RACIALIZING THREE STRIKES

Justin D. Levinson,* G. Ben Cohen**& Koichi Hioki***

"Three Strikes" laws sit at the fulcrum of racial disparities and mass incarceration. Despite clarity across decades that such laws have served to disproportionately punish Black Americans, legislatures have blessed them, courts permit them, prosecutors charge them, and juries convict based on them. Although it has long been clear that these laws have played a key role in the racialization of America's criminal justice system, less clear are the mechanisms that drive and permit the embrace of this racialization. In this Article, we test empirically in a national study the hypothesis that Three Strikes laws exist because of race, are retained because of race, and are implemented because of race. Our national study finds, among other things, that Three Strikes laws indeed leverage automatic associations of repeat criminality with Black and Latino people, while inviting explicit biases to operate. The Article examines the racialization of Three Strikes laws, contextualizes the problem within modern implicit bias scholarship and decision theory, and measures the ways that implicit and explicit racial bias fuel the use and operation of these laws. The Article concludes by considering whether, given the study's findings, repeat-offender laws should be retained.

TABLE OF CONTENTS

INTRODUCTION 920

I. THE RACIALIZATION OF THREE STRIKES LAWS: ORIGINS, RETENTION, AND MODERN-DAY USE 926
A. Three Strikes Sentencing Laws Exist Because of Race 927
1. The Origins of Recidivist Sentencing Laws 928
2. Recidivist Sentencing Laws Post-Civil Rights Era 931
B. Three Strikes Sentencing Laws Have Been Retained Despite Their Racial Origins 932
1. *Rummel v. Estelle* and *Solem v. Helm* 933

---

* Cades Foundation Professor of Law & Director, Culture and Jury Project, University of Hawai'i at Mānoa, William S. Richardson School of Law. The authors would like to thank Dean Camille Nelson and Dean Emily Janoski-Haehlen for providing summer research support and Alexys Delgado for outstanding research assistance.

** Associate Professor at the University of Akron School of Law.

*** Statistician. Researcher, Kyoto University, Graduate School of Management. Formerly Adjunct Associate Professor, Kyoto University, Graduate School of Management and Assistant Professor, Kobe University School of Business Administration.

2. *Harmelin v. Michigan*....934
3. *Ewing v. California* and *Lockyer v. Andrade*....935
C. Three Strikes Laws Have Been Implemented Despite Their Penological Shortcomings....937
1. Lack of Penological Purpose....937
2. Prosecutors Implement Three Strikes Laws Without Ever Acknowledging Race....939
D. The Racial Effect of Three Strikes Laws....940
1. California....942
2. Florida....944
3. Louisiana....945
4. Georgia....946
5. Federal Law....947

II. SETTING THE STAGE: THREE STRIKES RULES AND THE SCIENCE OF IMPLICIT BIAS....948
A. Implicit Bias and Criminal Justice....951
B. Stereotypes of Black and Latino Repeat Criminality....955
1. Black Men and Stereotypes of Criminality....956
2. Latino Men and Stereotypes of Criminality....958
C. The Role of Anchoring Effect and Race—A SuperBias?....961
D. A "SuperBias" Anchoring Effect?....964

III. THE EMPIRICAL STUDY....965
A. Methodology....965
1. Participants....965
2. Materials....966
B. Hypotheses....970
1. Implicit Bias and Three Strikes....970
2. Race, Sentencing Philosophy, Recidivism Predictions, and Dangerousness....971
3. Race-Based Priming Effects....971
4. Three Strikes and Anchoring Effects....971
C. Results....971
1. Implicit Bias and Three Strikes....971
2. Race, Sentencing Philosophy, and Recidivism Predictions....972
3. Race-Priming Effects....973
4. Three Strikes and Anchoring Effect....973
5. Additional Findings....974
D. Discussion....974

CONCLUSION....977

INTRODUCTION

"Three Strikes" laws have long been the subject of intense criticism both for being inconsistent with retributive norms and for disproportionately targeting

and incarcerating Black Americans.[1] Yet despite these critiques, these laws continue to drive lengthy incarcerations across nearly every U.S. jurisdiction.[2] Such a stark contrast between criminal justice realities and intense scholarly critique[3] raises the question of how such laws have continued to be a defining feature of our criminal legal system when they harbor a questionable penological purpose[4] and result in

1. *See, e.g.*, JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 15 (2017); MICHAEL D. WIATROWSKI, *"Three Strikes and You're Out": Vengeance as Public Policy*, *in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 117, 130 (David Shichor & Dale K. Sechrest eds., 1996); David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORN. J.L. & PUB. POL'Y 557, 588 (2000); Paul H. Robinson & Jeffrey Seaman, *'Mass Incarceration' Myths and Facts: Aiming Reform at the Real Problems*, 50 AM. J. CRIM. L. 1, 5, 11 (2024); James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 27, 32–33 (2012); NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1, 70 (Jeremy Travis, Bruce Western & Steve Redburn, eds., 2014); James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration [https://perma.cc/R7J8-FQM6]; *see also Three Strikes Basics*, STAN. L. SCH., https://law.stanford.edu/THREE-STRIKES-PROJECT/THREE-STRIKES-BASICS/ [https://perma.cc/4QSC-UE5S] (noting that forty-five percent of people who are serving life sentences under California's Three Strikes law are Black); Daniel Loehr, *The Eugenic History of Habitual Offender Laws*, 68 HOW. L.J. 233, 250–55 (2025) (observing that habitual-offender laws have a history associated with eugenic efforts).

2. *See, e.g.*, Brian Chad Starks & Alana Van Gundy, *Race and Three Strikes Law*, *in* COLOR BEHIND BARS: RACISM IN THE U.S. PRISON SYSTEM 412, 416–22 (Scott W. Bowman ed., 2014); JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION, NAT'L INST. JUST. 10–11 (1997), https://nij.ojp.gov/library/publications/three-strikes-and-youre-out-review-state-legislation-research-brief [https://perma.cc/G22A-QEZ8] (providing that in the 1990s, states and the federal government began enacting Three Strikes laws to punish repeat offenders, where almost half of the states enacted these laws in just a two-year period); *see generally* JENNIFER E. WALSH, THREE STRIKES LAWS 107 (2007) (providing a comprehensive overview of the Three Strikes movement in the United States).

3. *See, e.g.*, Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J.F. 75, 93 (2022) (noting widespread academic recognition that "habitual-offender laws disproportionately target people of color and 'undoubtedly contributed to the expansion of the Black prison population'"); *Three Strikes Basics*, *supra* note 1 (noting that materials and memorandums supporting Three Strikes laws justify its purpose to "keep murderers, rapists, and child molesters behind bars, where they belong," yet majority of the people who are punished under Three Strikes laws are serving time for nonviolent crimes).

4. *See* Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 366–69 (2014) (questioning whether there is a rational doctrinal basis for the recidivist premium). Professor Bagaric observes that the retributive rational for recidivist premium is, "reduced to its core," an argument that "recidivists are more blameworthy than first-time offenders" because "they are of bad character." *Id.* at 381–82; *see* Apoorva Joshi, *Explainer: Three Strikes Laws and Their Effects*, INTERROGATING JUST. (July 23, 2021), https://interrogatingjustice.org/mandatory-minimums/three-strikes-laws-and-effects/# [https://perma.cc/JD76-

race-aligned implementation.[5] In this Article, we test empirically the notion that Three Strikes laws exist because of race, are retained because of race, and are implemented because of race.[6] We pursue this hypothesis by relying on implicit- and explicit-bias-based methodologies in conducting a national study. Our study finds that Three Strikes laws indeed implicate automatic associations of repeat criminality with Black and Latino people, while inviting explicit biases. Because Three Strikes laws anchor criminal justice sentencing and drive coercive plea regimes,[7] their association with explicit and implicit racial bias works to perpetuate deep-rooted racial disparities in criminal sentencing even where a third-strike sentence is not imposed.

In states from California to Florida, and many in between, Black Americans comprise between 50% and 80% of the individuals sentenced under Three Strikes

---

AJ6C] (questioning the positive effect of Three Strikes laws, and raising the issue that the purpose of enacting these harsh punishments was to reduce incarceration rates and deter crime, yet research shows that these laws have increased incarceration rates).

5. Lockyer v. Andrade, 538 U.S. 63, 80–82 (2003) (Souter, J., dissenting) (arguing that "[a]lthough the State alludes in passing to retribution or deterrence . . . its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime; the underlying theory is the need to protect the public from a danger demonstrated by the prior record of violent and serious crime. Whether or not one accepts the State's choice of penalogical [sic] policy as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense." (citation omitted)). *But see* Ewing v. California, 538 U.S. 11, 26–27 (2003) (explaining that "[w]e have long viewed both incapacitation and deterrence as rationales for recidivism statutes").

