PROSECUTORIAL CHARGING AND IMPLICIT BIASES

Evan Chen[*]

The prosecutor is often seen by the judiciary as the heart of the criminal justice system. As a result, prosecutors are given wide discretion in their decision making, whether through charging, plea bargaining, or trial strategy. Their decision making has the potential to determine the fate of a criminal defendant, but the possible injustices that may arise from such discretion are seldom addressed. This Note, through the lens of implicit biases, analyzes the prosecutorial discretion in charging. By incorporating concepts in implicit social cognition and implicit biases, I argue that this discretion leaves criminal defendants pursuing selective prosecution claims with no practical remedy. I propose possible ways that the legal system can better shield itself from the effects of implicit biases. In turn, I hope that this Note will propel more discussion in this realm.

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I. INTRODUCTION

The study of implicit biases within the field of psychology has seen substantial development in the past decades. The diverse research has given psychologists a lens that they are able to utilize in researching an individual's perceptions in relation to their behavior. In turn, many implicit bias concepts are imported to other fields of academia such as political science, gender studies, and racial and ethnic studies. One particular field that has prompted discussions among scholars is the law. The primary focus of these discussions is to inquire into how implicit biases can affect the decision making of legal actors and, in turn, create undesirable outcomes. The assessment of the intersection between law and implicit biases has offered new ways that legal scholars and practitioners are able to tackle the injustices that are prevalent within the legal system.

One such area of law that has propagated debate is the criminal justice system, and more specifically, its failure to afford fair justice for racial minority populations. What has been observed as a progression toward a post-racial society in the United States has prompted scholars to delve deeper into how racism still persists in a "colorblind" formation.[1] Police misconduct and mass

[1] The criticism of colorblindness has seen much commentary from scholars in the legal context. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2–3 (1991) (proposing that the notion of colorblindness through the Constitution fosters White racial domination); Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011) (assessing Obama's post-racial policies and rhetoric through the lens of racialized mass incarceration).

incarceration are examples of how even in the present day, the concept of race still plays a potent part in society whether at the systemic or individual level.[2] I hope to demonstrate through this Note that implicit biases are one such way that a "colorblind" legal system can still create large racial disparities in its outcomes.

Although there has been a significant increase in research and scholarship on implicit biases in the criminal law realm, there continues to be significant gaps regarding the role of the prosecutor and the discretion they possess through charging.[3] Charging is the first point of contact between prosecutors and the alleged criminal defendant. The wide discretion given to prosecutors in this regard plays a pivotal role in how individuals proceed through the criminal justice system regardless of whether they are guilty.[4] Many scholars have criticized this discretion as the sole impetus

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[2] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1479 (2016); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999). For scholarship regarding police misconduct in relation to the Fourth Amendment, *see, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271. Mass incarceration has also produced substantial consequences to populations of color whether directly or indirectly. *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381 (2002).

[3] *See* Jerry Kang, 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, 1141–42 (2012) (stating that there are currently little to no studies addressing prosecutors' implicit biases, particularly in the charging context); *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796 (2012) (stating that scholars have yet to conduct an in-depth examination of prosecutors and their implicit biases).

[4] For a criminal defendant, simply proceeding through the criminal justice system regardless of the guilt or weight of the crime produces many obstacles for the individual notwithstanding prison time. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1814 (2012); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491 (2010).

in creating disproportionate outcomes between racial populations.[5] What I hope to illustrate is that this discretion can also be analyzed through the context of implicit social cognition where even the most reasonable prosecutors are vulnerable to biased decision making. This is premised on the notion that prosecutors can explicitly disavow racial biases in their decision making but still produce behavior to the contrary.[6] This decision making, when intertwined with wide discretion, may be a potent factor in the large racial disparities in prosecutorial charging.

The purpose of this Note is to highlight the issues that have surfaced from prosecutorial discretion in charging through implicit biases. By analyzing a prosecutor's decision making at the charging level, I hope to offer another lens through which we may view the ongoing racial crisis that the United States legal system has produced.[7] In Part II, I define implicit biases and how they influence an individual's behavior through different contexts. This explanation derives from the rich research that has been conducted within the field of psychology and the social sciences.[8] By utilizing studies within the context of police enforcement and employment, I hope to show how implicit biases can be prevalent in an individual's decision making. In turn, this research has given a new lens that scholars use to analyze various issues within the law. These scholars examine how implicit biases affect legal actors' decision making and how the legal system incorporates

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[5] Scholarship addressing prosecutorial charging has mainly focused on the difficulties of obtaining judicial remedies through the *Armstrong* test. The relevant topics and articles will be discussed further in Part IV.

[6] What is observed to be a "dissociation" between explicit and implicit biases. *See infra* Section II.A.

[7] Colorblindness, mass incarceration, police misconduct, and other related topics in addition to biased charging all contribute to this ongoing racial crisis. This Note seeks to narrowly focus on biased charging through the lens of implicit biases. Prosecutorial charging continues to be an area that is often contested in the context of disproportionate outcomes between racial populations. It has been shown that racial minorities are charged with crimes disproportionately when compared to their White counterparts. *See* Kang et al., *supra* note 3, at 1139–41. The Vera Institute of Justice has also conducted a review of empirical studies determining how race and ethnicity may affect prosecution. *See generally* BESIKI KUTATELADZE, VANESSA LYNN & EDWARD LIANG, VERA INST. OF JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION? (1st ed. 2012) (suggesting that a defendant's or victim's race directly or indirectly influences case outcomes). *See also* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014); EMILY OWENS, ERIN M. KERRISON & BERNARDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO 7–8 (2017).

[8] *See infra* Sections II.B, II.C.

psychological concepts.[9] Since its inception, there has been a large influx of research and commentary on how the law intersects with implicit biases. However, there are few that address its pervasive effects on prosecutorial discretion.[10]

To demonstrate how pervasive implicit biases can be at the charging stage, it is crucial to understand the current landscape that prosecutors work within and the issues that arise notwithstanding implicit biases' adverse effects. In Parts III and IV, I will explain what decisions prosecutors must make at the charging level and what discretion is afforded. I will show the current problems that arise and how they may be entangled with other parts of the legal system such as the judiciary, legislature, and executive. I reveal the source of the wide discretion deferred to prosecutors at the charging level, most of which is derived from the unwillingness of other government entities to interfere.

In Part V, I explain how implicit biases can directly affect charging decisions by the prosecutor in the context of race. This could be at the micro-level, such as how prosecutors view evidence and interact with the criminal defendant, or at the macro-level, such as the difficulty of pursuing judicial remedies in the context of implicit biases. Finally in Part VI, I will address and analyze what remedies have already been proposed and whether they may show success within the realm of prosecutorial charging. I conclude by suggesting possible remedies that can ameliorate the effects of implicit biases in prosecutorial charging. In turn, I hope that this Note will propel more constructive commentary regarding prosecutorial discretion.

II. IMPLICIT BIASES AND RESEARCH

A. What Are Implicit Biases?

Implicit biases derive from the study of psychological sciences, more specifically implicit social cognition.[11] Implicit social cognition traces how past experiences influence an individual's actions, even though that earlier experience is not available to self-report or introspect.[12] It explores how automatic cognition affects

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[9] *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

[10] *See supra* note 3 and accompanying text.

[11] *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 4 (1995).

[12] Previously, the widespread practice when studying attitudes and

an individual's decision making and seeks to reveal how the human mind operates subconsciously in addition to its systemic failures in processing information, leading to undesirable behavior.[13] To demonstrate, we have an implicit A, which is a trace of a past memory that cannot be introspectively identified by the individual.[14] This implicit A mediates and influences B, which is the category of responses that an individual performs.[15] How implicit social cognition is measured differs from conscious or explicit cognition which utilizes direct measures that presume accurate introspection.[16] Rather, "implicit [social] cognition require[s] indirect measures."[17] It proposes that a multitude of mental processes function implicitly, or unconsciously.[18] "These processes include implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept."[19]

Implicit biases, a form of discriminatory bias, are composed of implicit stereotypes and implicit attitudes.[20] Attitude is characterized as an evaluative disposition, more specifically the tendency to act favorably or unfavorably toward an individual or

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stereotypes was with direct measures such as a respondent's self-report. Implicit social cognition focuses on indirect measures and proposes that attitudes and stereotypes have an unconscious cognitive component. *Id.* at 4–5.

[13] *Id.* at 6–7 (explaining the potential in its application to real-life settings). Examples of this phenomenon can be seen in a variety of different settings, and scholars have applied these concepts to the legal system. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 (2007) (proposing that this undesirable behavior can also contribute to racial inequality within the legal system).

[14] Greenwald & Banaji, *supra* note 11, at 5.

[15] *Id.* When the article was published, the focus in researching an unconscious cognitive element in deliberate judgment was infrequent in social cognition literature.

[16] *Id.*

[17] *Id.*

[18] One of the first experiments that involved an unconscious cognitive component was research conducted in the late 1980s regarding implicit bias memory. The introduction of implicit memory research paved the way for scholars to develop measures of other implicit mental processes. This eventually led to the study of implicit attitudes and implicit stereotypes. *See* Greenwald & Krieger, *supra* note 9, at 947. For this particular experiment involving implicit bias memory, *see* Larry L. Jacoby, Colleen Kelley, Judith Brown & Jennifer Jasechko, *Becoming Famous Overnight: Limits on the Ability to Avoid Unconscious Influences of the Past*, 56 J. PERSONALITY & SOC. PSYCH. 326, 326 (1989).

[19] Greenwald & Krieger, *supra* note 9, at 947 (footnotes omitted).

[20] *Id.* at 951.

some object.[21] Implicit attitudes are traces of past experiences that are introspectively (or inaccurately) identified which influence a person's feelings, thoughts, or actions toward individuals or objects in a favorable or unfavorable manner.[22] This differs from explicit expressions of attitudes which can be measured from an individual's statements, thoughts, and actions toward someone or something.[23] For example, an individual stating that he dislikes strawberries has an unfavorable explicit attitude toward all strawberries. This distinction is crucial since oftentimes, implicit and explicit attitudes toward someone or an object differ.[24] Thus, if we were to refer to the strawberry scenario, if an individual explicitly states that he likes strawberries and refuses to eat them when offered due to some subconscious feeling of discomfort, this individual explicitly has a positive attitude toward strawberries while also having an implicit negative attitude toward them. These contradicting attitudes can coexist, which is referred to as a dissociation between implicit and explicit attitudes.[25] Dissociations are important since they "are commonly observed in attitudes toward stigmatized groups" such as groups delineated by race, ethnicity, gender, age, etc.[26]

Social stereotypes are a mental association between a social group or category and a specific trait.[27] This differs from attitudes, which imply a consistent evaluative response toward someone while stereotypes may encompass beliefs with diverging evaluative implications.[28] For example, a social group may be associated with positive and/or negative stereotypes. Individuals utilize social stereotypes to guide their interactions with persons within a particular social group, assuming that the person possesses that

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[21] Greenwald & Banaji, *supra* note 11, at 7.

