sup> Moreover, prosecutors and defense attorneys

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<sup>283</sup> Cf. Steve Cohen, *The Lasting Legacy of a Case that Was "Lost,"* 119 PA. STATE L. REV. 1 (2014) (detailing the legacy of the "Libby Zion" law in New York, adjusting the hours and supervisory requirements of residents and interns in hospitals following the death of an eighteen-year-old patient); see also M. Eve Hanan, *Big Law, Public Defender-Style: Aggregating Resources to Ensure Uniform Quality of Representation*, 74 WASH. & LEE L. REV. ONLINE 420 (2018) (arguing that statewide public defender offices should restructure and pool financial and intellectual resources to provide more effective advocacy).

<sup>284</sup> *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (guaranteeing a criminal defendant's right to effective counsel during the plea-bargaining process).

<sup>285</sup> A 2015 study by the Vera Institute estimated that the annual "average cost per inmate" across the United States was \$33,274. *Prison Spending in 2015*, VERA INST. JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/FC2G-Z72E>] (last visited Sept. 24, 2019). In New York, this number was estimated to be \$69,355. *Id.*

<sup>286</sup> See Roberts & Wright, *supra* note 63, at 1463 (noting a paucity of plea-bargaining training).

<sup>287</sup> See, e.g., ALKON & SCHNEIDER, *NEGOTIATING CRIME*, *supra* note 207. This textbook was the first comprehensive text on plea bargaining, but it does not address implicit and explicit racism in plea bargaining.

<sup>288</sup> Compare *id.*, with Mitchell & Caudy, *supra* note 12 (discussing how racial bias causes racial disparities in drug arrests); Kutateladze & Andiloro, *supra* note 12 (finding that racial disparities existed after case screenings based on alleged offenses and discretion exercised), Devers, *supra* note 12; STUNTZ, *supra* note 12, at 2; Goldstein & Schweber, *supra* note 18; Berdejó, *supra* note 5 (discussing racial disparities in plea bargaining outcomes between white

typically receive training within their own professional silos. The benefit of having prosecutors and defense attorneys take the training together, however, is that this allows each side to begin to share and understand each other's perspectives, including each other's racialized biases.<sup>289</sup>

As a threshold impasse, most attendees will deny that they are biased. Therefore, any training needs to include a non-threatening component that will help the participants become aware of their own biases. In my plea-bargaining training modules on implicit bias, I begin with pictures of convicted criminals, and I ask the group to guess the crime the individual committed. Of course, this exercise elicits implicit racialized biases. For many attendees, it is the first moment they become aware of their implicit biases. Another tool is to recommend that participants take the Implicit Association Test (IAT), an online test that assesses implicit biases, in the privacy of their own home or office. This opens the door for attorneys to examine how racialized biases could infiltrate plea bargaining and make suggestions about how debiasing strategies can minimize this. For example, preparing for the plea bargaining by completing a plea-bargaining worksheet (see Appendix) helps create a more thoughtful and slower process to gather the information needed. The plea-bargaining simulations should be based on real-life situations that will help participants practice and reinforce debiasing skills

These instructional meetings should range from a half day to a full day. Follow-up and tweaking of these debiasing skills can take place in bi-monthly advanced training with practice simulations. As an added incentive, these exercises could qualify for continuing legal education credit. However, there is a caveat: Training cannot effectively change people unless there is

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and black defendants); Baldus, Pulaski, & Woodworth, *supra* note 29 (showing that murders of white victims are eleven times more likely to result in a death sentence than those committed by black defendants); Spohn, *supra* note 38 (calling for an overhaul of sentencing procedures to reduce racial disparities such as the elimination or severely restricted use of the death penalty and sentencing those convicted of non-serious crimes to diversion programs); Rehavi & Starr, *supra* note 44 (finding that the average sentences for black defendants in federal court were thirty-five months longer than for white defendants); *see also* Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 827 (2012) (suggesting that jurors be educated about implicit bias during juror orientation to help identify implicit juror bias).