6. In doing so, we build on scholarship connecting implicit bias research to systemic racism. *See, e.g.*, Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 411–12 (2017) (noting that racial biases results in excessive punishment, and that Black individuals specifically face harsher penalties and are disproportionately punished because of racial biases); *see* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith, eds. 2012); *10 Reasons to Oppose "3 Strikes, You're Out*," ACLU (Mar. 17, 2002), https://www.aclu.org/documents/10-reasons-oppose-3-strikes-youre-out [https://perma.cc/M5G4-6TM5] (providing that Three Strikes laws disproportionately affects minority offenders, especially Black men, as Black individuals are overrepresented in criminal justice areas, and many of the Three Strikes Laws qualify minor offenses as "strikes").

7. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 38 (2002) (citing Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 483 (1976)) (describing the use of habitual-offender sentences as a driver for plea bargaining in the office of then Orleans Parish District Attorney Harry Connick, that "the primary justification for plea-bargaining is system maintenance—the necessity of its use if most criminal offenders are to be processed"); *see also* Tina M. Olson, Comment, *Strike One, Ready for More?: The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law*, 36 CAL. W. L. REV. 545, 545–46 (2000) (sharing the harsh reality of individuals faced with the punishment of Three Strikes laws through the story of a 21-year-old who refused a reasonable plea deal and decided to serve a long sentence because of the harsh consequences associated with getting a third strike on his record).

laws even though they make up under 15% of the American population.[8] Reliance on these sentencing enhancements increases racialized punishment, untethered to an appropriate purpose: a life sentence for a petty theft,[9] a small amount of drugs,[10] or fleeing in a vehicle.[11] Michelle Alexander's book *The New Jim Crow* detailed how President Clinton endorsed the idea of a "three strikes and you're out" law in 1994 as part of a "new racial caste system" as "politicians of every stripe competed with each other to win the votes of poor and working-class whites, whose economic status was precarious at best, and who felt threatened by racial reforms."[12] Daniel Harawa has argued that Three Strikes laws exploit implicit attitudes concerning the "incorrigibility of Black people."[13] Ultimately, the laws have become a significant

---

8. *See infra* Section I.D.; *Race and Origin*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI225223 [https://perma.cc/3X7E-G7FW]; Gracie Martinez & Jeffrey S. Passel, *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Jan. 23, 2025), https://www.pewresearch.org/race-and-ethnicity/fact-sheet/facts-about-the-us-black-population/ [https://perma.cc/D6TX-ZM7B] (providing that people who self-identified as Black in 2023 made up 14.4% of the population in the United States).

9. State v. Bryant, 300 So.3d 392, 393 (La. 2020) (Johnson, C.J., dissenting) (providing that the defendant "was sentenced, as a habitual offender, to life in prison for unsuccessfully attempting to make off with somebody else's hedge clippers"); *see infra* Subsection I.B.3 (noting case precedent in which individuals received disproportionately severe sentences for the theft of minor items, highlighting cases where sentencing outcomes were completely excessive compared to the nature of the offense); Dan Glaister, *Buried Alive Under California's Law of 'Three Strikes and You're Out,'* THE GUARDIAN (Mar. 4, 2004, at 21:00 ET), https://www.theguardian.com/world/2004/mar/08/usa.danglaister [https://perma.cc/CCX7-TJJS].

10. *See* Russell v. State, 346 So. 3d 435, 437 (Miss. 2022) (providing that the jury convicted the defendant Russell of "possession of marijuana in an amount greater than 30 grams but less than 250 grams. . . . [T]he State presented evidence of Russell's prior felony convictions: two for burglary of a dwelling and one for felon in possession of a firearm. At this point, Russell was again given an opportunity to call witnesses but chose not to do so, nor did he present any other evidence. Based on Russell's prior felony convictions, the circuit court found that Russell was a violent habitual offender and sentenced him to life in prison without eligibility for probation or parole."); *America's Three Strikes Drug Law Handcuffs Judges*, THE THIRD STRIKE, https://www.thirdstrikecampaign.com/powerless [https://perma.cc/TJ4B-CSYA] (last visited Mar. 8, 2025) (examining a broad range of judicial opinions from courts across the country regarding the imposition of life sentences for drug offenses, including analyses of judicial reluctance to enforce such severe penalties, considerations of proportionality, and instances where judges have deferred to congressional mandates despite reservations about the fairness of these sentences).

11. *See* State v. Horton, 886 S.E.2d 509, 511 (W. Va. 2023) (explaining that the petitioners triggering offense resulting in a life recidivist sentence was a 2019 conviction for "fleeing in a vehicle with reckless disregard . . . The petitioner was previously convicted of malicious assault in 1999 and wanton endangerment involving a firearm in 2003.").

12. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 57, 72 (2010) (noting how "proponents of racial hierarchy found they could install a new racial caste system" through use of tools like habitual-offender sentencing laws).

13. Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 704 (2021) ("Every day, courts across the country sentence people to life in prison for minor crimes, as a majority of states have habitual offender or three strikes laws."). Harawa suggests that imposing excessively long sentences, often life in prison, for relatively minor offenses sends

contributor to racialized mass incarceration, capable of imposing the most draconian punishments for the most *de minimis* offenses.[14]

Even as police and prosecutors seek in good faith to reduce racial biases primarily propagated through bias in discretionary domains,[15] Three Strikes laws undermine such efforts by carrying forward historic bias into modern prosecutions. Recidivist sentencing laws have little deterrent effect,[16] impose significant carceral costs,[17] and incarcerate individuals well beyond terms necessary to advance goals of

---

a message that certain individuals are beyond redemption and undeserving of a second chance. *See id.* at 702–03.

14. *See* MELISSA LEE & JESSICA LEVIN, JUSTICE IS NOT A GAME: THE DEVASTATING RACIAL INEQUITY OF WASHINGTON'S THREE STRIKES LAW 7–12 (2024) (arguing that the Three Strikes movement results in disproportionate over-incapacitation by imposing severe penalties on individuals whose offenses do not warrant such extreme measures, and proves that the law's broad application unjustly categorizes certain offenses as strikes, leading to excessively punitive outcomes that fail to align with principles of proportionality and justice); Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE POL. (Mar. 27, 2013), https://www.rollingstone.com/politics/politics-news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-92042/ [https://perma.cc/J4UV-ZJGY] (highlighting a collection of instances where individuals received harsh sentences for the smallest of offenses because of the Three Strikes movement).

15. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxvii (2019) ("[P]rosecutors also hold the key to change. They can protect against convicting the innocent. They can guard against racial bias. They can curtail mass incarceration."); Note, *Welfarist Prosecution*, 135 HARV. L. REV. 2151, 2171 (2022) (providing that the progressive prosecution model requires the attorney to be aware of racial and socioeconomic realities of the criminal justice system); G. Ben Cohen, *The Promise of Progressive Prosecution*, 77 RUTGERS L. REV. 1, 29 (2024) (noting the possibility of reducing racial bias propagated through the role of bias in discretionary decisions); *see generally* KIM TAYLOR-THOMPSON & ANTHONY C. THOMPSON, PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022) (providing methods for reducing racial disparities in criminal legal system).

16. Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1223 (2021) (defining the flaws of recidivist approaches to deterrence, specifically noting that recidivist sentencing is unlikely to have a significant deterrent effect because they fail to meet the necessary conditions for deterrence, such as widespread public awareness of the penalties, a meaningful threat of punishment, and rational decision-making; most offenders, particularly those with extensive criminal histories, are either unaware of the specific legal rules, perceive little risk of apprehension, or act impulsively and under the influence of substances, making it improbable that harsher penalties will influence their future criminal behavior); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 189–91 (2004) (noting that while these laws are intended to make repeat offenders aware that longer sentences are required for deterrence, the alternative is that repeat offenders are not deterred after experiencing that prison was not as bad as they had thought, therefore risking prison time is not an important consideration).

17. Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 103–04 (2019) (citing Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense?: Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 113 n.64 (1998)) (noting need to include crime within prison as part of cost of crime); *see* M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism?: A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 2 (2007).

incapacitation, retribution, or rehabilitation.[18] Why then does the U.S. legal system, from the Supreme Court to the states, tolerate—and even embrace—these laws?