[22] *Id.* at 8.

[23] Greenwald & Krieger, *supra* note 9, at 948.

[24] *Id.* at 949.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 949–50. One of the first demonstrations of implicit stereotypes in an experiment was utilizing the stereotype that associates males with fame-deserving achievement. This experiment was based on the initial implicit bias memory experiment. *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCH. 181, 181 (1995).

[28] Social groups can be associated with positive and/or negative stereotypes which differ from attitudes. *See* Greenwald & Banaji, *supra* note 11, at 14 ("For example, the stereotype of members of a certain group (e.g., cheerleaders) may simultaneously include the traits of being physically attractive (positive) and unintelligent (negative).").

trait which is often associated with the social group.[29] Similar to implicit attitudes, implicit stereotypes operate unconsciously, and outside the realm of cognition.[30] That is, an individual's past experience is introspectively (or inaccurately) identified and mediates the attribution of traits to a member of a particular social group without the knowledge of the individual.[31]

Bias is characterized as an individual's displaced response that varies within a range of possible judgments.[32] To demonstrate, a professor may be biased in grading a student's paper. The professor may vary their response in grading such as assigning a high grade to an average student's performance whereas they assign other students lower grades based on the same exact performance.[33] Implicit bias consists of both implicit attitudes and implicit stereotypes.[34] The study of implicit biases has been extremely prevalent in the field of implicit social cognition since they can produce behavior that heavily contrasts with an individual's explicit beliefs.[35] An individual who intends to avow nonprejudicial judgments upon others may not be aware that a cue is implicitly influencing that judgment.[36]

B. Implicit Biases and Research Generally

The study of implicit biases has seen significant progress within the past couple of decades. Prominent social psychologists since its inception have attempted to create an accurate tool to measure an individual's implicit bias. These tools include the Go/No-go Association Task, semantic priming, the Affect Misattribution Procedure, and sentence completion tasks.[37] One of the most prevalent tools was formed in 1998 by an article titled *Measuring Individual Differences in Implicit Cognition: The Implicit*

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29 *Id.*

30 *Id.* at 15.

31 *Id.*

32 Greenwald & Krieger, *supra* note 9, at 950.

33 *Id.*

34 *Id.* at 951.

35 *Id.* Greenwald and Krieger also note that this contrasting behavior is noteworthy considering that the legal discrimination doctrine is premised on human actors being guided by their explicit beliefs, attitude, and intentions. *Id.* Thus, implicit biases pose a challenge to how the current legal system approaches this doctrine and related concepts.

36 Greenwald & Banaji, *supra* note 11, at 17.

37 Michael Brownstein, *Implicit Bias*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/implicit-bias/#Aca [https://perma.cc/9LQE-8EAY] (July 31, 2019).

Association Test by Greenwald, McGhee, and Schwartz.[38] The Implicit Association Test ("IAT") was created in an attempt to measure implicit attitudes by tracking "their underlying automatic evaluation."[39] The authors stated that IAT may be of use to resist masking self-presentation strategies and to reveal attitudes and other automatic associations for individuals who do not explicitly express those attitudes.[40] This proposition was supported by their study in which they measured the difference in the association of two designated concepts with an attribute.[41] The authors demonstrated the IAT by conducting and describing the results of an experiment in which they assessed implicit attitudes toward Black individuals relative to White individuals.[42]

This study paved the way for a flurry of research done utilizing the IAT as the method to measure implicit social cognition such as implicit attitudes and implicit stereotypes.[43] It further suggests that implicit bias is pervasive and oftentimes dissociated from explicit bias.[44] In addition, implicit bias may be used to predict certain kinds of behavior in the real world.[45] A meta-analysis was done in 2009 which reviewed 122 research reports that used IAT.[46] These reports consisted of areas such as race, gender/sexual orientation, consumer preferences, political preferences, personality traits, alcohol and drug use, phobias and anxiety, close relationships, and other intergroup behavior.[47] The meta-analysis article recommends the continued use of IAT and self-report measures together as a predictor of an individual's behavior.[48]

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[38] *See* Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464 (1998).

[39] *Id.* at 1464.

[40] *Id.* at 1478.

[41] This measure stipulates that it is easier for respondents to give responses to items from different categories when those categories are cognitively associated with each other. *Id.* at 1476–78.

[42] *Id*. at 1474–76.

[43] *See* Greenwald & Krieger, *supra* note 9, at 953–55. *See also Welcome to Project Implicit!*, PROJECT IMPLICIT, https://www.projectimplicit.net/ [https://perma.cc/335V-RRYV] (last visited Apr. 1, 2025) (providing more information on studies utilizing IAT).

[44] Greenwald & Krieger, *supra* note 9, at 955–56.

[45] *Id.* at 953–54.

[46] *See* Anthony G. Greenwald, T. Andrew Poehlman, Eric Luis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCH. 17 (2009).

[47] *Id.* at 24.

[48] *Id.* at 32.

This recommendation is due to the authors' finding that for socially sensitive topics, such as those focused on racial and other intergroup behavior, "the predictive validity of self-report measures was remarkably low and the incremental validity of IAT measures was relatively high."[49] In these socially sensitive topic areas of research, the "predictive validity of IAT measures significantly exceeded the predictive validity of self-report measures."[50]

Implicit biases and related areas of study have arisen in the context of race and intergroup behavior, more specifically how individuals may discriminate against others on the basis of race and ethnicity. A study done by social psychologist Joshua Correll demonstrated that the ethnicity of a group of actors plays an influential part in whether an actor shoots another person.[51] By using a video game in a course of four studies, the study aimed to determine whether a person's ethnicity would affect an actor's decision to shoot or not.[52] The participants playing the video games were confronted with White or African American targets, holding guns or other objects.[53] The participants were then instructed to "shoot" armed targets and "not shoot" unarmed targets.[54] In Study 1, White participants were more likely to shoot an armed target more quickly if the target was African American compared to when the target was White.[55] This contrasted with the participants' decisions to "not shoot" an unarmed target more quickly if that respondent identified the target as White.[56] Study 2 repeated the same procedures but gave the participants less time, producing more errors in the participants' decision making.[57] Study 3, while repeating the same procedures as Study 1, showed that the amount of bias differed with perceptions of a cultural stereotype and the

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[49] *Id.*

[50] *Id.*

[51] Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1324 (2002).

[52] *Id.* at 1315. The goal of this study was to investigate the effect of a target's ethnicity on a respondent's decision to "shoot" that target.

[53] *Id.* The study simulated the scenario of a police officer who is confronted with a potentially hostile target whose ethnicity is shown. Respondents were prompted either to shoot the target or not shoot the target, similar to the decision a police officer might be facing in this scenario.

[54] *Id.*

[55] *Id.* at 1317–18.

[56] *Id.* at 1317.

[57] *Id.* at 1318–19.

level of interaction with that stereotype rather than racial prejudice that is personal to the individual.[58] Lastly, Study 4 revealed that African American and White participants had equivalent levels of bias in a community sample.[59] These results suggest how pervasive racial and ethnic profiling may be in the context of police officers who are confronted with a potentially dangerous situation.[60] The possible causation they inferred was due to an individual's automatic associations with another's race or ethnicity which could have real-life consequences in their behavior.[61]

Racial discrimination was also studied and observed in the labor market. In a field experiment conducted in 2003 by Marianne Bertrand and Sendhil Mullainathan, they sought to explore whether having either a White-sounding or African-American-sounding name would affect callback rates for potential employment interviews.[62] This experiment was prompted by the premise that economic success in the United States labor market revealed significant racial inequality.[63] Compared to White Americans, African Americans were "twice as likely to be unemployed and earn[ed] nearly 25 percent less when they [were] employed."[64] The setting of this experiment was in Chicago and Boston, where the authors responded to help-wanted ads in the local newspapers.[65] These responses included resumes, half of which had White-sounding names, while the other half had African-American-sounding names.[66] Names, such as Emily or Greg, were considered White sounding, while Lakisha and Jamal

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[58] *Id.* at 1322–23.

[59] *Id.* at 1324–25.

[60] *Id.* at 1328. These studies suggest that the racial bias to shoot may be widespread; however, the authors state that it is not yet clear whether this bias actually exists among police officers. They propose that the bias is present among White college students and a community sample consisting of Whites and African Americans.

[61] *Id.* at 1325–27.

[62] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

[63] *Id.* at 991. There were several arguments for why there was this significant facial inequality. Some cited employer prejudice or employer perception while others argued differential treatment by race was already eliminated. The latter further argued that programs such as affirmative action create an environment that fosters reverse discrimination.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 991–92.

were considered African-American sounding.[67] The experiment indicated a large difference in callback rates based on how a name was perceived in the context of race.[68] The research revealed that resumes with White-sounding names had a better callback rate than those with African-American-sounding names.[69] In addition, responses varied among employers when considering the qualifications stated within the resume.[70] Candidates with African-American-sounding names received fewer return calls on higher quality resumes when compared to those with White-sounding names; differing quality in resumes was measured by characteristics such as educational level and years of experience.[71] This study further perpetuates the proposition that racial discrimination and racial biases, explicit or implicit, are pervasive in our daily lives.

C. Implicit Biases and the Legal System

A movement that paralleled the growth of research within implicit social cognition can also be seen in the legal field. This movement, recognized as Behavioral Realism, applies its concepts to problems of discrimination in law.[72] It rests on the notion that "legal theories, no less than their epistemological counterparts, both can and should be naturalizing."[73] Naturalism's core concept is that epistemic theories should be revised continuously with the incorporation of modern understanding derived from empirical sciences and how the human cognitive process works.[74] Most commentary on implicit social cognition within the law and Behavioral Realism can be divided into differing areas of analysis. One area analyzes the current legal system through the lens that has already been researched in implicit social cognition and implicit biases. In other words, commentators employ the results

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[67] *Id.* at 992.

[68] *Id.* at 999–1003.

[69] *Id.* at 1011.

[70] *Id.* at 1003–06. In addition, an applicant's address also influenced the callback rate. Applicants living in higher-income or "Whiter" areas had a higher callback rate.

[71] *Id.* at 999–1003.

[72] Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1000–01 (2006).

[73] *Id.* at 1001.