<sup>289</sup> *See* Frenkel & Stark, *supra* note 275, at 34 (explaining how perspective-taking is a debiasing tool).

actual organizational follow-up with rules and procedures that support the goal of removing the racialized presumption of guilt.<sup>290</sup>

*Collect Data About the Plea-Bargaining Outcomes.*

It is helpful for each office to self-assess its justice outcomes.<sup>291</sup> Data analytics is a useful tool to help each office evaluate if its organizational strategies were effective in minimizing racial disparities in justice outcomes.<sup>292</sup> This way, based on the data, organizations can sufficiently answer questions like: were the plea-bargaining outcomes for similar crimes different if the defendant was African American or white? As with all data collections, the data answer some questions and raise others. How should an organization be held accountable if racial disparities in justice outcomes persist? If data is collected on individual prosecutors and defense attorneys, will these legal actors be penalized if they do not improve? These data are one more helpful measure for organizations to reinforce what is working while also reassessing the additional training and procedural needs of each office.

*Hold conferences that include both state and federal legal actors involved with plea bargaining.*

There has been a rigid, artificial line between state and federal legal actors involved with plea bargaining that should be removed to address the racialized presumption of guilt. State and federal legal actors involved with plea bargaining are often unaware of the policies and procedures each office uses to ensure justice outcomes.<sup>293</sup> Moreover, there is a patchwork of different rules and procedures among district attorneys' offices and public defenders' offices within the same state. Adding to the variations in plea

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<sup>290</sup> See, e.g., *Briefing on Racial Disparities and Prosecutorial Practices in the Connecticut Criminal Justice System Before the Connecticut Advisory Committee of the U.S. Commission on Civil Rights* 4 n.11 (Apr. 2, 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/07/FJP-Komar-Statement-Final-7.2.19.pdf> [https://perma.cc/QDL4-BKVF] [hereinafter Komar Briefing] (statement of Liz Komar) (citing a 2018 study from the Equality and Human Rights Commission reporting on the limits on implicit bias training).

<sup>291</sup> See Schneider & Alkon, *Bargaining in the Dark*, *supra* note 63 (data helps disclose racially disparate justice outcomes); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511 (2018).

<sup>292</sup> Komar Briefing, *supra* note 290, at 5.

<sup>293</sup> See, e.g., Elayne E. Greenberg, *Adding Value to Conversations about Criminal Reform*, A.B.A. DISP. RESOL. MAG. 2 (2020).

bargaining, the federal system has an entirely different plea-bargaining system from state systems.<sup>294</sup> There is minimal opportunity for the attorneys in the different offices and systems to convene and learn from each other. However, if the different groups met, legal actors may welcome the treasure trove of ideas from each office.<sup>295</sup> Let's turn to the steps that individual prosecutors and defense attorneys should take to help racially debias the way the conduct plea bargains.

#### B. PROCEDURAL DEBIASING STRATEGIES FOR INDIVIDUAL DEFENSE ATTORNEYS AND PROSECUTORS TO USE NOW

While public defenders' offices and district attorneys are reorganizing, there are more immediate steps individuals can take to prepare for their next plea bargain.

*Become aware of your own racialized implicit biases.*

Take the IAT at: <https://implicit.harvard.edu/implicit/takeatest.html>. Through this lens, individuals should consider the other racialized judgments they may have made when they were representing an African American male client during plea bargaining because of implicit bias.

*Use debiasing techniques when preparing for the next plea bargain.*

For defense attorneys, when interviewing a client, get to know him as a human being.<sup>296</sup> How easy it is to treat the defendant as one more case, when there are an overwhelming number of cases to manage. Defense attorneys should thoroughly investigate, as if preparing for trial, to get objective information to help debias.<sup>297</sup> This objective information will slow attorneys down and promote a more deliberative process.

Defense attorneys can use a checklist tool as a procedural safeguard with questions that ask if attorneys would handle the case differently if the client was a different race.<sup>298</sup> For prosecutors, this is an opportunity to review

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<sup>294</sup> See FED. R. CRIM. P. 11 (outlining procedures to enter and proceed with plea negotiations and agreements).