We consider whether the American legal system embraces repeat-offender laws due to a range of contributory psychological mechanisms, both implicit and explicit, that place these laws at the well-insulated apex of race, anchoring, and retribution. These psychological mechanisms allow even well-intentioned lawmakers, prosecutors, and judges to avoid experiencing dissonance in the application of these laws when Black and Latino individuals are subject to them, while similarly situated White defendants become exempted from their most draconian application. Or to put it plainly: where members of the public believe, consciously or not, that Three Strikes laws will apply primarily to Black and Latino individuals, their rank unfairness is tolerated.

Our research establishes, first, that implicit biases play a fundamental and automatic role in the way that Three Strikes laws are perceived, maintained, and implemented. People automatically associate Black and Latino men with repeat criminality without even realizing it, but when they think about White men who have transgressed, they automatically start from the assumption that White men have deviated from their otherwise law-abiding nature. On an explicit psychological level too, our findings show that certain people who knowingly disfavor Black and Latino men will find ways to think about repeat criminality in ways directly consistent with that animus. Together, the implicit, automatic association, paired with the explicit animus, can have dire consequences.

This Article places a modern lens upon decades of studies that demonstrate the deep interconnection between race and the criminal legal system. It leverages and deploys research methods from the field of social cognition to investigate whether (and how) specific legal provisions amplify the opportunity for racial bias in the criminal justice system, demonstrating how implicit and explicit racial bias drives recidivist sentencing enhancements.

The Article is divided into three Parts. In Part I, the Article provides background information detailing the origins, retention, and modern-day use of Three Strikes laws. It identifies the racialized origins of recidivist sentencing laws in the United States of America, their emergence during Jim Crow, and their heightened use in the post-Civil Rights Era. It surveys Supreme Court precedent concerning constitutional challenges to Three Strikes laws, noting that despite—or perhaps because of—their racialized history and operation, the Supreme Court tolerated these laws as they were adopted. It then addresses how the laws, and the prosecutors who wield them, contribute both to mass incarceration and racial disparities in sentencing.

---

18. *See* Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 112–13 (1998) (considering penological purposes of Three Strikes laws); Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 7–8 (1998) ("The main justification for California's anti-recidivist law is 'incapacitation'. . . . To a lesser extent, Three Strikes also utilizes 'deterrence' to justify the enhanced punishment.").

Part II provides the modern theoretical and psychological framework for our argument and study. It identifies how both implicit and explicit stereotypes of Black and Latino Americans connect these groups with notions of repeat criminality and considers the implication of those stereotypes on Three Strikes laws. In addition, it maps out relevant existing theories on implicit racial bias in the criminal legal system, including projects that devised novel Implicit Association Tests ("IAT") within criminal law, setting the stage for the Three Strikes IAT deployed in our empirical study.

In Part III, we detail our study conducted on a diverse sample of Americans, identifying the ways that implicit and explicit racial bias infiltrate the operation of Three Strikes laws. We discuss the methodology of our study, the hypotheses that we formed before initiating the study, and the study's results. We then consider the results of our study in practical and constitutional contexts, providing avenues for legislative reform, strategic litigation, and the exercise of prosecutorial discretion.

Our research supports the conclusion that Three Strikes laws exist because of race, are retained because of race, and are implemented because of race. As such, the Article's conclusion considers eliminating recidivist sentencing enhancements, as well as proactive steps taken by prosecutors, defense lawyers, and judges to ensure that implicit and explicit racial bias do not play a role in criminal sentencing.

I. THE RACIALIZATION OF THREE STRIKES LAWS: ORIGINS, RETENTION, AND MODERN-DAY USE

The history of harsh recidivist sentencing in the United States is inextricably linked with race. Though framed as public safety measures, Three Strikes and other anti-recidivist statutes have historically functioned in ways that disproportionately impact communities of color and reinforce existing disparities.[19] This Part begins by tracing the racialized origins of these laws, from their post-Civil War emergence as a means of reenslaving freed Black citizens to their resurgence in the late twentieth century amid coded political appeals for "law and order."

The explicitly racialized history contrasts with the stark modern silence concerning the racialized goals of Three Strikes laws: the Supreme Court, legislatures, and prosecutors have all worked to build a race-neutral scaffolding for the laws, functionally erasing the appearance of race from Three Strikes laws and discourse. In the same way that proponents of nonunanimous juries sought to diminish the influence of Black jurors who had won the right to serve on juries "to establish the supremacy of the white race" while avoiding constitutional scrutiny,[20]

---

19. *See* Loehr, *supra* note 1, at 240–42, 250–52; Kellner, *supra* note 3, at 93 (noting that in southern states, these laws "replaced the Black Codes that were prevalent after the Civil War ended" and "criminalized recently emancipated African American citizens by introducing extreme sentences for petty theft associated with poverty").

20. *See* Ramos v. Louisiana, 590 U.S. 83, 126 (2020) (Kavanaugh, J., concurring) (providing support for the majority decision and noting that "at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors" (citing THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 16, 19 (2015))); Emily Coward, Ramos v. Louisiana *and the Jim Crow Origins of Nonunanimous*

Three Strikes laws use purportedly race-neutral criminal sanctions to perpetuate harsh racialized punishment with a questionable penological rationale.

The Part then juxtaposes these purportedly race-neutral approaches to punishment with the modern racialized reality of Three Strikes laws, providing a bleak look at the ways that Three Strikes laws have continued to accomplish their original racist goals. While proponents[21] claim that Three Strikes laws serve as race-neutral deterrents to repeat offenders or act to incapacitate those of "incorrigible character," their origins and use against Black defendants expose their function: not merely to punish crime, but to entrench racial hierarchies within the criminal legal system. Understanding this legacy is essential to evaluating not only how explicit bias has shaped the development of these laws, but also how implicit biases embedded in habitual-offender sentencing impact their continued use.

A. Three Strikes Sentencing Laws Exist Because of Race

Three Strikes laws exist because of race discrimination.[22] This Section identifies the racialized origins of recidivist sentencing laws in the United States of America, their emergence during Jim Crow, and their heightened use in the post-Civil Rights Era. Recidivist sentencing laws for minor offenses, such as misdemeanors, took hold during Jim Crow as a way of reenslaving freed citizens.[23] After the Civil Rights Era, habitual-offender or "Three Strikes" laws were used to perpetuate mass incarceration.[24] *The New Jim Crow* details how the Clinton Administration endorsed the idea of a "three strikes and you're out" law in 1994 as

---

Juries, UNIV. N.C. SCH. GOV. (Apr. 29, 2020), https://nccriminallaw.sog.unc.edu/ramos-v-louisiana-and-the-jim-crow-origins-of-nonunanimous-juries/ [https://perma.cc/6QER-A9K3] (providing context of the issue in the case of *Ramos v. Louisiana*, highlighting Justice Kavanaugh's concurring opinion where he states that a "non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors").

21. *See* Edwin Meese III, *Three-Strikes Laws Punish and Protect*, 7 FED. SENT'G R. 58, 58 (1994) ("The argument in favor of a three-strikes law is made on the basis of common sense and statistical research. Most criminal justice experts agree that career criminals, who represent a relatively small component of the offender population, commit a disproportionately high volume of violent crime.").

22. While proponents of Three Strikes laws argue that there are legitimate bases for these laws, without the implicit and explicit bias inherent in them, they would not exist. *See* Beres & Griffith, *supra* note 18, at 112–13.

23. *See* John Derek Stern, *The War on Drugs and Jim Crow's the Most Wanted: A Social and Historical Look at Mass Incarceration*, 3 RAMAPO J.L. & SOC'Y 66, 68 (2017) (providing those petty crimes, such as loitering or jaywalking, resulted in imprisonment); Loehr, *supra* note 1, at 240–45.

24. Ashley Nellis, *How Mandatory Minimums Perpetuate Mass Incarceration and What to do About It*, THE SENT'G PROJECT (Feb. 14, 2024) (citing Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three Strikes Laws*, 30 J. LEGAL STUD. 89, 89–106 (2001)), https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/ [https://perma.cc/W8W6-LKUQ] (noting "'Three Strikes' laws that lengthened sentences, requiring minimum sentences of 25 years to life imprisonment" were essential parts of policies that generated mass incarceration).

part of a "new racial caste system" as "politicians of every stripe competed with each other to win the votes of poor and working-class whites, whose economic status was precarious at best, and who felt threatened by racial reforms."[25]

The history of race and Three Strikes laws sets a precedent for our modern-day research into not only whether implicit bias infects these laws but also whether explicit bias still lives in this domain. Even from the outset, legislatures and courts connected incorrigibility and criminal character with race[26] and operationalized that connection by imposing lengthy mandatory sentences on freed Black citizens after the Civil War.