[74] *Id.* at 1000–01 (stating that the theories that support legal doctrines should be revised in accordance with advances in relevant fields of scientific inquiry).

of studies already completed and apply their results to the framework of how we create laws, then explain why implicit bias may arise in the application of those laws.[75] Another area pushes for a more experimental role and empirically tests whether implicit biases are relevant to the legal actors themselves.[76]

The development of Behavioral Realism and research on implicit biases has driven scholars to address the shortfalls of the criminal justice system. One of the creators of the IAT, Anthony Greenwald, collaborated with prevalent legal scholars in the law review article *Implicit Bias in the Courtroom*, where they provide a broad overview of implicit biases in the context of two trajectories within the legal system: the criminal path and the civil path.[77] More specifically within the criminal path, the article authors note that at every level within the process, individuals of a minority race may suffer from the effects of implicit biases.[78] The review emphasizes that if we were to break down implicit biases within the criminal justice system, or the legal system as a whole, it would require a multi-directional and comprehensive process.[79] With the effects of implicit biases reaching nearly every level within the system, each level must be addressed in consideration of one another.[80] By focusing on only one area such as attenuating the judge's implicit biases, issues that arise from other areas such as police encounters and prosecutorial discretion would be ignored.[81] Thus, the remedies offered would need to account for the multitude of sources that implicit biases could arise from and how, in

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[75] For example, this was done analyzing anti-discrimination laws. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 978–79 (2006).

[76] For examples of empirical studies, *see* Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 65–66 (2017); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1–2 (2010).

[77] *See* Kang et al., *supra* note 3, at 1135, 1152. Since the purpose of my article is to address prosecutorial discretion in charging, the focus here is on the authors' scholarship in the criminal path. However, as shown, implicit biases are also prevalent in the civil path of the legal system.

[78] The article explores the criminal path at length with the application of implicit biases. *Id.* at 1135–50. To summarize, these levels include the very first encounter with law enforcement, then encounters with the prosecutor via charging and plea bargain. Lastly, if the defendant decides to go to trial, the judge and jury may also be influenced by implicit biases.

[79] *Id.* at 1150–52.

[80] *Id.*

[81] *Id.* at 1134–35, 1139–42.

aggregate, they may produce results that are unfair to the criminal defendant.[82]

These notions are further echoed by other legal scholars, where they address specific actors rather than the criminal justice system as a whole. In the law review article *Implicit Racial Bias in Public Defender Triage*, authored by Richardson and Goff, they suggest that public defenders who are often portrayed as a champion for criminal defendants may have implicit biases that affect their performance and decision making.[83] This is shown in the term "public defender triage" where public defenders are faced with a dilemma in deciding which cases to pursue.[84] Public defender offices often lack adequate resources and hold unmanageable caseloads, which make it difficult for them to account for implicit biases.[85] Likened to the proposal in the law review article *Implicit Bias in the Courtroom*, this may result in unfavorable decision making at all levels of a public defender's handling of a case.[86] It includes biased evaluation of evidence, biased interactions with the criminal defendant, and biased acceptance of punishments.[87] Thus, the review calls for additional research on the implicit biases held by public defenders—legal actors who are seldom included in implicit bias discussions.[88] The authors encourage public defender offices to work with social psychologists and implement systems to reduce implicit biases.[89]

An empirical study also examined how exposing jurors to racial cues can affect their behavior and decision making when evaluating evidence.[90] In this study, respondents were informed of basic facts regarding an armed robbery and were shown a series of crime scene photographs.[91] The respondents were randomly assigned into two groups, with each group seeing identical

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[82] *See id.* at 1172–85 (suggesting ways to reduce implicit biases in judges and jurors).

[83] *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (describing the ways implicit racial bias may impact interactions and decision making on behalf of public defenders).

[84] *Id.* at 2631–32.

[85] *Id.* at 2631–34.

[86] *Id.* at 2634–35.

[87] *Id.* at 2635–41.

[88] *Id.* at 2648–49.

[89] *Id.* at 2649.

[90] *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331–39 (2010) (describing the procedure for, and outcome of, the study).

[91] *Id.* at 331–32.

photographs except for one changed element: the perpetrator of the crime was either dark-skinned or light-skinned.[92] The respondents then were presented with evidence from a trial and were to judge each piece of evidence to indicate whether the defendant was culpable for the crime.[93] The results show that respondents who viewed the dark-skinned perpetrator rather than the light-skinned perpetrator tended to indicate more criminal culpability and thus were more likely to believe that the perpetrator was guilty of armed robbery.[94] In turn, the authors suggest that the current system for jury decision making is inadequate to address the potential pervasiveness of implicit biases.[95]

The culmination of these studies and reviews further reinforce that implicit biases have a foothold in nearly every facet of the legal process in the criminal justice system. However, even with the plethora of legal research, there has been little commentary regarding the prosecutorial process.[96] Prosecutors have wide discretion and influence on the outcomes of a criminal defendant, but this is seldom addressed in the context of possible implicit biases.[97] There has, however, been a push for accountability and redress in this specific area of law. Smith and Levinson attempted to raise awareness of this issue in their law review article *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*.[98] They state that "scholars have yet to conduct an in-depth examination of how implicit bias might affect one of the most noteworthy parts of the criminal justice system—prosecutorial discretion—and no empirical projects focused on implicit bias have gained access to prosecutors as study participants."[99] Prosecutors may claim that they never intend to discriminate based on race, but nonetheless may produce behavior to the contrary.[100] The authors argue that this discriminatory behavior is pervasive in many of the decisions that prosecutors make in regard to a criminal defendant.[101] They note, however, that empirical studies

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92 *Id.* at 332.
93 *Id.* at 332–34.
94 *Id.* at 337.
95 *Id.* at 339.
96 Kang et al., *supra* note 3, at 1141.
97 *Id.* at 1141–42.
98 *See generally* Smith & Levinson, *supra* note 3.
99 *Id.* at 796.
100 *Id.*
101 In summary, these decisions include when a prosecutor would have to decide whether to charge or release a defendant and what type of crime to charge; pretrial strategy such as determining bail, disclosing exculpatory evidence, and

have yet to test whether prosecutors would act in ways that show bias in their decision making.[102] Since their review provides only possible scenarios in which prosecutors may express implicit biases by utilizing studies done on implicit biases in different contexts, they encourage researchers to test how they could operate in the prosecutorial context.[103] Additionally, they consider possible remedies but state that such remedies are often insufficient to truly ameliorate implicit biases.[104]

The following sections hope to build upon the discussions which have seen little development relative to other fields of law. Considering that prosecutorial charging plays a pivotal role in how an individual proceeds through the criminal justice system, it is crucial that we further contextualize its effects through the lens of implicit bias.

III. PROSECUTORIAL CHARGING

When an individual is formally accused of a crime, a pivotal point of contact with the legal system is through the prosecutor. The prosecutor at this stage plays a pivotal role in the individual's journey through the criminal justice system. Even before the consideration of a plea bargain, pre-trial strategy, or trial, the prosecutor must determine whether to have the individual charged with the crime or simply let them go. This often overlooked and unchecked power can determine the fate of an alleged criminal defendant.[105]

When an individual is brought before the prosecutor for charging, the prosecutor considers many factors, which for this

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plea bargaining; and strategies employed during trial such as jury selection and closing arguments. *Id.* at 806–22.

[102] *Id.* at 822.

[103] *Id.*

[104] Possible remedies include encouraging policymakers to consider the problem of implicit racial bias in prosecutorial charging, collecting information on racial demographics at each stage of the charging process, hiding racial demographic data until the charging decision has been made, and hiring and promoting a more racially diverse pool of prosecutors. The authors note however that for the effects of implicit biases to be most effectively undermined, remedies would have to include fundamental changes in political, economic, and social structures in our country. *See id.* at 822–26.

[105] Disproportionate rates of charging for racial minorities still pose a serious problem in the criminal justice system. There are various studies examining the disparities in charging rates and the influence of those disparities on the fate of an alleged criminal defendant. *See generally* Rehavi & Starr, *supra* note 7. *See also* OWENS ET AL., *supra* note 7, at 6.

Note will be divided into the micro- and macro-level.[106] There may be policies that are in place to encourage or mandate charging for specific crimes.[107] The Chief Prosecutor of a prosecutor's office also has the ability to structure the nature of charging.[108] Since many Chief Prosecutors are elected by the citizens of their state, their actions through the implementation of policies may reflect what is considered popular on the political spectrum in their jurisdiction.[109] If voters are pressuring the government to be harsher on crime, then the Chief Prosecutor, with the interest of being re-elected, may heed their concerns in order to gain their favor.[110] Likewise, legislatures have the ability to create mandatory charging statutes at the federal or state level.[111] Similarly, as to the dynamics of the Chief Prosecutor, the legislature also has it in their interest to comport with the voters' demands, and as a result create statutes that would compel the mandating of specific charges.

The prosecutor may also "divert" the individual from the

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[106] I divide the factors that influence prosecutorial charging into two levels. Macro-level factors derive from entities that influence the prosecutor's decision making at the charging stage; essentially, this includes everything that does not derive from the individual prosecutor. Micro-level factors are the personal influences that the prosecutor may take into consideration when charging. Oftentimes these factors may overlap with one another; however, it is important to distinguish them for the purposes of my argument.

[107] For example, there have been policies in place on the federal level to encourage certain charging practices for immigration offenses. *See* Press Release, U.S. Dep't of Just. Off. of Pub. Affairs, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) [hereinafter Press Release on DOJ's Renewed Commitment to Criminal Immigration Enforcement], https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal [https://perma.cc/D7UN-89KT] (urging federal prosecutors to prioritize immigration offenses). *See also* Press Release, U.S. Dep't of Just. Off. of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/M6SB-L5MS].

[108] *See* Press Release on DOJ's Renewed Commitment to Criminal Immigration Enforcement, *supra* note 107.

[109] *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 647–50 (1998) (explaining the relationship between Chief Prosecutors, assistant prosecutors, and the voters through the principal-agent problem).

[110] *See id.*

[111] *But cf.* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1080 (1997) (stating that the factors that influence allocation of resources in law enforcement are too varied to be defined in legislation).

criminal justice system into an alternative program that focuses on restitution and rehabilitation. Depending on the jurisdiction, it is not entirely clear the authority that the prosecutor has in the diversion process. Nonetheless, their decisions are given great deference.[112] When prosecutors do not divert and proceed to charge, they then must determine what charges to employ. Generally, the majority view of judges in the United States is to give great deference to prosecutors in this regard, which enables them to select among all applicable statutes with little to no interference.[113] If an individual allegedly commits a crime and the law within that jurisdiction contains several statutes that cover the elements of that crime, but with differing possible sentencing times, the prosecutor has the ability to choose regardless of which statute is a better fit.[114]

In sum, macro-level influences on charging allow for wide discretion in prosecutorial discretion. As a result, most of the decision making manifested at the micro-level lies with the individual prosecutor. Although each prosecutor may have differing benchmarks defining how to charge, there are notable factors to consider. For example, some factors may include "[t]he probability of conviction," "[t]he willingness of the offender to cooperate with law enforcement," and "[e]xcessive costs of prosecution in relation to the seriousness of the offense."[115] In addition, the reasons may stem from more selfish decision making such as increasing the prosecutor's win-loss records, improving public perception, and lightening their own workload.[116] Altogether, it is very difficult to track the reasoning behind a prosecutor's charging decision, and as a consequence many of these

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[112] This deference was shown by the Supreme Court of Kentucky. *See* Flynt v. Commonwealth, 105 S.W.3d 415, 426 (Ky. 2003) (ruling that to admit a defendant into a diversion program, the court must first obtain the Commonwealth attorney's approval).