<sup>295</sup> I was a member of the NY plea bargaining task force in which the members included legal actors from state and federal courts. During the ensuing conversations, the state legal actors were surprised to learn about the more deliberative process that goes on in federal court before a suspect is charged. The state actors then began to consider how they too could create a more deliberative process before a decision is made to charge a suspect.

<sup>296</sup> See, e.g., Adachi, *supra* note 55 (discussing an example in which a defense lawyer learned more about her client and his family, which helped her humanize her client).

<sup>297</sup> Roberts & Wright, *supra* note 63, at 1465.

<sup>298</sup> Adachi, *supra* note 55.

the arrest information with a cautious eye that understands how the racialized implicit biases of police, de facto policies of racial profiling, and rapid decisions to charge increase the likelihood that the information relied upon is biased. Similar to their defense colleagues, prosecutors can develop their own checklist to question whether they would handle the case differently if the defendant was a different race. Both defense attorneys and prosecutors could find a motivated colleague in the office who can serve as another check on whether an attorney's advocacy is tinged with racialized bias.<sup>299</sup> This colleague can then also join in the systemic efforts to check racial bias in plea bargaining. Thus, individual attorneys can enlist their colleagues to help debias individual's and office efforts to help make plea bargaining a more racially neutral process.

*Empathy.*

Both prosecutors and defense attorneys may find that empathizing with African American male defendants is another antidote that buffers the toxic effects of racialized implicit bias in plea bargaining.<sup>300</sup> Empathy is a cognitive, emotional, and behavioral process in which the person puts themselves in the other's shoes.<sup>301</sup> When we empathize, we slow our thought process down and shift from a reactive process to a more deliberative one.<sup>302</sup> In this more deliberative stance, we are likely to see the humanity of the other person, rather than viewing them through a distorted, biased lens.<sup>303</sup> Not only does the recipient of empathy benefit, but the empathizer does, too. Empathy reduces the cognitive dissonance prosecutors and defense attorneys experience by creating more consistency between their explicit nondiscriminatory intent and their implicit biases.<sup>304</sup>

*Plea-Bargaining Worksheet—Humanize the client (See Appendix A).*

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<sup>299</sup> *Id.*

<sup>300</sup> See, e.g., Elayne E. Greenberg, *Bridging Our Justice Gap with Empathetic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 33 OHIO ST. J. ON DISP. RESOL. 441, 441 (2017). Even though individuals have different capacities to empathize, an individual can learn to expand their ability to empathize. However, empathy is not an unlimited resource. At times, a person may intentionally withhold empathy as a protective measure to preserve their own emotional well-being. *Id.* at 453–62.

<sup>301</sup> *Id.* at 454.

<sup>302</sup> *Id.* at 453.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

The plea-bargaining worksheet is an essential prerequisite to debiasing plea bargaining. It provides prosecution and defense colleagues with an opportunity to slow down the process and engage in a more thoughtful inquiry about what, based on the particular client, is the most equitable way to resolve this matter. The worksheet requires the attorneys to provide, share, and question information based on objective rationales towards seeking justice. Moreover, the worksheet engages attorneys to give thought to multiple justice options rather than just horse-trading charges and concessions.

*Schedule the Plea Bargaining.*

If an individual is serious about debiasing plea bargaining, the plea-bargaining negotiations need to be moved from congested courthouse corridors to a quiet meeting place where a respectful focus can be devoted to negotiating justice. Furthermore, it needs to be scheduled for a time when both prosecutors and defense attorneys have adequate time to prepare. And don't forget to bring coffee! Bringing coffee or other refreshments helps set the tone to have a thoughtful negotiation during which parties can share information, question one another, and appreciate the high stakes of justice.<sup>305</sup>

*During the plea bargaining, share information and talk about the client as a human being. Don't just horse trade charges. Decide, for this client, what an equitable justice outcome is.*

If prosecution and defense attorneys have adequately prepared for the plea negotiation, the ensuing negotiation should be a conversation during which the parties share information and problem-solve to seek an equitable justice outcome. In this slower, more deliberative process there is an opportunity to explicitly address concerns about implicit bias. Respectful