1. The Origins of Recidivist Sentencing Laws

The first recidivist laws appeared in the United States in the late 1790s and early 1800s.[27] In the 1824 case of *In re Ross*, the Court considered lengthening a sentence for larceny where the defendant had a prior conviction for larceny.[28] The Court made clear that "[t]he punishment is enhanced from the *character* of the culprit."[29] While recidivist statutes can be traced back to colonial times, those statutes generally provided for graduated enhancements.[30] It was not until after the

---

25. ALEXANDER, *supra* note 12; *see also* PFAFF, *supra* note 1 (racial disparities arose from harsh sentencing including Three-Strikes laws); Allison Wiltz, *How We Know America's Racism is Not a Conspiracy, but a Shameful Reality*, MEDIUM (June 12, 2024), https://allyfromnola.medium.com/how-we-know-americas-racism-is-not-a-conspiracy-but-a-shameful-reality-8d4da4353b29 [https://perma.cc/9SJK-SD4Z] (recognizing the racial disparity that Black Americans face in the realm of punitive policies).

26. *See* Loehr, *supra* note 1, at 240–42 (describing how scholars from the 1800s linked "the idea of the 'habitual offender' to race"). Professor Loehr quotes scholars from the 1880s describing how the skull features of people who committed crimes, "correspond to characteristics observed in normal skulls of colored and inferior races." *Id.* at 241 (quoting CESARE LOMBROSO, CRIMINAL MAN 45–48 (Mary Gibson & Nicole Hahn Rafter trans., Duke Univ. Press 2006) (1876)).

27. *See* Graham v. West Virginia, 224 U.S. 616, 623 (1912) (upholding life sentence for defendant convicted of a third conviction, reasoning that an old offender with repeated criminal conduct "aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804; and there have been numerous acts of similar import in many states."); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to "Apprendi,"* 97 MARQ. L. REV. 524, 528–29 (2014) (outlining the historical roots of recidivist laws dating back to the early 1800s, when prisons were granted the authority to increase sentences for offenders with prior convictions, including the imposition of life sentences, as a means of reinforcing the idea that each additional crime should result in progressively harsher punishment, reflecting a belief that repeated offenses demonstrated a refusal to heed previous lessons and warranted escalating incarceration terms).

28. *In re* Ross, 19 Mass. (2 Pick.) 165, 165–67 (1824) (providing that the defendant Ross was sentenced to ten days imprisonment and then confined at hard labor for four years based upon the recidivist sentencing statute).

29. *Id.* at 171 (emphasis added).

30. Parke v. Raley, 506 U.S. 20, 26–27 (1992) (providing statutes from the 1600s that provide progressive punishments and maintaining that "statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times").

Civil War that recidivist statutes started imposing life or life-equivalent sentences on defendants.[31] Daniel Loehr traces the emergence of these statutes to the emergence of eugenics, where the "racialized vision of the habitual offender played into American notions of blackness and criminality."[32]

The harshness of these recidivist sentencing statutes trace their roots directly to the Jim Crow South[33] and the 1920s.[34] In 1870, five years after the Thirteenth Amendment abolished slavery, Louisiana enacted a statute authorizing a judge to impose a life sentence for the fourth misdemeanor conviction.[35] Former Chief Justice Johnson of the Louisiana Supreme Court described the post-Civil War recidivist statutes as efforts to reinstate slavery under a different name, noting that "[i]n the years following Reconstruction, southern states criminalized recently-emancipated African American citizens by introducing extreme sentences for petty theft associated with poverty."[36] Sometimes described as "Pig Laws, they replaced the Black Codes that were prevalent after the Civil War ended . . . designed to reenslave African-Americans."[37] Chief Justice Johnson describes "their modern manifestation: [as] harsh habitual-offender laws that permit a life sentence for a Black man convicted of property crimes."[38]

These laws were part of a larger effort to disenfranchise Black citizens, often tied with other illegal violence.[39] While some of this historical period was

---

31. Moore v. Missouri, 159 U.S. 673, 677–78, 650 (1895) (upholding life sentence for defendant convicted of second offense of burglary).

32. *See* Loehr, *supra* note 1, at 241–42 (citing KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 5 (2019)).

33. *Id.* at 242 (noting example of "Yale Law School's first dean, Francis Wayland, in Atlanta, Georgia in 1887. . . . calling for life imprisonment of habitual criminals").

34. *See* Caleb J. Stevens, *Nomos and Nullification: A Coverian View of New York's Habitual Offender Law*, *1926 to 1936*, 56 AM. CRIM. L. REV. 427, 427 (2019) (citing Victoria Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 930 (2013)) (describing New York's adoption of the Baumes' Law as comparable to the contemporary three strikes legislation).

35. State v. Kierson, 72 So. 799, 799 (La. 1916) (noting jurisdiction to try misdemeanor cases was vested in the district court by the Constitution of 1898 and Section 974 of the Revised Statutes, and that a district court had "the power to impose the double and triple penalties provided in said section, and, in case of a fourth conviction, to impose a sentence of perpetual imprisonment in jail"); *see* Harper G. Street, *Breaking the Chains of a Habitually Offensive Penal System: An Examination of Louisiana's Habitual-Offender Statute with Recommendations for Continued Reform*, 82 LA. L. REV. 964, 967 (2022). Additionally, over 50% of individuals incarcerated in Louisiana prisons under the habitual-offender statute were convicted of nonviolent crimes. *Id.*

36. State v. Bryant, 300 So.3d 392, 393–94 (La. 2020).

37. *Id.* at 393.

38. *Id.* at 394.

39. Gilles Vandal, *"Bloody Caddo": White Violence Against Blacks in a Louisiana Parish, 1865-1876*, 25 J. SOC. HIST. 373, 376–77 (1991); Cecilia Trenticosta & William Claude Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125, 129–32 (2011).

recounted by Justice Kavanaugh in his concurring opinion in *Ramos v. Louisiana*,[40] little attention has been addressed to the use of multiple misdemeanors to diminish or eradicate a defendant's Sixth Amendment right to trial by jury.[41]

In 1898, the all-White Louisiana Constitutional Convention adopted a new constitution providing for a series of racist provisions, including for the first time vesting jurisdiction to try misdemeanor cases in district courts.[42] Louis Martinet, the great Civil Rights leader of his time, wrote to the United States Attorney General begging for relief:

> Mr. Attorney General, all the rights and privileges that make American citizenship desirable or worth anything are being taken one by one from the colored American in the South. He no longer sits on juries; when he is compelled to travel he must pay first class fare and yet is denied first class accommodation . . . . Under the numerous convict laws and other abominable statutes he can be auctioned off or hired out to parties for any offense from the slightest misdemeanor to the greatest crime.[43]

The Louisiana courts upheld life sentences for multiple misdemeanors in the decades after the all-White convention.[44] As noted by Professor Loehr in *The Eugenic Origins of Three Strikes Laws*, "'habitual offender' laws spread across the

---

40. Ramos v. Louisiana, 590 U.S. 83, 126–27 (2020) (Kavanaugh, J., concurring) (explaining that "[c]oming on the heels of the State's 1896 victory in *Plessy v. Ferguson* . . . the 1898 constitutional convention expressly sought to 'establish the supremacy of the White race'" and providing that "the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service" (citation omitted)).

41. U.S. CONST. amend. VI (providing that in criminal prosecutions, the accused has a right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation").

42. *See* John Simerman & Gordon Russell, *In Louisiana's Split Verdict Rule, White Supremacist Roots Maintain Links to Racist Past*, THE ADVOC. (Apr. 7, 2018), https://www.theadvocate.com/baton_rouge/news/courts/in-louisianas-split-verdict-rule-white-supremacist-roots-maintain-links-to-racist-past/article_35e1664a-38ed-11e8-89d7-1ff0a664198b.html [https://perma.cc/B9KG-736Y] ("Misdemeanors now would be tried before judges, not juries. Lesser offenses would be tried by juries of just five members. And in the state's guiding document, which went into law without a public vote, the delegates approved 9-3 verdicts for serious felonies.").

43. Letter from L.A. Martinet to the Hon. Attorney General (Feb. 8, 1898) (on file with National Archives, Records of the U.S. Senate, Record Group 46, Committee Papers, Senate Judiciary Committee, 55A-F15, Washington, D.C.).