[113] *See* United States v. Batchelder, 442 U.S. 114, 123 (1979) (stating that the government may prosecute the same conduct under either criminal statute with different maximum penalties). State courts, such as in California, have also echoed this deference. *See* People v. Wilkinson, 94 P.3d 551, 558 (Cal. 2004).

[114] *See Batchelder*, 442 U.S. at 123; *Wilkinson*, 94 P.3d at 558.

[115] I would like to focus on these factors for the purposes of my argument, but they are in no way exhaustive. *See* NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS 54–56 (4th ed. 2023), https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf [https://perma.cc/82DA-Y6LH] (providing these and more factors to consider to determine which charges to file).

[116] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996 (2009).

factors are often blurred with one another. Each step can completely change the outcome for a criminal defendant, but attention is seldom given to the possible injustices that prosecutorial discretion may produce. Thus, if defendants bring allegations that certain charges are unconstitutional, they are ill-equipped to pinpoint the sufficient evidence necessary to triumph.

IV. THE CURRENT LANDSCAPE OF CHARGING AND ITS SHORTCOMINGS

Regardless of which level within the legal system, the judiciary seldom minds the consequential decision making that the prosecutor possesses in the charging process. The wide discretion imputed, in theory, should assume robust judicial safeguards for an individual who alleges selective prosecution based on unconstitutional grounds. For example, what if a certain racial group were selectively charged and an individual within that group seeks judicial intervention? This Part sets forth what the judiciary considers a safeguard against selective prosecution through the seminal case of *United States v. Armstrong* and the issues that arise thereafter.

The judicial remedies designed to address selective charging are considered one of the most problematic and debated topics of prosecutorial charging. Through *United States v. Armstrong*, the United States Supreme Court holds that for a court to overturn a prosecutor's charging decision on a finding of unconstitutional discrimination based on characteristics such as race, religion, or sex, the defendant must establish that (1) the prosecutor made different charging decisions for similarly situated suspects (a discriminatory effect), and (2) the prosecutor intentionally made the decision on the basis of an "arbitrary" classification (a discriminatory intent).[117] Arbitrary classifications include "suspect classes" promulgated through the equal protection doctrine and individuals exercising constitutional liberties.[118]

Although in theory the Court does provide a possible outlet for those claiming selective charging based on unconstitutional grounds, many legal scholars surmise that the actuality of success in practice is nearly impossible.[119] The issues begin to surface

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[117] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996).

[118] *Id.* at 464–65.

[119] *See* McAdams, *supra* note 109, at 620. *See also* Poulin, *supra* note 111, at 1076–79.

when a criminal defendant attempts to compel discovery to support selective prosecution. According to *Armstrong*, a court reviewing a claim of selective prosecution may grant discovery to the defendant if there is "some evidence" to support the elements of the claim.[120] More specifically, the defendant must show "some" evidence that similarly situated suspects of other groups could have been prosecuted, but were not.[121] However, the "some evidence" standard proves to be nearly impossible to obtain on the side of the criminal defendant.[122] This is mainly due to what evidence is available to present to the court without discovery.[123]

To demonstrate, imagine if a Black defendant claims that similarly situated White individuals were not arrested or prosecuted for the crime that they allegedly committed. For this claim to enable discovery, there must be "some evidence" presented to support this claim. That is, if there is no concrete evidence of the particular prosecutor explicitly admitting a racial motive behind the charging decision, the defendant must rely on data that would imply a correlation between Black individuals being charged and similarly situated White individuals not being charged with the same crime.[124] However, what is problematic is that this data is nearly non-existent due to the prosecutor offices' lack of data collection on the charging level.[125] The data that is available oftentimes cannot satisfy the "some evidence" standard to compel discovery.[126] In the few instances where a defendant does obtain data of those who were charged, they must then also find data of those who were not charged.[127] However, attempting to locate this additional data set would almost prove fatal to their claim since prosecutors sometimes do not keep records of individuals who were not charged.[128] Therefore, for a Black defendant to compare their charging decision with a similarly situated White individual who was not charged would entail great difficulty since the data necessary is not collected or available.[129]

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120 *Armstrong*, 517 U.S. at 469.
121 *Id.*
122 *See* McAdams, *supra* note 109, at 618.
123 *Id.* at 617–18 (stating that issues arise when there is currently insufficient data being recorded to support a potential selective prosecution claim).
124 *Id.* at 632.
125 *Id. at* 617–18.
126 *Id.*
127 *Id.* at 618.
128 *Id.*
129 *Id.* at 623.

In the law review article *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, Richard H. McAdams argues that this problem is further amplified since there is no comparative group to contextualize the data.[130] Even if the Black claimant were to obtain information on Black individuals who were charged and similarly situated White individuals not being charged with the same crime, they would need additional data to contextualize whether there is a disparity.[131] For example, if there were ten Black individuals charged compared to five White individuals charged with the same crime, then can you conclude that the Black individuals were unfairly charged relative to the White individuals? No, because we do not have information on the larger pool of individuals that this data stems from. If the pool of charging decisions consisted of twenty Black individuals and ten White individuals, then it would suggest there is no disparity because both races were charged fifty percent of the time. Therefore, to present "some evidence," not only would you need data on similarly situated White individuals that were not charged but also the data on Black individuals that were not charged and White individuals that were charged.[132] This lack of data would effectively make the remedy promulgated by *Armstrong* nearly impossible to obtain.[133]

Notwithstanding the difficulties of satisfying *Armstrong*, the wide discretion imputed to prosecutors and the lack of subsequent review is also problematic. This wide discretion can be attributed to the separation of powers between the executive and judiciary. The prosecutor is considered by the courts as the heart of the criminal justice system, and for it to function efficiently they must be afforded the necessary resources and discretion.[134] This was highlighted in Part III, where courts would be unwilling to intervene on matters regarding whether to charge, diversion of charges, and selection of charges. The United States Supreme Court has also shown deference to prosecutors and through its opinions emphasized the necessity to protect their discretion.[135]

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130 *Id.* at 630–31.

131 *See id.*

132 *See id.*

133 *Id.* at 632.

134 *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (stating broad discretion is attributed to the notion that the decision to prosecute is ill-suited to judicial review).

135 *See* United States v. Armstrong, 517 U.S. 456, 464 (1996); *see also* United States v. Batchelder, 442 U.S. 114, 115 (1979); People v. Wilkinson, 94 P.3d 551,

This was especially apparent in the *Armstrong* decision, where Chief Justice Rehnquist stated that the requirements needed to prove selective prosecution are rigorous.[136] Furthermore, there is a presumption of prosecutors performing their duties absent "clear evidence to the contrary."[137] The Court reasoned that the possible costs of responding to prima facie cases of selective prosecution would create difficulties for the offices to perform their duties.[138] As a result, it is necessary to establish a high bar against these claims due to the possible chilling effect that they may have on prosecutor offices.[139]

The statements in *Armstrong* and related cases can offer crucial information on how the judicial system may react to possible interference with prosecutorial discretion. This could be shown in the severe lack of success that selective prosecution claims have had since the promulgation of the *Armstrong* standard.[140] If we were to take into consideration the Court's trajectory in reviewing prosecutorial conduct, it may be reasonable to determine that the introduction of a remedy that would be unfavorable to the prosecutor would be futile. That is, any judicial remedies must be carefully and narrowly tailored to not offend the operations of the prosecutors. Otherwise, proposing that a criminal defendant seek refuge under the judiciary would be extremely difficult to pursue unless the courts drastically shift their stance on prosecutorial discretion.

V. HOW IMPLICIT BIASES MAY AFFECT PROSECUTORIAL CHARGING

The system in place already has produced a high barrier that has seen relatively little success for those who attempt to circumvent its disproportionate effects.[141] Even if, in theory, there is de jure reform to make claims of selective charging more accessible for defendants, this is only a single layer of racial injustices as a whole. When we hypothetically pierce through the current barrier in charging that is already prevalent, it unravels the next barrier that throws everything addressed thus far into

558 (Cal. 2004).

136 *Armstrong*, 517 U.S. at 468.

137 *Id.* at 464–65.

138 *Id.* at 465.

139 *Id.*

140 *See* McAdams, *supra* note 109, at 615–16.

141 *Id.*

disarray. This barrier is manifested through implicit biases and how their undetectable hold on the prosecutor's behavior dominates every facet of the criminal charging process.

In this Part, I evaluate the role of the prosecutor at the micro-level and the macro-level. Micro-level analysis addresses how implicit biases at the individual level may affect the prosecutor's decision making, while macro-level analysis addresses outside sources such as the judiciary.

A. The Prosecutor

The wide discretion given to prosecutors enables an environment where implicit biases at the micro-level can become incredibly potent. What results from this wide discretion is that prosecutors, without the fear of judicial review, can utilize their own biases and the biases of possible jurors for a likely conviction.[142] Currently, there is a lack of research on implicit biases that directly implicates prosecutors.[143] Why should we explore prosecutors through the lens of implicit biases when there is no clear evidence indicating such bias? Empirical studies focusing on other legal actors may support the connection that prosecutors may also be affected by implicit biases. Studies on judges—who are also prominent actors in the legal system—have suggested that the pervasive effects of implicit biases affect their judgments.[144] Likewise, this relationship was also shown in juror-eligible study participants in relation to issues such as evidence evaluation and the determination of the presumption of innocence.[145] The common thread with these studies is that

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[142] For an in-depth discussion on the effect of discretion on legal actors within the criminal justice system, *see* Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157 (2013); Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394 (2010); *see also* Jessica Saunders & Greg Midgette, *A Test for Implicit Bias in Discretionary Criminal Justice Decisions*, 47 L. & HUM. BEHAV. 217 (2023).

[143] *See* sources cited *supra* note 3.