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<sup>305</sup> Prosecutors and defense attorneys, both essential legal actors in our justice system, may view their justice contributions differently. According to the ABA Criminal Justice Standards for the Prosecution Function, prosecutors “seek justice within the bounds of law, not merely to convict.” ABA CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 235, at 3-1.2(b). The ABA Criminal Justice Standards for the Defense Function explicitly provide that “[t]he primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.” ABA CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION, *supra* note 235, at 4-1.2(b).



questioning by the defense attorney to the prosecutor about whether the prosecutor is likely to make similar offers and concessions if the defendant was white helps remind the prosecutor that prosecutorial discretion should not be influenced by race. Parties should refer to the plea-bargaining worksheet as a helpful guide to ensure that both parties share and process the important information that is relevant in coming to an appropriate resolution. The defendant's picture, other than a mugshot, will help humanize the client and debias the racialized implicit biases that both defense attorneys and prosecutors may have about the defendant.

*Counseling the Client.*

Before an attorney counsels a client, the attorney must decide what is the relevant information to gather, and what are the appropriate options for the client. Counseling a client involves ambiguity and discretion, conditions that allow racial implicit biases to emerge. Therefore, when a defense attorney counsels an African American male defendant, the attorney must ensure that the attorney's own racial biases about the defendant do not compromise the quality of guidance the attorney provides. Defense attorneys can check these biases by engaging in more mindful counseling.<sup>306</sup> What are acceptable plea offers for this defendant? What are the full ramifications of accepting a plea, not only for the present legal matter, but for the remainder of the defendant's life? Is the defense attorney counseling the African American male defendant in the same way the attorney would counsel a similarly situated white defendant? The answers to these questions will assist defense attorneys when they reevaluate whether the way they counsel African American male defendants is shaped by the defense attorney's implicit racial biases.

C. YES, BUT . . .

Each of the organizational and individual debiasing prescriptions described above, although a step forward, will not unshackle the racial biases from plea bargaining. Rather, they provide an opportunity for legal actors to become aware of how their racialized biases affect the plea-bargaining process and the justice outcomes for African American male defendants. This is an ongoing examination, and hopefully as more recommended suggestions

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<sup>306</sup> Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding*, 6 J. SOC. PSYCH. & PERSONALITY SCI. 284, 284 (2014) (discussing how mindful meditation helps reduce implicit age and race bias).

become a regular part of plea-bargaining practice, they will help to create a culture of change.

Still, some may point to other debiasing reforms that have scrubbed the racial identity of the defendant to ensure a fairer justice outcome.<sup>307</sup> True, scrubbing the identity of African American male defendants accused of minor traffic violations yields more equal justice outcomes. However, in cases that involve plea bargaining, it is imperative that the legal actors accurately appreciate the defendant's humanity. Scrubbing the racial identity of that African American defendant obscures that humanity and perpetuates the deep-rooted racial bias towards African American males in the criminal justice system writ large.

Others have read the proposals, agreed that they are likely effective, but qualified their endorsement: “. . . but it will require more money.” How sobering! Are some willing to maintain the status quo of racialized justice because it is more affordable to maintain the status quo? This author posits that the humanity of all demands justice for all.

#### CONCLUSION

This Article chronicles racial discrimination's deep historical roots in American society and criminal justice system and explains how this discrimination continues to shape the racialized presumption of guilt in plea bargaining. The Article then prescribes structural and procedural debiasing reforms that build on implicit bias and anti-racist scholarship. The purpose is to motivate us to get past our personal defenses and comfort zone about race and compel us to take more meaningful action. District attorneys' offices, public defenders' organizations, and the prosecutors and defense attorneys who work within these organizations are the primary legal actors who control plea bargaining. They are also the legal actors who have the power to become legal change agents within their plea-bargaining sphere of influence.