44. State v. Kierson, 72 So. 799, 799 (La. 1916) (providing that Chapter 974 of the Louisiana Revised Statutes covers "misdemeanors triable before a judge, and felonies triable before a jury," and that the judge "has the power to impose [the] double and triple penalties provided in the section, and, in case of a fourth conviction, to impose a sentence of perpetual imprisonment in jail").

country in the early 1900s as part of the eugenics movement, which grew in the 1880s and reached its peak in the 1920s."[45]

2. Recidivist Sentencing Laws Post-Civil Rights Era

In the late 1980s and 1990s, American cities experienced (or believed that they experienced) surges in violent crime, including homicides and drug-related arrests.[46] Some blamed this on the crack-cocaine epidemic.[47] Some blamed this on economic disinvestment.[48] Others blamed this on the emergence of super-predators.[49] In response to these concerns, legislatures enacted harsh recidivist sentencing statutes.[50] Twenty-six states and the federal government adopted harsh mandatory minimum recidivist sentencing policies.[51] Today, 49 of 50 states have

---

45. Loehr, *supra* note 1, at 240–42 (noting "habitual offender" was not understood to mean someone that repeatedly committed crimes, but rather someone who contained criminality in their being).

46. *See* Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, 29 HUM. RTS. MAG. 3, 3–5 (2002) ("The 1990s were dominated by get tough-on-crime measures, dramatically increasing the nation's prison population and the length of prison sentences. Those measures culminated with the enactment of 'three strikes' legislation around the nation. Beginning with Washington State in 1993, by the end of the decade, the federal government and over half of all states had enacted some form of a 'three strikes' law.").

47. JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 110 (2017); ALEXANDER, *supra* note 12, at 68, 70; DONOVAN X. RAMSEY, WHEN CRACK WAS KING: A PEOPLE'S HISTORY OF A MISUNDERSTOOD ERA 41 (2023), Beverly Xaviera Watkins & Mindy Thompson Fullilove, *The Crack Epidemic and The Failure of Epidemic Response*, 10 TEMP. POL. & C.R.L. REV. 371, 372, 382 (2001).

48. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 21–22 (1996); John Hagan, *Crime Inequality and Efficiency*, *in* PAYING FOR INEQUALITY: THE ECONOMIC COST OF SOCIAL INJUSTICE 80, 81 (Andrew Glyn & David Miliband eds. 1994); Richard M. McGahey, *Economic Conditions, Neighborhood Organization, and Urban Crime*, 8 CRIME & JUST. 231, 234–35 (1986).

49. John J. Dilulio, Jr., *The Coming of the Super-Predators*, THE WKLY. STANDARD, Nov. 27, 1995, at 23, 23–24; *see* Forman Jr., *supra* note 1, at 31–32; Kyle Stutzman, *The End of "Permanently Incorrigible": Putting* Jones v. Mississippi *into Context*, 73 WASH. U. J.L. & POL'Y 374, 380–81 (2024) (citing Carroll Bogert & LynNell Hancock, *Analysis: How the Media Created a 'Superpredator' Myth that Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020, at 04:00 MT), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101 [https://perma.cc/Z6D8-R6DK]); Stutzman, *supra*, at 380 n.30 ("While the super-predator theory described and applied to perceptions of all juveniles, it was most often employed against Black children. . . . The phrase itself is dehumanizing - portraying youths as animalistic and naturally inclined to seek out and harm more vulnerable members of society without a second thought or any remorse." (citations omitted)).

50. Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 689 (1995) ("The new recidivist statutes therefore were not only irrational, they joined the new death penalty laws as manifestations of the current age of a rational punishment."); Robert Heglin, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out,"* 20 J. LEGIS. 213, 213–14 (1994) (noting flurry of legislation).

51. WALSH, *supra* note 2, at xvi; Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effect of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 89 (2001) (noting 24 states adopted these laws within a two-year period); Erwin Chemerinsky, *Cruel and Unusual: The Story of*

some version of habitual-offender laws.[52] Observers suggested that these laws were more popular than they were understood.[53]

The modern readoption of these laws occurred at a time of heightened racialization of the criminal legal system during the "War on Drugs" period of the 1990s. California's Three Strikes legislation, adopted in 1994, was one of 26 laws passed within a three-year period.[54] In some instances, these laws were promulgated under a promise of eliminating judicial discretion but led to "glaring racial disparities."[55]

B. Three Strikes Sentencing Laws Have Been Retained Despite Their Racial Origins

Despite, or perhaps because of, their racialized history and operation, the Supreme Court tolerated these laws as they were adopted. This Section details the silence around the racial origins[56] of Three Strikes laws in the Supreme Court's resolution of these statutes' constitutionality. In *Graham v. West Virginia*,[57] the Court reviewed the case of an individual labeled an incorrigible horse thief who

---

Leandro Andrade, 52 DRAKE L. REV. 1, 5 (2003) (noting 26 states have across the country have some form of Three Strikes laws).

52. Loehr, *supra* note 1, at 235, 269–76.

53. Michael G. Turner & Jody L. Sundt, *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROB. 16, 16 (1995) (providing that "[a]lthough the three-strikes phrase is currently in vogue among legislations, the media, and the public, the details of these laws are not well known"); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO J. LEGAL ETHICS 301, 309 (2017) ("[D]espite the drop in crime, politicians still played to fear of crime, the values of exclusion rather than inclusion, and the need for social control, all of which continued to target minorities").

54. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); *see* Heglin, *supra* note 50, at 215–16; Leslie T. Grover & Eric Horent, *Black in the South: Policy Implications of Racial Disparity for the Working Poor*, 17 LOY. J. PUB. INT. L. 145, 179 (2015) (citing *State Rates of Incarceration by Race*, THE SENT'G PROJECT (2004), http://www.prisonpolicy.org/scans/sp/racialdisparity.pdf [https://perma.cc/NQ8K-DW9T] (noting prison growth since the 1990s was due largely to legislation like "the three strikes laws").

55. *See* Rachel E. Barkow, *When Mercy Discriminates*, 102 TEX. L. REV. 1365, 1371–72 (2024) ("In reality, those on the right got what they wanted in terms of more severity, but those on the left did not achieve their goal of greater equality. In fact, these binding laws resulted in huge racial disparities."); Robert D. Crutchfield, *Current Criminal Justice System Policy Reform Movements: The Problem of Unintended Consequences*, 5 IND. J.L. & SOC. EQUAL. 329, 348–49 (noting that the effort to reduce judicial discretion "led to 'reforms' such as the three strikes laws that began in Washington state and spread to California and then across the country. They were eventually adopted in federal statues . . . These changes led to substantial increases in the number of men and women confined in both federal and state prisons. And, while there was racial disproportionality in American prisons prior to 1980, these changes led to a *perpetuation as well as a likely increase* in racial disparity." (emphasis added)).

56. *See* Loehr, *supra* note 1, at 236–39.

57. Graham v. West Virginia, 224 U.S. 616 (1912).

received a life sentence under West Virginia's recidivist statute.[58] The Court upheld his lengthy sentence, noting that recidivist statutes did "not punish[] the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."[59]

The modern Supreme Court first addressed the constitutionality of recidivist sentencing in 1980.[60] The Court acknowledged that the primary purpose of a recidivist statute was to address the "*propensities*" of the defendant and rejected challenges under the Eighth Amendment.[61] A closely divided Court has also upheld judicial sentencing based upon prior convictions.[62] Separately, the Court placed restrictions on discovery in federal cases to limit the ability of defendants to challenge race-based disparities in application of sentencing laws.[63]

Primarily, the Supreme Court's jurisprudence focused on the question of whether the Eighth Amendment's prohibition against cruel and unusual punishments included a proportionality assessment and, if so, how it operated.

1. Rummel v. Estelle[64] *and* Solem v. Helm[65]

In *Rummel v. Estelle*, the Court held that a life sentence *with* parole eligibility did not violate the Eighth and Fourteenth Amendments when imposed for felony theft (obtaining $120.75 under false pretenses) where the defendant had two nonviolent prior felonies. One felony was for fraudulent use of a credit card to obtain $80 worth of goods or services, and another was for passing a forged check in the amount of $28.36.[66]

Justice Powell, with Brennan, Marshall, and Stevens, dissented, observing "a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment."[67]

---

58. *Id.* at 620–23 (stating the language of Chapter 152, §§ 23 and 24 of the W. VA. CODE in which the proceeding relied on, providing that "[w]hen any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life").

59. *Id.* at 623. The Court also justifies its reasoning on the basis that other courts in other jurisdictions have similar laws of increased punishment. *Id.*

60. Rummel v. Estelle, 445 U.S. 263, 276 (1980); *see* Comment, Rummel v. Estelle*: Can Non-Capital Punishment Still Be Cruel and Unusual?*, 38 WASH. & LEE L. REV. 243, 245–48 (1981) (providing an analysis of the Supreme Court's decision and noting that the Court rejected both of Rummel's arguments and held that a life sentence was in fact not cruel and unusual punishment).

61. *Rummel*, 445 U.S. at 284–85 (emphasis added).

62. Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998).