[144] *See* sources cited *supra* note 76. *See* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (conducting an empirical study on trial judges that shows judges harbor the same kind of implicit biases as other individuals, leading to change in judgment and behavior). For a general discussion on a judge's decision making and the possible automatic processes involved, *see* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

[145] Empirical studies on legal actors are limited, which could be attributed to

participants have to draw information from various sources to make a judgment. Their results suggest that one such source is the implicit association between a defendant's race and negative stereotypes or attitudes.[146] Even though the premise that prosecutors are not immune to implicit biases is not demonstrably shown in empirical studies, I will analyze how these biases may interplay with their decision making.

Prosecutors, like judges and jurors, consider various information provided to make decisions in their prosecutorial duties. I will utilize the factors set forth in Part III to show how implicit biases may manifest through prosecutorial charging at the micro-level. Although not exhaustive, they may provide a glimpse of what is occurring in the mind of prosecutors at the time of charging. The factors that I would like to address are (1) the probability of conviction, and (2) the willingness of the offender to cooperate with law enforcement. To demonstrate how these factors interplay with the prosecutor's decision making in an implicitly biased way, let us imagine a scenario where a Black individual is brought before a prosecutor for the crime of involuntary manslaughter. First, the prosecutor must consider the probability of conviction, determined by their ability to prove each necessary element of the crime. The elements of involuntary manslaughter that the prosecutor must prove to obtain a successful conviction are: (1) with criminal negligence; (2) he causes the death; (3) of another person.[147] The most relevant element for my purposes is the first prong of "with

possible barriers in conducting research in the legal setting. There are, however, several findings in studies conducted on juror-eligible populations that illuminate the possible negative effects of implicit biases on judgment within the legal setting. *See* Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010) (examining whether individuals hold implicit associations between African Americans and criminal guilt in the context of racial equality and the presumption of innocence); Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019) (showing that implicit racial bias leads to Americans associating race with the concept of retribution itself); Justin D. Levinson, G. Ben Cohen & Koichi Hioki, *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. REV. 225 (2021) (showing that jurors possess strong anti-Black and anti-Latino implicit "future dangerousness" biases and that these biases predict their dangerousness judgments); Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014).

146 *See* sources cited *supra* note 144; *see* sources cited *supra* note 145.

147 N.Y. PENAL LAW § 125.10 (McKinney 2025).

criminal negligence." A person acts with criminal negligence "when he fails to perceive a substantial and unjustifiable risk that [the offense] will occur."[148] The risk is of a "nature and degree that the failure to perceive it [is] a gross deviation from the standard of care that a reasonable person would observe in the situation."[149]

Now, the question that arises is how a prosecutor might analyze these elements to calculate the probability of conviction in a biased way. The use of a reasonable person standard to determine when the killing of a human being is "negligent" poses serious challenges. The term "reasonable" may have different meanings, but it is often defined as a person under the same circumstances as the case at hand.[150] However, even with this guidance, the term reasonable differs from person to person, which enables outside influences to determine its definition.[151]

This malleable definition of reasonableness enables a prosecutor's negative implicit biases of Black individuals to take the helm of their assessment of what is considered reasonable in proving this "negligent" element of involuntary manslaughter. Studies have demonstrated the pervasiveness of the implicit bias of Black individuals being violent or "criminals" relative to their White counterparts.[152] These biases, unbeknownst to the prosecutor, may convince them that the defendant's actions deviated from reasonableness.[153] The activation of these implicit biases might occur in a relatively innocuous manner, such as

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[148] *Id.* § 15.05(4).

[149] *Id.*

[150] *Reasonable*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/reasonable [https://perma.cc/5JHL-MMZX] (last visited Dec. 21, 2025); *Reasonable Person*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/reasonable_person [https://perma.cc/8H37-MUXL] (last visited Mar. 10, 2025).

[151] The concept of the reasonable person being interpreted in a biased manner has seen much commentary. For scholarship on how the term reasonable can be racialized in the legal system, *see* Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry *Stops*, 6 MICH. J. RACE & L. 355, 357–58 (2001) (proposing a need for a reasonable Black person standard); *see also* Aliza Hochman Bloom, *Objective Enough: Race Is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C.L. 1, 47–48 (2023) (arguing that the courts should permit the consideration of race when assessing the reasonable person standard).

[152] *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCH. BULL. 1139 (1995); *see also generally* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

[153] *See generally* Smith & Levinson, *supra* note 3.

perceiving Afrocentric features in the defendant.[154] Once these implicit biases are activated at an introspectively unidentifiable level, the defendant, as a consequence, would already be perceived as violent or "criminal" relative to the reasonable person. This is due to the prosecutor's interpretation of the defendant's actions being primed accordingly to reflect these negative implicit biases.[155]

Thus, when the prosecutor assesses the facts presented to determine whether the defendant failed to perceive the risk that their conduct may kill someone when compared to this reasonable person standard, there is an implicit lens within the prosecutor's mind suggesting that the defendant is already violent or a criminal. As a result, any action taken by the defendant could easily skew toward what is not reasonable because being violent and criminal is already considered a deviation from what is reasonable. In turn, the prosecutor may be more willing to charge or select a harsher charge. They may assume that the probability of conviction would be higher due to implicit biases instigating these negative implicit traits. Their perception of the evidence needed to prove the "negligent" element would assume less difficulty in success compared to if the defendant was White. This perceived probability is also amplified if the prosecutor takes into consideration how a hypothetical jury would react to the facts. If a jury also has the same implicit biases as the prosecutor, then the probability of convincing the jury to convict is also heightened.[156]

Another factor that a prosecutor considers is "the willingness of the offender to cooperate with law enforcement." This factor is especially relevant in today's political and social realm due to growing distrust of the government and law enforcement. Rising instances of police brutality targeting mostly the Black population have led to a movement that calls for the defunding of law enforcement.[157] The increased exposure to these movements may

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[154] *See* Irene V. Blair, Charles M. Judd & Kristine M. Chapleau, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCH. SCI. 674, 674 (2004).

[155] This perception can be attributed to the prosecutor being primed to interpret evidence in a certain way. *See* Smith & Levinson, *supra* note 3, at 798–801.

[156] *See generally* Levinson & Young, *supra* note 90 (analyzing how implicit biases may have negative implications in jury decision making).

[157] For more scholarship regarding these social movements, *see* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); *see also* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

lead prosecutors to implicitly form biases that individuals taking part in these movements, who are often members of racially subordinated groups, are less willing to cooperate with law enforcement if they are accused of a crime.[158] This is because implicit biases can form within an individual from sources such as consuming media that portray a group in a certain way.[159] Therefore, in the scenario where a Black individual who is charged with involuntary manslaughter is brought before a prosecutor, the observations relied on by law enforcement may cause the prosecutor to implicitly label the defendant as having a lack of respect for the law and an unwillingness to cooperate. Likewise, the effects of mass incarceration since the War on Drugs may also place stigma and preconceived biases on Black individuals brought before the prosecutor.[160] Many individuals who have been affected by mass incarceration have formed negative judgments in regards to law enforcement.[161] By personally perceiving the destructive nature of law enforcement in their communities, these individuals may show distrust toward legal entities, which would enable prosecutors to form this implicit bias of unwillingness to cooperate.[162] With these prenotions, the prosecutor may be more willing to charge or select a harsher charge for a Black individual when compared to their White counterpart.

In addition to the previous factors, it is possible that prosecutors would assess whether there are possible improper motives for a victim or witness.[163] The race of the victim or witness may also skew this factor in determining whether there were improper motives. For example, if the race of the victim is White, the prosecutor may be less likely to assume improper motives. This is due to implicit biases also having the possibility of instilling positive stereotypes or attitudes, such as, in this case, a positive

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158 This indirect effect was also argued to be prevalent with the FCC's decisions regarding local news to push for the broadcast of violent news. This shift often includes unfavorable and often inaccurate depictions of the minority population and, as a result, individuals that consume this media implicitly build up biases against that population. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1549–53 (2005).

159 *See id.*

160 *See* Nunn, *supra* note 2, at 381–84.

161 *See* Roberts, supra note 2, at 1287.

162 *Id.* at 1287–88.

163 *See* NAT'L DIST. ATT'YS ASS'N, *supra* note 115, at 77 (mentioned in relation to factors for determining availability and acceptance of a guilty plea; however, this factor can also be contextualized in prosecutorial charging, for example, if prosecutors assess victim or witness statements in police reports).

stereotype that individuals who are White are perceived as "trustworthy" and "intelligent."[164] In contrast, if the victim was Black, the implicit biases of "untrustworthy" and "unintelligent" may cause the prosecutor to assume improper motives.[165]

The same principles also factor into how the prosecutor determines a witness's credibility. If we were to imagine a scenario where a Black individual is accused of a crime and the key witness is a White individual, then the prosecutor reviewing the case may assume that the witness had proper motives due to the implicit biases of trustworthiness. The prosecutor as a result may be more willing to charge or select a harsher crime due to the perceived increase in credibility of the witness's statements strengthening the evidence against the defendant.

B. The Judiciary

As stated previously, the realm of legal remedies to counterbalance the wide discretion given to prosecutors in their charging decisions requires near-impossible feats on the side of the criminal defendant. The initial reaction to this problem may be to lower this burden and make selective prosecution claims pursuant to *Armstrong* more accessible. I argue that even if there is an implementation of possible solutions, implicit biases create yet another impasse. To demonstrate this dilemma, we must analyze the difficulties of succeeding in a selective prosecution claim pursuant to *Armstrong* through the lens of implicit biases. The *Armstrong* test requires that for a court to overturn a charging decision based on race, there must be both discriminatory effect and discriminatory intent.[166]

1. Discriminatory Effect

The first prong of the test for establishing a discriminatory effect is problematic when applied to implicit biases. It requires a defendant to show a discriminatory effect through proof that the prosecutor would have made a different charging decision for

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[164] *See* Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP RELS. 359, 361–62 (2007) (indicating that Black Americans are stereotyped as being less intelligent and trustworthy compared to their White counterparts).

[165] *Id.*

[166] United States v. Armstrong, 517 U.S. 456, 465 (1996).

similarly situated suspects of another race.[167] The first problem that surfaces is how a defendant would be able to provide the necessary proof in light of the severe lack of charging data that is available through the prosecutor's office.[168] Although having data is technically not a requirement to succeed on a claim, the barrier that the lack of data erects is oftentimes fatal to selective prosecution claims.[169] Accordingly, the response to this would be to propose initiatives for prosecutors' offices to start collecting data on charging as a way to lower this barrier. However, even if prosecutors' offices were to begin collecting data on charging, their application may also be weakened by implicit biases. That is, data collection can be skewed by the implicit biases of the collector, and interpretation of that data can be skewed by the implicit biases of the interpreter.[170] This effect is especially apparent in our alleged "post racial" or "colorblind" society, where individuals assume themselves to interpret information without the consideration of race.[171] I would like to note that research behind biased data collection and data interpretation is substantial to the point that it would be difficult to encapsulate all of it within the confines of this argument. Thus, I would like to only utilize certain concepts to help illustrate its effects. There are many other biases that may be intertwined to produce non-representative data, and I would only like to provide a glimpse of how it may negatively impact the courts' analyses of the first prong of the *Armstrong* test.