“[T]o bring about change, [you] must not be afraid to take the first step . . . . [T]he only failure is failing to try.”<sup>308</sup> We can begin to mitigate this

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<sup>307</sup> See, e.g., Sunita Sah, Christopher T. Robertson, & Shima B. Baughman, *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAV. SCI. & POL'Y 69, 69 (2015); Evan Sernoffsky, *SF DA Gascón Launching Tool to Remove Race When Deciding to Charge Suspects*, S.F. CHRONICLE (June 12, 2019), <https://www.sfchronicle.com/crime/article/SF-DA-Gasc-n-launching-tool-to-remove-race-when-13971721.php> [<https://perma.cc/SQ89-H6MN>] (introducing a world-first application of artificial intelligence to “scrub” information from police reports that would be suggestive of a person's race).

<sup>308</sup> ROSA PARKS & GREGORY J. REED, *DEAR MRS. PARKS: A DIALOGUE WITH TODAY'S YOUTH* 97 (1996).

racialized presumption of guilt against African American male defendants today. Individual prosecutors and defense attorneys can begin to implement some of these suggestions immediately in their next plea bargain. District attorneys' offices and public defenders' organizations can begin announcing today that mitigating the racialized presumption of guilt is an organizational priority. They can then affirmatively take the steps necessary to reinforce that priority. Colleagues who are purveyors of justice in their writings, teachings, social activism, spirituality, personal living, and political support can use their sphere of influence to call attention to this racial injustice and help galvanize debiasing reform.

Still, some readers may believe that, given the depth and amount of time that racism has persisted, racism is an intractable scorn that is part of our human condition. Others, like this author, however, reject the status quo as intolerable and optimistically believe reform is achievable. No country should take pride in promises of democracy and "justice for all" while supporting a presumption of guilt towards its African American male defendants that taints the negotiated justice process. "History, despite its wrenching pain, cannot be unlived, [but] if faced with courage, need not be lived again."<sup>309</sup>

#### APPENDIX: PLEA-BARGAINING WORKSHEET

**I. Name and contact information of the individual who is accused. Please include the name the individual prefers to be called.**

**II. Tell more about the individual: *Humanize the person* (age, gender, education, family background, employment history). Please include a photo.**

**III. What, if any, (is)(are) the individual's previous charges, crimes and dispositions?**

**IV. Is the person on probation or parole? Number of times checked in? Overall compliance? Relationship with parole officer?**

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<sup>309</sup> ANGELOU, *supra* note 1.

**V. Please describe the alleged crime (what happened, location, witnesses):**

**VI. Are there any extenuating circumstances or defenses? If yes, please explain.**

**VII. Are there any identifiable political or social factors that may mitigate/aggravate the gravity of the alleged crime?**

**Please explain.**

**VIII. Please identify any bias(es) you might have about the individual charged with the crime, the type of crime, or the individual with whom you will plea bargain.**

**VIII. Consider the other side's perspective – If the other side were completing this worksheet, what information might the other side agree with?**

**IX. Consider the other side's perspective – If the other side were completing this worksheet, what information might the other side see differently?**

**X. What are the client's primary interests?**

*For Defense Counsel, your client is the defendant.*

*For Prosecutors, your client is the people.*

**Your Client's:**

**The Other Side's Client:**

**XI. If you cannot agree on an acceptable plea bargain, What is your client's BATNA (Best Alternative to a Negotiated Agreement)<sup>310</sup>?**

**What is the other side's BATNA?**

**XII. During your meeting with the other side, what questions do you have for the other side? Please state your rationale for asking each question.**

**XIII. During your meeting with the other side, what information about your case and your client do you want to make sure to convey? Please provide your rationale for the information you wish to convey.**

**XIV. Given your client's interests and the interests of the other side, what are some possible acceptable *options* to consider? Please explain how each option might satisfy both sides' interests.**

***Thank you!***

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<sup>310</sup> BATNA is the acronym used for the negotiation term "Best Alternative to a Negotiated Agreement." Your BATNA is your best course of action if you are unable to resolve the issue at hand with your negotiating counterpart. *See*, Fisher, Roger & Ury, William, *Getting to Yes* at 101 (Penguin Books 2011).