63. United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (holding that defendants claiming selective prosecution (and or heightened sentence) based on race must provide "clear evidence" that similarly situated individuals of a different race were not prosecuted and that the prosecution was motivated by discriminatory intent).

64. *Rummel*, 445 U.S. at 263.

65. Solem v. Helm, 463 U.S. 277 (1983).

66. *Rummel*, 445 U.S. at 286.

67. *Id.* at 307 (Powell, J., dissenting).

In contrast, in *Solem v. Helm*, the Court held that a life sentence *without* parole for uttering a $100 "no account" check was disproportionate to the crime, even though the defendant had committed six prior nonviolent felonies.[68] The Court differentiated *Solem* from *Rummel* by noting that in *Rummel*'s case, the life sentence included parole eligibility after twelve years.[69] The Court recognized that no penalty was "per se constitutional."[70]

2. Harmelin v. Michigan[71]

Ultimately, the Court effectively stepped away from the full-throated *Solem* endorsement of proportionality review in *Harmelin v. Michigan*.[72] Two justices in the majority outright rejected the notion of proportionality review: Justice Scalia, with Chief Justice Rehnquist, took the view that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[73] In contrast, Justice White noted that the Eighth Amendment's prohibition against "excessive fines" and "unreasonable bail," along with the express prohibition against unusual punishments, carried with it a proportionality assessment.[74]

Justice Kennedy, in a plurality with Justice O'Connor and Justice Souter, took the middle road, announcing the controlling opinion "that the Cruel and Unusual Punishment clause encompasses a narrow proportionality principle."[75] Ordinarily, Justice Kennedy observed, legislatures rather than courts must make assessments concerning the purposes and objectives of the penal system and determine punishment based upon those decisions. Further, Justice Kennedy observed that "the Eighth Amendment does not mandate adoption of any one penological theory."[76]

At the time of *Rummel*, only a handful of states authorized life sentences for recidivist sentencing.[77] "[B]etween 1993 and 1995, three strikes laws effected a sea change in criminal sentencing throughout the Nation."[78]

---

68. *Solem*, 463 U.S. at 279–81, 303.
69. *Id.* at 279.
70. *Id.* at 290.
71. Harmelin v. Michigan, 501 U.S. 957 (1991).
72. *Id.* at 965.
73. *Id.*
74. *Id.* at 1009–11 (White, J., dissenting).
75. *Id.* at 997 (Kennedy, J., concurring).
76. *Id.* at 999.
77. Rummel v. Estelle, 445 U.S. 263, 279–80 (explaining that Rummell "might have received more lenient treatment in almost any State other than Texas, West Virginia, or Washington. The distinctions, however, are subtle rather than gross. A number of States impose a mandatory life sentence upon conviction of four felonies rather than three. Other States require one or more of the felonies to be 'violent' to support a life sentence. Still other States leave the imposition of a life sentence after three felonies within the discretion of a judge or jury." (footnotes omitted)).
78. Ewing v. California, 538 U.S. 11, 24 (2003).

3. Ewing v. California[79] *and* Lockyer v. Andrade[80]

In *Ewing v. California*, the Court determined that the defendant's sentence of 25 years to life in prison, imposed for felony grand theft under the Three Strikes law, was not grossly disproportionate and therefore did not violate the Eighth Amendment's prohibition on cruel and unusual punishments.[81] The oral argument in *Ewing* focused on the question of whether a state could alter its penological justifications for one sentence rather than another:

> Justice Souter: Does the State, for purposes of proportionality analysis, have the option to adopt a different theory of penalty?
>
> Donald E. De Nicola (Prosecution): Yes, we do adopt the theory of incapacitation, and we do rely on incapacitation as a theory that justifies the sentence in this case.[82]

Justice Souter observed how the State's switch from retribution, justifying death sentences, to incapacitation, justifying the Three Strikes sentencing, affects proportionality analysis.

> [I]t makes this kind of analysis of comparables—this proportionality analysis—impossible because we no longer have two comparable entities on either side of our comparison. What we have is a low sentence on the one hand for deterrence, and a high sentence for incapacitation or retribution. We have apples and oranges instead of oranges and oranges. So my question is, if we accept the State's option to say, "We've changed the theory," don't we read comparability analysis right out of the law?[83]

Michael Chertoff, arguing as amicus for the United States, responded that states "are entitled to adopt different penological theories or a mix of theories."[84]

Ultimately, the Court accepted that a state could post hoc explain or justify a sentence so long as it reflected a rational legislative judgment. In this instance, the Court found California's decision—that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated—was entitled to deference.[85]

In *Lockyer v. Andrade*,[86] the Court affirmed two consecutive sentences of 25 years to life for stealing approximately $150 of videotapes where the defendant

---

79. *Id.* at 11

80. Lockyer v. Andrade, 538 U.S. 63 (2003).

81. *Ewing*, 538 U.S. at 30–31.

82. Transcript of Oral Argument at 42, Ewing v. California, 538 U.S. 11 (2003) (No. 01-6978), https://www.supremecourt.gov/pdfs/transcripts/2002/01-6978.pdf [https://perma.cc/DCW3-7JGN].

83. *Id.* at 43.

84. *Id.* at 45–46 (suggesting the state was entitled "to say that certain types of crimes ought to be addressed in terms of retribution; other types of crimes posing other kinds of issues can be dealt with in terms of deterrence and incapacitation").

85. *Ewing*, 538 U.S. at 30.

86. Lockyer v. Andrade, 538 U.S. 63 (2003).

had three prior felony convictions.[87] Describing the background facts, Dean Erwin Chemerinsky observed that Leandro Andrade, a nine-year Army veteran and father of three, was caught shoplifting children's videotapes from two K-Mart stores in California, totaling $153.[88] Although typically a misdemeanor punishable by a fine or six months in jail, Andrade's past convictions, including three nonviolent residential burglaries in 1983, escalated the charge to "petty theft with a prior," a felony punishable by three years in prison.[89] Under California's 1994 "Three Strikes" law, Andrade's two petty theft convictions were treated as his third and fourth strikes, resulting in two consecutive sentences of 25 years to life.[90] Convicted in 1996 at age 37, he must serve 50 years before parole eligibility, meaning he will be 87 by the earliest possible release. Justice Souter dissented, observing, "If Andrade's sentence is not grossly disproportionate, the principle has no meaning."[91]

In 2012, California voters passed an initiative that limited life sentences to people whose third strike is a "serious or violent" felony, allowing for resentencing for those whose last offense was minor.[92] Leandro Andrade was released under this law in 2012 while 1,500 people sentenced to life for nonserious, nonviolent felonies were still in prison.[93]

---

87. *Id.* at 66–67, 77; *see also* Dan Canon, *This Army Vet and Father of Three Got Two Life Sentences for Stealing Movies for His Kids*, MEDIUM (Oct. 31, 2021), https://medium.com/i-taught-the-law/this-army-vet-and-father-of-three-got-two-life-sentences-for-stealing-movies-for-his-kids-d814ef00cf4f [https://perma.cc/GPP7-BLXW] (providing context around the defendant, Andrade, who developed a drug habit and got arrested for "cramming five VHS tapes down his pants (Snow White, Casper, The Fox and the Hound, The Pebble and the Penguin, and Batman Forever)" and then was later caught stealing "four more movies from a different Kmart (Free Willy 2, Cinderella, Santa Claus, and Little Women")); *see also* Erwin Chemerinsky, Gil Garcetti & Miriam Aroni Krinsky, *California's 'Three Strikes' Law Still Carries a Devastating Human and Financial Cost. End It Now*, L.A. TIMES (Aug. 12, 2022, at 03:00 PT), https://www.latimes.com/opinion/story/2022-08-12/three-strikes-law-prosecutor-discretion-california-costs [https://perma.cc/E39D-EZH4] (describing how Andrade was sentenced to two consecutive 25 years to life for stealing videotapes from Kmart even though he could have been prosecuted for misdemeanor petty theft).

88. Chemerinsky, *supra* note 51, at 1, 2.

89. *Id.* at 2.

90. *Lockyer*, 538 U.S. at 67–68.

91. *Id.* at 83 (Souter, J., dissenting); *see also* Jay Willis, *How Two Supreme Court Cases Made "Cruel and Unusual Punishment" Meaningless*, BALLS & STRIKES (Mar. 30, 2023), https://ballsandstrikes.org/legal-culture/lockyer-v-andrade-20th-anniversary/ [https://perma.cc/7JVC-55Y2] (detailing Justice Souter's dissent calling the punishment an example of "demonstrable gross disproportionality").