First, I offer an example of how implicit biases can affect data collection. For this particular matter we must refer to what would satisfy the "some evidence" standard regarding the first prong of discriminatory effect to compel discovery. To reiterate, a criminal

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[167] *Id.*

[168] *See* Poulin, *supra* note 111, at 1119–20 (stating that government statistics are routinely reported but are rarely enough to illuminate a defendant's claim or permit the public to evaluate them).

[169] *See* McAdams, *supra* note 109, at 617–18.

[170] There is a plethora of ways that biases can be prevalent in data collection and analysis. The purpose of this section is not to provide an in-depth analysis on biased data but only to touch on specific biases that could be relevant in charging. *See* Swapnil Kangralkar, *Types of Biases in Data*, MEDIUM: TDS ARCHIVE (Aug. 26, 2021), https://medium.com/towards-data-science/types-of-biases-in-data-cafc4f2634fb [https://perma.cc/VN67-Y2VC] (providing additional examples of biased data).

[171] For scholarship on biased data regarding race and related topics, *see* Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 192 (2019); *see also* Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017).

defendant claiming selective prosecution based on race must show "some evidence" that similarly situated suspects of another race were not prosecuted.[172] However, this "some evidence" is nearly impossible to obtain due to the lack of data that refers to four particular groups: (1) suspects of the racial minority group that were charged; (2) suspects of the racial minority group that were not charged; (3) similarly situated suspects of other racial groups that were charged; (4) similarly situated suspects of other racial groups that were not charged.[173] But for my purposes, I will assume that we are able to eliminate this barrier and specific initiatives would enable this type of data collection.

Now let us proceed with the example. A Black claimant charged with drug distribution obtained four data points for the purpose of providing "some evidence" to compel discovery for a selective prosecution claim based on their race. The data shows that for the individual prosecutor, their past charging decisions related to drug trafficking consisted of: (1) ninety Black individuals charged; (2) ten Black individuals not charged; (3) forty-five White individuals charged; (4) five White individuals not charged. On their face, these data points may suggest to the claimant that there is no disparity to compel discovery due to the two racial groups having an equal charge rate of ninety percent. However, what the data does not suggest is how the collection of these data points may be affected by implicit biases. Let us imagine that during the time period when this data was collected, there was a large concert where forty White individuals were arrested by law enforcement for drug trafficking. The evidence that was brought before the prosecutor in charging these forty White individuals was relatively strong and the prosecutor decided to charge all forty individuals. Due to this decision, forty individuals were added to the pool of five White individuals that were charged, which totaled forty-five White individuals being charged for the crime of drug trafficking. Thereafter, the claimant alleging selective prosecution pursuant to the *Armstrong* test was provided with these data points in an attempt to provide "some evidence" of a discriminatory effect.

Comparing what the data shows before and after the concert would suggest that the data is not representative of what is actually occurring.[174] Before the concert, there were only five

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[172] *Armstrong*, 517 U.S. at 469.

[173] *See* McAdams, *supra* note 109, at 626–34.

[174] As stated previously, this is only an example of what may possibly happen. The bias addressed here is time period bias. For more information, *see* CFI Team,

White individuals charged and five White individuals who were not charged, a charging rate of fifty percent for White individuals. When compared to the charging rate of Black individuals at ninety percent, there is clearly a disparity. However, the injection of forty White individuals due to the concert caused the charging rate to match that of Black individuals. As such, the data collector would be precluded from questioning the charging rates due to the implicit stereotype of Black individuals being linked to drug distribution and use.[175] They would conclude that the ninety percent charging rate of Black individuals would be expected since it would reflect this implicit stereotype.[176] In contrast, the data collector's assumption that they do not interpret data in a racist manner due to the notion of colorblindness may not take into account that the ninety percent charging rate of White individuals is also not reflective of fair prosecutorial charging.[177] This is because they assume that since the data shows an equal charging rate between the two races, it is reflective of society's values that individuals of different races are treated the same.[178] As a result, they do not delve further into the context from which the data is derived.

Likewise, the data presented can also be interpreted in an implicitly biased way that would dissuade a court from seeing the correlation needed for providing "some evidence" of a discriminatory effect. Specifically, courts may be biases in how they interpret whether two suspects of different groups are "similarly situated." For example, say an individual prosecutor's charging rates for a drug charge facially show a disparity between two racial groups to which the two suspects belong. Black individuals are being charged ninety percent of the time, compared to White individuals being charged seventy-five percent of the time. It is not clear whether a fifteen percent difference between

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Time Period Bias, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/career-map/sell-side/capital-markets/time-period-bias/ [https://perma.cc/HSV8-WSY8] (last visited Mar. 12, 2025).

175 *See* Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 446 (2005).

176 *See id.*

177 *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 115 (6th ed. 2022) ("Whites explain the product of racialized life . . . as nonracial outcomes and rely on . . . color blindness to produce such accounts.").

178 *Id.* at 82 (discussing how colorblind ideology is used to mask racialized society).

the charging rates is sufficient to constitute "some evidence." However, a court interpreting this information may reason that the disparity can be attributed to non-racial considerations and not infer a discriminatory effect. They would then conclude that the two groups are not "similarly situated" due to each group having differing circumstances, other than race, which resulted in the charging disparity. If we were to refer to the implicit or explicit biases of Black individuals being linked to drug use, I would argue that this race-neutral interpretation is merely a mask for the court's negative implicit and explicit biases against Black individuals.[179] What the court may fail to realize is that these non-racial considerations of drug use and conditions that result thereafter are merely a proxy for a more insidious bias against Black individuals.[180] As a result, in the context of examining whether Black individuals are similarly situated to White individuals, the court may reason that the two groups are not similarly situated since one group has differing circumstances that may not be attributed to race. This examination would also be bolstered by society's presumption that the legal system is colorblind, and as a result, decisions that may be implicitly derived because of race are attributed to non-racial considerations.[181]

In sum, satisfying the first prong of the *Armstrong* test requires a tremendous feat on the part of the claimant. Coupled with implicit biases, this tremendous feat would be nearly impossible to overcome. Even in the instance when the claimant does satisfy the first prong, another barrier is erected through the second prong of discriminatory intent.

2. Discriminatory Intent

The second prong of the test, establishing a discriminatory intent, is also problematic when applied to implicit biases. In particular, providing evidence that the prosecutor "intentionally" made the charging decision on the basis of an arbitrary classification is very difficult. If we were to take into account that implicit biases cannot be introspectively identified by the prosecutor, it would be very difficult for anyone, including a selective prosecution claimant, to also detect that the prosecutor

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179 *See* Steen et al., *supra* note 175, at 446.

180 *See* BONILLA-SILVA, *supra* note 177, at 63.

181 *See generally* Gotanda, *supra* note 1 (examining the relationship between colorblind constitutionalism and society's perception of the legal system).

was influenced by implicit biases at the time of the charging decision. In the instance when the prosecutor was to charge an individual because they were Black, compared to not charging a White counterpart due to implicit stereotypes and attitudes, how might a possible claimant access this information? How could claimants seek to obtain evidence that cannot be introspectively identified by the perpetrator themself? Unless there is explicit evidence that the prosecutor made the charging decision based on race, the claimant is left with no resources to satisfy this prong of the test.[182] This is also further exacerbated by the court's unwillingness to pry into the prosecutor's decision making for fear of revealing crucial strategies employed.[183] In addition, even if the courts allowed for more rigorous discovery upon exploring the prosecutor's decision making, this may be unsuccessful since an individual's implicit biases often contrast with their explicit and detectable biases.[184] A prosecutor may vigorously defend themself on the basis that they did not have explicit discriminatory intent while implicitly having such intent.[185] For this reason, deriving the necessary evidence of intent from something that is difficult to introspectively observe and sometimes contradictory would be futile for a claimant.

The trajectory of courts when addressing discriminatory intent in race discrimination cases reflects a desire to pinpoint a specific moment that showcases the required intent, a "smoking gun" that explicitly discloses that race was a consideration at the moment the perpetrator made the discriminatory decision.[186] This desire can also be illustrated in other fields of law through the lens of implicit biases. In employment discrimination cases, for example, the alleged victims often are unable to provide evidence of a discriminatory intent due to employers masking their decision

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[182] Poulin, *supra* note 111, at 1111 (stating that evidence of discriminatory conduct or motive is difficult to obtain due to legal actors being too discrete to express their bias).

[183] United States v. Armstrong, 517 U.S. 456, 468 (1996) ("If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy.").

[184] Greenwald & Krieger, *supra* note 9, at 949.

[185] *Id.*

[186] *See* Jolls & Sunstein, *supra* note 75, at 976 (stating anti-discrimination laws have often had the problem of obtaining the "smoking gun" of proof to establish the requisite bias).

making in race-neutral ways.[187] As a result, the claimants are unable to obtain the "smoking gun" necessary to win.[188] Consequently, in the context of charging, we may deduce that if courts are reluctant to infer intent without explicit evidence, then the barrier that implicit biases create for the second prong would be fatal to the claim of selective prosecution based on race.

Thus, the theoretical remedy that the *Armstrong* doctrine creates is practically unattainable when adjusting its applicability through the lens of implicit biases. What is required by a possible claimant to satisfy the legal test requires tremendous feats, and most of the proof they must provide is undetectable in the eyes of the judiciary. As a result, a defendant who was selectively charged is left with no remedy.

VI. REMEDIES

My narrow objective, through the analysis of possible remedies, is to address a singular component in the overall criminal justice system that is potent in producing disproportionate outcomes for racially subordinated groups. Oftentimes, when legal actors attempt to determine why there is disparate impact on racial or ethnic groups, they are misguided in the search of a concrete piece of evidence or "thing."[189] What they fail to realize, however, is that this concrete "thing" lies buried beneath a systemic racial structure, where unraveling one layer only reveals another. No one particular "thing" is responsible for these outcomes, and the mitigation of one problem is not sufficient to address its entirety. Thus, the eradication of implicit biases or the amelioration of their effects in prosecutorial charging plays only a singular role in unraveling this unjust system. The remedies I propose below only seek to offer possible alternatives to lower the barrier to pursuing selective prosecution claims. This in turn will hopefully lead to a change in how we view the current legal system and its shortcomings.