92. *See* David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)*, 25 FED. SENT'G REP. 265, 265 (2013); J. Richard Couzens & Tricia A. Bigelow, *The Amendment of the Three Strikes Sentencing Law* 4 (Apr. 2023), https://capcentral.org/wp-content/uploads/2023/12/Judge-Couzens-Prop-36-Memo-042023.pdf [https://perma.cc/JK98-GTD4].

93. *See* Willis, *supra* note 91.

C. Three Strikes Laws Have Been Implemented Despite Their Penological Shortcomings

Three Strikes laws continue to be implemented without a recognition of their racial origins or the vast racial disparities in their application.[94] Today, recidivism statutes exist in all 50 states,[95] and 25 states have some form of Three Strikes laws imposing a life or life-equivalent sentence for a third offense.[96] All of these statutes are potentially susceptible to, and potentially driven by, implicit bias, as we investigate below. This Section considers their continued mass implementation, focusing first on their lack of penological purpose and second on the prosecutorial discretion that continues to fuel their use.

1. Lack of Penological Purpose

Three Strikes laws drive incarceration without addressing violent crime. Significant empirical research noted that Three Strikes sentencing laws disproportionately impact nonviolent offenders[97] and lead to increasingly violent confrontations between offenders and law enforcement.[98] Claims that reductions in crime rates were related to the adoption of Three Strikes laws[99] have been rebutted.[100] Research completed ten years after the enactment of California's recidivism statute noted that the laws disproportionately affected marginalized communities, increased prison overcrowding, and failed to deliver significant reductions in crime.[101]

Other scholars observed that recidivist sentencing could actually increase more serious crimes as "when committing an ordinarily nonlethal felony, a criminal might kill victims and others at the crime scene in order to reduce the chances that they will overpower or identify the criminal."[102] But "[m]ost defendants who

---

94. Starks & Van Gundy, *supra* note 2, at 415–17.

95. *See* Loehr, *supra* note 1, at app. 269–76.

96. Courtney E. Broscious & Kathy S. Javian, *The Evolution of Sentencing Policy in New Jersey, New York, and Pennsylvania*, 22 COMMONWEALTH 1, 11 (2023).

97. Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1, 20 (2004). Recidivist sentencing enhancement for violent offenses occurs infrequently in part because individuals convicted of offenses like homicide are less likely to be rearrested (40.7%) versus offenses like burglary (74%) and drug offenses (66.7%). *See* BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1994 8, tbl. 9 (2002) (providing statistics for the rate of recidivism of state prisoners at Table 9).

98. Marvell & Moody, *supra* note 51, at 91–92.

99. OFF. OF THE ATT'Y GEN., CAL. DEP'T OF JUST., "THREE STRIKES AND YOU'RE OUT": TWO YEARS LATER 9 (1996) (claiming a 10.9% reduction of violent crime).

100. Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 104–11 (1998) (arguing that broader social and economic factors, not the laws, were the primary drivers of crime reduction); Vitiello, *supra* note 46, at 4 (providing that "[e]mpirical studies suggest that California would have experienced virtually all of its decline in crime without 'three strikes'").

101. *See* VINCENT SCHIRALDI, JASON COLBURN & ERIC LOTKE, JUST. POL'Y INST., THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAW 10 YEARS AFTER THEIR ENACTMENT (2004).

102. *See* Marvell & Moody, *supra* note 51, at 91 (providing that "when the penalties for a crime and for an exacerbated version of that crime are similar, the criminal can be

commit felony crimes do not weigh the risk of being caught and punished. Instead, they learn about their sentencing exposure after the fact."[103]

Numerous studies detailed the lack of deterrent effect.[104] Franklin Zimring, Gordon Hawkins, and Sam Kamin's book *Punishment and Democracy: Three Strikes and You're Out in California*[105] conducted an exhaustive analysis of the impact of the law, finding that it disproportionately affected nonviolent offenders and those convicted of minor felonies, and led to significant increases in the prison population.[106] While critics complained that Zimring, Hawkins, and Kamin's findings that the Three Strikes laws provided no deterrence to crime were exaggerated,[107] "increases in sentences have rarely, if ever, produced the desired reduction in crime rates."[108]

Scholars note that Three Strikes laws escalate punishment inversely to the seriousness of the third strike and are focused primarily on the offender rather than the offense.[109] In the *Paradox of Recidivism*, Christopher Lewis describes exponential increases in punishment for recidivist offenders.[110] He proposes a controversial thesis that a felony record should be mitigating rather than aggravating because the record creates "barriers" that make defendants less morally culpable, arguing that recidivists have "stronger 'incentives' than first-time offenders to commit just about any kind of crime."[111] More importantly, all of the focus on

---

expected to commit the exacerbated version if that reduces the chances of apprehension and conviction").

103. Joe D. Whitley, *Three Strikes and You're Out*: *More Harm than Good*, 7 FED. SENT'G REP. 63, 63 (1994).

104. Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 66–72 (1999) (discussing empirical data demonstrating how the law disproportionately targeted nonviolent offenders and minorities while clogging courts and jails).

105. ZIMRING, HAWKINS & KAMIN, *supra* note 54.

106. *Id.* at 155–60; *see generally* Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CALIF. L. REV. 257 (2002) (reviewing FRANKLIN E. ZIMRING, GORDON HAWKINS, AND SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001)).

107. Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and* Romero*: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43, 44 (2000).

108. John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 189 (2005) (noting the conclusion "is now widely shared among criminal justice system researchers").

109. *Id.*; *see also* Daniel Roger, Note, People v. Fuhrman *and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at the Altar of Public Passion?*, 20 T. JEFFERSON L. REV. 139, 141, 149–62 (1998) (arguing that "three-strike" laws have led to the erosion of traditional sentencing principles like proportionality and rehabilitation, in favor of punitive measures that prioritize political gain over justice).

110. Lewis, *supra* note 16, at 1211 (noting some jurisdictions apply a six-fold increase in the length of punishment, others impose a ten-fold average increase, and some impose sentences 100 times more severe for offenders with the most serious criminal records "compared to first-time offenders convicted of exactly the same crime").

111. *Id.* at 1213–14, 1270 ("[W]e cannot justifiably blame or punish them for reoffending as severely as we could do for the same crime, if it were a first offense. Judges and sentencing commissions, as such, have moral reason to treat prior convictions as a

recidivism only looks at individuals who have "been caught breaking the law" as distinguished from those individuals who commit many crimes. "Arrest and conviction data inevitably reflect this factor: all things equal, more skillful offenders are caught less often than the clumsy ones."[112]

2. Prosecutors Implement Three Strikes Laws Without Ever Acknowledging Race

Prosecutors use Three Strikes laws all the time without ever acknowledging that race plays a role in their decisions. Yet their exercise of discretion plays a significant role in the racial disparities associated with habitual-offender laws.[113] They possess significant discretion in deciding whether to charge individuals under these laws, and studies suggest that they may be more likely to pursue such charges against Black defendants than White defendants with similar criminal histories.[114] Rachel Barkow observes that much of the disparities in the operation of recidivist sentencing laws arises from prosecutors withholding draconian punishments from White offenders.[115] Her work suggests that even as legislatures attempt to impose mandatory sentencing in order to reduce racial disparities, prosecutors find ways to ensure that White defendants avoid the consequences.[116]

Marc Miller and Ronald F. Wright provide a detailed analysis of the "black box" decision making, exploring how prosecutorial discretion masks explicit or conscious discriminatory intent.[117] They highlight the importance of data collection and analysis to identify and address potential racial disparities in prosecutorial practices, suggesting that internal regulation and transparency measures can help

---

presumptive mitigating factor at sentencing—imposing a recidivist sentencing discount, instead of a premium.").

112. *See id.* at 1217.

113. Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J.F. 75, 76 (2022) (noting that state habitual-offender enhancements serve as key drivers of mass incarceration and racial disparities in sentencing, and the significant discretion prosecutors wield in choosing when to seek enhanced sentences); Joseph A. Thorp, Nolle-*and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429, 470 (2016) ("The problems with charge bargaining are exacerbated by mandatory minimum sentences and three-strikes laws, which often give prosecutors—rather than the judge—the ultimate control over a defendant's sentence."); *see* Rachel E. Barkow, *When Mercy Discriminates*, 102 TEX. L. REV. 1365, 1372 n.34 (2024) (citing Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law*, 6 J. ETHNICITY CRIM. JUST. 83, 92, 94 (2008)).

114. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 316 (2017) (citing Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2 (2013) (acknowledging racial disparities in sentencing)).

115. Barkow, *supra* note 113, at 1372 (providing that "[p]rosecutors did not bring charges carrying mandatory minimum sentences proportionately across all racial groups but instead were far more likely to bring a charge carrying a mandatory minimum sentence against Black defendants").