The legal landscape of prosecutorial charging as it exists reflects a demonstrably hostile attitude toward legal remedies for claims

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[187] For examples of employment discrimination cases with evidentiary issues of discriminatory intent, *see* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[188] Jolls & Sunstein, *supra* note 75, at 976.

[189] *Id.* at 978–79.

of selective prosecution based on unconstitutional grounds.[190] Even if we were to tear down the judicial stronghold upon which prosecutorial discretion rests, we then must face the undetectable evils of implicit biases. In theory, if we were to pressure the judiciary to take into consideration implicit biases in their interpretation of the law, the efforts may be unsuccessful as shown previously in the judiciary's reluctance to incorporate social sciences in its reasoning.[191] Consequently, proposing possible remedies to ameliorate the effects of implicit biases within the prosecutorial charging process creates an impasse. The proposals put forth will attempt to work within the confines of the current legal system. My hope is that by utilizing the checks and balances from other entities, we may be more successful in incorporating social sciences into policies and amendments, and the judiciary may be more inclined to follow suit. In this Part, I address the implementation of remedies first in isolation at the micro-level (prosecutor), followed by the macro-level (outside sources).

A. Prosecutor's Implicit Biases and Remedies

The first level to address is the prosecutor's implicit biases at the individual level. The question is whether there is anything that can be done to deter implicit biases from affecting prosecutors' decision making. The research on debiasing individuals is vast and may be of some use. For example, it has been shown that if an individual were to be exposed to counterstereotypes before decision making, the effects of the negative stereotypes may be counterbalanced.[192] Research has also shown that if an individual were to have more social contact with the social group from which negative implicit attitudes derive, then their effect may also be

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[190] *See* McAdams, *supra* note 109, at 615–16 (stating that there is one published case dismissing a criminal charge based on racially selective prosecution).

[191] The courts' general treatment of incorporating science into their opinions follows the *Daubert* standard. This standard pertains to the admissibility of expert witness testimony. For how the *Daubert* standard is analyzed, *see* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[192] *See* Levinson, *supra* note 13, 369–70 (explaining how using a "debiasing agent" may moderate biases and stereotypes). *See also* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCH. 642, 645 (2004) (indicating that exposure to women in leadership can result in a reduction of implicit biases against women).

deterred.[193] Likewise, there may be steps that the prosecutor can take in furtherance of reducing implicit biases, such as questioning their own objectivity and increasing their motivation not to be implicitly biased.[194] Based on this research, legal offices in some parts of the United States have implemented debiasing programs in their training programs.[195]

Although these studies and initiatives may propose short-term remedies to the dangers of implicit biases, the longevity of their effects is not clear, and their practicality in a non-experimental setting such as a prosecutor's office poses challenges.[196] This is especially apparent if we consider that prosecutors maintain themselves in a systemic "triage" where, although wide discretion is afforded, certain nuances in their environment may indirectly lead them to make irrational decisions even if they had the interests of fair justice in mind.[197] These nuances would counterbalance the prosecutor's attempt to debias themself.[198] In addition, how are we able to detect when a prosecutor is no longer implicitly biased or that the effects of biases are limited in prosecutorial decision making? Many tests have been formulated by social psychologists, such as the IAT, in an attempt to record an individual's implicit biases; however, their efficacy has not been proven in the realm of prosecutorial charging discretion.[199]

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193 This was shown in the context of respondents self-reporting the number of gay friends that they had in correlation to their negative implicit attitudes toward gay people. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCH. 268, 270 (2006).

194 *See* Kang et al., *supra* note 3, at 1172–77.

195 The National Center for State Courts ("NCSC") organized a pilot project for the states California, Minnesota, and North Dakota to educate legal officials about implicit biases. *See* PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II & JENNIFER K. ELEK, NAT'L CTR. FOR STATE CTS., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012).

196 Levinson, *supra* note 13, at 371 ("In fact, overcoming implicit biases such as those demonstrated by the IAT appears to be quite difficult, given that implicit biases are particularly resistant to conscious efforts.").

197 Similarly to the Public Defender Triage, prosecutors also face an environment that promotes irrational decision making. *See generally* Richardson & Goff, *supra* note 83, at 2628.

198 *Contra id.* at 2641.

199 Kang et al., *supra* note 3, at 1141 ("Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains."). Smith & Levinson, *supra* note 3, at 796 ("But scholars have yet to conduct an in-depth examination of how implicit bias might affect one of the most noteworthy parts of the criminal justice system—prosecutorial discretion—and no empirical projects focused on implicit bias have gained access to prosecutors as study

Considering this, it is clear that debiasing the prosecutor alone may not produce the best results. As researchers have argued, experiences derived when the individual was at the early stages of life can be pervasive in developing implicit biases of persons or things.[200] These experiences and memories can be tailored to effectuate negative stereotypes and attitudes through actors that are relevant in that individual's life, such as parents, peers, and media.[201] This concept was also shown in legal scholarship via Jerry Kang's article, *Trojan Horses of Race*, where he argues that the Federal Communications Commission ("FCC") media policies indirectly create implicit biases in those who process the material.[202] Also, what has been proposed is that these biases stem from factors such as one's desire to maintain social order. This is known as the "system justification theory," where individuals act automatically to maintain the structure of social order.[203] The research conducted may explain where prosecutors derive their implicit biases from, whether it be growing up in a racially biased environment, consuming media that indirectly portrays racist ideals, or implicitly wanting to maintain the very environment that creates these biases. However, because we cannot travel back in time to the points when the implicit biases manifested in the prosecutor and eliminate them, the efforts to effectively debias are impossible. Every prosecutor has different experiences or memories that their implicit biases may stem from, and the oversight necessary to effectively counter them would, at the very least, offend the wide discretion judicially imputed to them.

Likewise, the environment in which prosecutors place themselves undermines the efficacy of any debiasing efforts on the individual. If implicit biases are such that they create undesirable decision making and outcomes, then that in itself may be a deterrent to having implicit biases or developing them. However, the present prosecutorial environment creates incentives for

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participants.").

[200] *See* Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCH. SCI. 79, 79–81 (2004).

[201] Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 203 (2005) ("Stereotypes often arise developmentally, and at an early age. People learn stereotypes not only from direct contact with the members of the categorized group, but also from parents, peer groups, and the popular media.").

[202] *See* Kang, *supra* note 158, at 1490.

[203] *See* John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCH. 881, 912 (2004).

prosecutors to utilize or develop implicit biases to their advantage. That is, individuals use implicit biases to function efficiently in their everyday lives, and the prosecutor is no different in regard to charging discretion.[204] If we were to consider that prosecutors may factor in the rate of conviction, then the use of implicit stereotypes may create mental shortcuts in analyzing the strength of the evidence.

To illustrate, perhaps a prosecutor charges a Black person based on their initial implicit stereotype of them being associated with danger and crime, and then the criminal defendant receives an unfavorable outcome such as conviction. The prosecutor implicitly realizes that this mental shortcut is useful and continues to utilize it without being able to introspectively identify its negative effects. By using this past experience or memory, the prosecutor may use this implicit bias to create mental shortcuts in evaluating future cases that also have Black defendants due to the positive result that has occurred thus far. In other words, bias is rewarded by the system. Instead of attempting to analyze the evidence in a race-conscious way that would require more time and resources, the prosecutor is incentivized to use negative stereotypes such as dangerousness and crime as a shortcut. As a result, members of a racially subordinated group would be more likely to be charged unfairly due to the incentives created by the utilization of implicit biases in prosecutorial decision making. In the context of the prosecutor attempting to debias themself, this mental shortcut creates a disincentive to do so. The reason for this is that the environment in which the prosecutor is situated promotes the use of implicit biases.

Although efforts to debias an individual prosecutor may seem like a possible solution, it is not clear how the effects of these efforts would manifest in a practical manner, at least in the environment that prosecutors are in now. For this reason, in tandem with possible debiasing strategies, we must also focus on other remedies.

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[204] This effect is similar to the utilization of heuristics in the field of cognitive psychology and behavioral economics. Heuristics are mental shortcuts that often lead to systematic errors, and similar to implicit biases, have an automatic component. *See* Jolls & Sunstein, *supra* note 75, at 973–75 (providing more explanation of and comparison between heuristics and implicit biases).

B. External Sources

In this section, I evaluate external sources affecting prosecutorial charging. These sources consist of the legislature and prosecutors' offices. Although all of these external sources may also be ridden with implicit biases, their environments may be more malleable compared to the environments of the judiciary and individual prosecutor.

1. Legislation

Legislatures are able to create statutes to structure decisions for specific charges. In theory, if legislatures were aware of how implicit biases can have a disproportionate impact on certain minority groups, then they could create statutes that implement safeguards against this. In addition, scholars have discussed the possibility of legislation restricting prosecutorial discretion.[205] However, it has been shown that when the legislature attempts to involve itself in prosecutorial discretion, the results are often undesirable.[206] That is, variables that affect the allocation of prosecutorial resources are too nuanced and "fluid to be identified and defined in legislation."[207] Instances of legislation regarding the federal sentencing guidelines reflect this stance.[208] Thus, although there should be continued exploration of this area, at the present the legislature may not be the most effective source of developing remedies for unfair charging practices and implicit biases.

2. Chief Prosecutors, Policies, and Office Culture

I suggest that by having the Chief Prosecutor alter the environment, through the implementation of charging policies, may yield the best results. This particular external source is potent, and unlike its judicial counterpart, its actions could be seen as more fluid and nimbler, subject to change according to the local

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[205] For example, Professor Poulin has suggested that to combat the lack of data collection, the legislature should require the government to assemble such data. *See* Poulin, *supra* note 111, at 1121–22.

[206] *See* Bibas, *supra* note 116, at 962 ("Unfortunately, these external, institutional controls have proven to be ineffective. Legislation is too crude, and ex post review of individual cases is too narrow, to attack the deeper, systemic problems with patterns of prosecutorial discretion.").

[207] Poulin, *supra* note 111, at 1080.

[208] *Id.*

political and social dynamics it is situated in. As a result, the introduction of the concepts of social psychology at this source may see relative success. The reason for this fluidity can be attributed to Chief Prosecutors being subject to external pressures, such as voters and public perception.[209]

Thus, if community perception changes to disfavor implicit biases and selective prosecution, then external pressures may force the Chief Prosecutor to implement changes and policies accordingly for reelection. Furthermore, unlike their legislative counterparts, Chief Prosecutors and prosecutors' offices are well-equipped to handle the allocation of resources to combat issues that arise because they know first-hand how charging works as a practical matter and have an investment in sorting out potential issues. These entities are the ones employing and training the prosecutors to make these decisions and in turn might receive the backlash if problems arise. Therefore, proposing possible remedies against selective charging and implicit biases in this realm may produce better results relative to other sources. If we, as a society, attempt to move away from a "colorblind" society into a race-conscious one, then the fluidity of this source could also parallel this movement. That is why my proposal seeks to tap into the potency of this particular area and explicate exactly what a Chief Prosecutor or prosecutor's office could do to create fair charging practices while also taking into account the effects of implicit biases.

The first step must be implementing uniform and consistent data collection among the prosecutor's office at the charging level, whether it be at a federal or state level. This would include, but not be limited to, data that is sufficient to provide the evidence required to compel discovery pursuant to the *Armstrong* test. Notwithstanding implicit biases, prosecutors' offices stray away from allocating resources to collecting data on charging decisions.[210] Their reasons may vary, such as not realizing the importance of charging in prosecutorial discretion or wanting to allocate resources elsewhere.[211] What they fail to realize is that the lack of data or analysis of these decisions stifles legitimate political and scholarly discussions in this particular area. The lack

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[209] Bibas, *supra* note 116, at 983–84. However, as further stated by Professor Bibas, this political check often produces inconsistent results.

[210] This is to comport with the reasoning in *Armstrong*. *See* United States v. Armstrong, 517 U.S. 456 (1996).

[211] *Id.* at 464.

of information available not only deters successful selective prosecution claims but also deters third parties who want to delve deeper and propose change. Due to the inconsistent collection of data throughout the United States, we do not have the resources to address certain vulnerabilities of the charging process, such as how the selection of harsher charges would affect the trajectory of a criminal defendant, or if the effects of not charging for specific crimes would affect the community involved. Many of the questions are often left unanswered due to there being little foundation to stem the proposals from. Thus, data collection may assist a criminal defendant in providing the "some evidence" necessary to compel discovery in relation to a selective prosecution claim and may spark movement in other areas such as politics and academia.

The shortcomings of data collection and its limited application due to implicit biases should also be noted. I suggest that, in tandem with data collection, the prosecutors' offices also implement a reviewing process for charging decisions that would include a third-party expert and a community-based board. The themes of this concept have been discussed in legal academia and other areas such as Critical Race Theory.[212] Scholars have already proposed remedies that involve the review of charging decisions at the internal level.[213] Likewise, although not uniformly implemented throughout the United States, a vast number of government entities within the criminal justice system have forms of review, whether through legal actors or individuals from the community.[214] What I seek is to build upon these concepts to

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[212] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990); MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ W. CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (for scholarship on Critical Race Theory addressing similar themes).

[213] This was proposed by Professor Bibas, who stated that citizens should advocate within prosecutors' offices and consult with prosecutors regarding charging decisions. *See* Bibas, *supra* note 116, at 990.

[214] The common theme of prosecutorial review boards (or related entities) is that their members consist of prominent figures within the legal system rather than individuals from the community who are directly affected. For example, in the state of New York, the New York State Commission of Prosecutorial Conduct consists of members appointed by the Governor, Majority and Minority Leaders of the State Legislature, and the Chief Judge. All of its members are prominent figures within the legal community such as law professors, judges, and attorneys. Although this membership consists of highly qualified individuals in the legal realm, I argue that the lack of community involvement may hinder its

ensure that their purpose and implementation can be more clearly defined in the context of implicit biases. First, the makeup of the community board would demographically and racially reflect the county that the prosecutor's office has jurisdiction in. If a county is predominantly Black, then the racial makeup of the community board would also reflect this. Prosecution being a predominantly White profession must be countered with a review board that is representative of the community in regards to charging.[215] Members of the community board should be selected by those directly affected by the prosecutor's office's charging practices. These boards may derive their members from groups such as community leaders, advocates, or business owners.

The reason for this selection is that implicit biases affect the individual regardless of their race.[216] So, if the purpose of instilling a Black community leader is due to the assumption that they do not have implicit biases against their own racial group, this may not produce the expected results because studies have shown that Black individuals also harbor the same negative implicit biases against their own racial group.[217] This leads to my recommendation that the members of the board have a stake in the outcome of charging decisions in order to counteract the pervasiveness of their implicit biases and ensure fair charging practices. If a member, such as a community leader, seeks to promote a safe environment for their community but simultaneously ensures that their population is not charged unfairly, it creates an incentive for them to intervene in a non-

effectiveness. *See New York State Commission on Prosecutorial Conduct*, N.Y. STATE, https://www.ny.gov/new-york-state-commission-prosecutorial-conduct [https://perma.cc/P4HC-M3SZ] (last visited Mar. 18, 2025). In contrast, there has been a push for police misconduct review boards consisting of community members in cities such as Albany and New York City. I propose building similar structures as shown in community police review boards, but for prosecutors. *See Community Police Review Board*, ALBANY N.Y., https://www.albanyny.gov/865/Community-Police-Review-Board [https://perma.cc/9SYT-LPZT] (last visited Mar. 18, 2025); *see also About the CCRB*, NYC CIVILIAN COMPLAINT REV. BD., https://www.nyc.gov/site/ccrb/about/about.page [https://perma.cc/V8QE-QLPV] (last visited Mar. 18, 2025).

[215] In 2014, the Reflective Democracy Campaign compiled data from 46 states and found that ninety-five percent of elected prosecutor positions were held by White Americans. *Justice for All: Who Prosecutes in America?*, REFLECTIVE DEMOCRACY CAMPAIGN, https://wholeads.us/research/justice-for-all-report-elected-prosecutors/ [https://perma.cc/8UTL-E2Z2] (last visited Mar. 18, 2025).

[216] Correll et al., *supra* note 51, at 1324–28 (revealing that African African and White individuals had equivalent levels of bias in a community sample).

[217] *Id.*

implicitly biased way. This is compared to the prosecutor who, due to their relative isolation, does not take into consideration the community impact of their implicitly biased charging decisions. The prosecutor has less interest in ensuring a fair charging process and debiasing themself due to having no stake in the possibly resulting disproportionate outcomes, or, as mentioned previously, is utilizing these biases for their benefit. Additionally, these community boards should also have the ability to work with third-party experts. These experts may include impartial senior prosecutors, statisticians, or criminologists. Since the knowledge of the prosecutorial process may differ from each community member, it may be beneficial for a third party who is knowledgeable to guide and help them act in an informed manner.[218]

Second, the boundaries and limitations of the community board should be clearly defined. The boundaries can be defined by what problems it is seeking to resolve, which is the lack of evidence available to succeed in obtaining judicial remedies. These issues can be mitigated in part by data collection in isolation. However, as proclaimed previously, implicit bias may skew the collection and interpretation of the data. This would, as a consequence, mask the data necessary for potential claimants. By adding a community-based board, such a board may be able to provide input to be used as evidence in potential claims. That is, if a particular charging decision was based on race, the community board may, with the assistance of the third-party experts, dispute this decision. These disputes may entail bringing forth discrepancies in the data, reviewing whether the prosecutor had insidious reasons to charge, or providing other evidence that would support a selective prosecution claim. A fair reaction to these proposals would be that if we were to add a community-based board, then the prosecutorial discretion would essentially be eradicated, and prosecutors would not be able to make any decision in regard to charging. The prosecutors would not be able to function efficiently due to outside influences watching and critiquing their every decision. These concepts would not comport with the judicial interpretation of the prosecutor's role in charging.[219] My response to this is to limit the

[218] As stated previously, the prosecutorial process has many variables to take into consideration, which results in the judiciary's reluctance to review their decisions. However, if we were to implement a review by individuals that are more directly affected by its consequences, it may produce more fruitful results.

[219] This proposal does offend the discretion given in charging shown in

way in which the board input or dispute given is analyzed before a court. For example, consider a case where a prosecutor charges an individual, and the community disputes this on the basis of selective charging based on race. Should the prosecutor be forced to withdraw or change the charge in accordance with the community board's input? I suggest that the community-based board should only be a "soft deterrence" to the prosecutor's charging decisions, and the board would not have the ability to completely overturn a charging decision.[220] A prosecutor may take the board's input into consideration and then review the evidence provided; however, they would also have the discretion to ignore the input.

The counterargument to this would be that it makes the community-based boards essentially powerless, especially with a prosecutor who does not take advice from them. That is why we have a second "soft deterrence" in place at the judicial level to combat this. In particular, the board dispute or input may be used as "some evidence" to compel discovery or the evidence needed to succeed in a potential selective prosecution claim. A potential claimant may be able to use disagreement or discrepancy as evidence to further bolster their case. Likewise, in order to comport with the judicial views of interference at the charging level, this evidence would not be determinative of selective prosecution but may be factored into the court's decision. The very fact that a dispute occurred may lead the legal actors involved to further interrogate the issue. If a pattern of these disputes arises and is observed by the courts, it may lead the judiciary, through opinions, to produce accessible remedies for possible claimants of unfair charging. At the very least, allowing the board disputes or input would attack the very notion that prosecutorial discretion is presumed to be fair.[221]

Also, having a community board actively involved in the prosecutorial charging process may indirectly result in ameliorating implicit biases. If prosecutors have more opportunities to interact with individuals of the community

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Armstrong and related cases. My goal is to gradually implement a review that still gives deference to the prosecutor but with certain caveats. These caveats, however, are aimed to conform with the current judicial interpretation of charging.

[220] This language of soft deterrence parallels Professor Poulin's use of "soft enforcement." *See* Poulin, *supra* note 111, at 1090–92 (discussing the term "soft enforcement").

[221] United States v. Armstrong, 517 U.S. 456, 464–65 (1996).

affected by the charging decisions, it may lessen the effects of the negative implicit biases.[222] It may also deter prosecutors from utilizing implicit biases as mental shortcuts in deciding whether to charge. More specifically, the potential of disputes being brought forth may create disincentives to use the mental shortcuts. If there is a possibility that the community-based board's input would be submitted as evidence in a potential claim, the prosecutor may implicitly cease to use the mental shortcuts produced by implicit biases. Therefore, as time progresses, their self-interest may build resistance against implicit biases in their decision making.

VII. CONCLUSION

The concept of implicit biases offers a new way by which we can analyze legal issues. As research into implicit biases continues to progress, the legal system must follow suit. The current system, however, seems resistant to implementing the necessary changes. Implementing changes in parts of the prosecutorial system that may be more malleable may prompt other legal actors to also take initiative. Although prosecutorial charging is but a singular component in the scheme of the criminal justice system, it plays a pivotal role in the system's racial outcomes. Addressing this singular component and offering possible solutions will hopefully propel discussion in other areas of prosecutorial discretion and the movement for racial justice. This Note only seeks to further build upon this movement in the hopes that eventually the society, culture, and legal system that instill these implicit biases will change to disfavor them.

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[222] *See* Dasgupta & Asgari, *supra* note 192, at 645. *See also* Dasgupta & Rivera, *supra* note 193, at 270.