116. *Id.*

117. *See* Wright & Miller, *supra* note 7, at 53–54.

mitigate the impact of implicit bias.[118] This prosecutorial discretion, coupled with potential racial bias and a lack of transparency, can result in the overrepresentation of Black individuals in prisons.[119]

Even where legislatures craft mandatory Three Strikes laws to purportedly curb the influence of discretionary decisions, their implementation permits charge bargaining, or leveraging[120] their use, which invites racial disparities.

> [B]ecause court officials are more inclined toward bargaining and deductive application of formal rules, and will tend to seize whatever strategic advantages the law offers to serve their occupational and organizational ends. Thus while mandatory sentencing reforms constrain judges' control over sentencing, and may—as in the case of Three Strikes—forbid prosecutors to bargain over sentences, they are likely to increase the incidence of charge bargaining, a form of (perhaps implicit) negotiation that works "backwards from the sentence to the offense.[121]

As such, even those systems that attempt to eliminate the possibility of bias leave behind the mechanisms for their use.

D. The Racial Effect of Three Strikes Laws

At the same time the Supreme Court was upholding these laws and prosecutors were implementing them in large numbers, all without any reference to race, the true organizing principle of Three Strikes laws continued to be race. This Section details the data-driven story of Three Strikes laws and reveals how they never stopped contributing to racial disparities in the criminal justice system.

Studies suggest that prosecutors are more likely to pursue Three Strikes charges against Black defendants than White defendants[122] even when their criminal histories are similar.[123] Policing of Black and Latino communities further

---

118. *See id.* at 50–52.

119. *See id.* at 54.

120. *See generally* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (prosecutor did not violate due process clause by seeking a superseding indictment under habitual-offender statute carrying a mandatory life sentence when the defendant declined to plead guilty and accept a five-year sentence to charge involving uttering a forged instrument in the amount of $88.30).

121. John R. Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing*, 47 LAW & SOC'Y REV. 37, 40–41 (2013) (quoting Michael Tonry, *Structuring Sentencing*, 10 CRIME & JUST. 267, 303 (1988)).

122. NAZGOL GHANDNOOSH & CELESTE BARRY, THE SENT'G PROJECT, ONE IN FIVE: DISPARITIES IN CRIME AND POLICING 8 (2023), https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/ [https://perma.cc/TRS5-3VUT]; *see* PFAFF, *supra* note 1, at 171–72.

123. There is no evidence that racial disparities in habitual-offender sentencing are a result of different rates of criminality. GHANDNOOSH & BARRY, *supra* note 122 (noting that "[r]acially disparate policies and bias largely drive racial and ethnic disparities in drug arrests and incarceration"); U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES 2019 (2021); U.S. DEP'T OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2021 NATIONAL HEALTH SURVEY ON DRUG USE AND HEALTH app. B-1–B-31

exacerbates this issue, leading to a higher number of prior strikes for residents of these communities even if Black and White citizens commit crimes at comparable rates.[124] Three Strike regimes have resulted in harsher sentences in "politically conservative counties" where "Black felons receive longer sentences."[125]

From the outset of their reemergence, recidivist sentencing enhancements were marred by "indefensible racial disparities"[126] that had nothing to do with recidivism.[127] Charging practices reveal significant racial disparities.[128] "Racial disparities in sentencing can result from theoretically 'race neutral' sentencing policies that have significant disparate racial effects,[129] particularly in the cases of habitual offender laws."[130] Moreover, habitual-offender laws exacerbate racial

---

(2022); RICHARD A. MIECH ET AL., UNIV. MICH. INST. SOC. RSCH., NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2022: SECONDARY SCHOOL STUDENTS (2023).

124. Vitiello, *supra* note 46, at 5; Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 28–31 (2013) (suggesting prosecutors were more likely to charge Black defendants with mandatory minimums than White defendants). *But see* Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1891 (2023) (asserting that in some counties in North Carolina, prosecutors' consideration of race in addressing recidivist sentencing can have the effect of reducing racial disparities where "prosecutors' beliefs about past biases in the system impact their current decisions").

125. Sutton, *supra* note 121, at 37.

126. William Claiborne, *Study Finds Disparity in Three Strikes' Law*, WASH. POST (Mar. 4, 1996), https://www.washingtonpost.com/archive/politics/1996/03/05/study-finds-disparity-in-three-strikes-law/28f1de6f-3495-4266-bd35-53ae19d07d6c/ [https://perma.cc/9LQL-U32W]; Greg Krikorian, *More Blacks Imprisoned Under '3 Strikes,' Study Says*, L.A. TIMES (Mar. 5, 1996, at 00:00 PT), https://www.latimes.com/archives/la-xpm-1996-03-05-mn-43270-story.html [https://perma.cc/EC2F-YGNG].

127. Disparities have been shown to have little to do with recidivism. *See* Matthew Clarke, *Justice Department Releases Ten-Year Recidivism Study*, PRISON LEGAL NEWS (Mar. 1, 2022), https://www.prisonlegalnews.org/news/2022/mar/1/justice-department-releases-ten-year-recidivism-study/ [https://perma.cc/7XJP-2Z76].

128. Nazgol Ghandnoosh, *How Defense Attorneys Can Eliminate Racial Disparities in Criminal Justice*, CHAMPION June 2018, at 38 (2018) (citing Starr & Rehavi, *supra* note 124, at 7 ("Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry mandatory minimum sentences than otherwise similar whites.")); Charles Crawford, Ted Chiricos & Gary Kleck, *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 504 (1998) (providing that "[s]tate prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws").

129. Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing, Hearing on Reports of Racism in the Justice System of the United States to the Inter-American Commission on Human Rights 2 (153rd Session, Oct. 27, 2014) [hereinafter ACLU], https://www.aclu.org/documents/aclu-submission-inter-american-commission-human-rights-racial-disparities-sentencing [https://perma.cc/4NWM-YD9F]. Vanita Gupta, then-Deputy Legal Director of the ACLU (subsequently United States Associate Attorney General), along with Kara Dansky wrote that "[r]ecidivist statutes should be eliminated or reduced" in order to address racial disparities. *See* Vanita Gupta & Kara Dansky, *Racial Disparities: Reducing Racial Disparities Through Structural Criminal Justice Reforms*, 37 CHAMPION 47, 49 (2013).

130. ACLU, *supra* note 129 (citing Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and*

disparities arising from policing and other socio-economic factors. The concentration of policing in lower-income communities disproportionately impacts Black and Latino people.[131] Researchers suggest that this leads to a higher likelihood of arrests and as a result convictions that count as initial strikes under habitual-offender laws, even for nonviolent offenses.[132]

Recidivist sentencing schemes are a significant driver of mass incarceration,[133] have a disparate racial impact,[134] and as such exacerbate racial disparities in mass incarceration.[135] Examining racial disparities in states such as California, Louisiana, Florida, Georgia, and others, as well as in the application of federal criminal law,[136] reveals that racial disparities are pervasive.

1. California

Researchers investigating California's Three Strikes rule found significant racial disparities against Black and Latino people in the operation of the recidivist

---

Contextual Threat, 19 CRIM. JUST. POL'Y REV. 63 (2008)); *see* SCOTT EHLERS, VINCENT SCHIRALDI & ERIC LOTKE, JUST. POL'Y INST., RACIAL DIVIDE: AN EXAMINATION OF THE IMPACT OF CALIFORNIA'S THREE STRIKES LAW ON AFRICAN-AMERICANS AND LATINOS 8–12 (2004); Florangela Davila, *State 'Three-Strikes' Law Hits Blacks Disproportionately*, SEATTLE TIMES (Feb. 18, 2002), https://archive.seattletimes.com/archive/20020218/sentencing18m/state-three-strikes-law-hits-blacks-disproportionately [https://perma.cc/6YXZ-YQRD].

131. PFAFF, *supra* note 1, at 172.

132. *Id.*

133. Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 309 (2008) ("[T]hree-strikes laws across the country, which have had the effect of dramatically increasing prison populations."); Keith Owens, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129, 147 (1995); Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 194 (2014) (noting that "'three strikes and you're out laws' that impose lengthy and often mandatory sentences on repeat offenders," play a central role in "the rise of mass incarceration").

134. Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 745 (2006); Kellner, *supra* note 3, at 93 (noting that in "present day, the laws have had the discriminatory effect that was originally intended").

135. Luna, *supra* note 18, at 26–27.

136. Similarly, "[a]mong those serving [life without parole] in Mississippi, 74% of those sentenced under the state's habitual offender law between 1986 and 2018 are Black. Analysis of [life without parole] sentencing data over the same period in North Carolina reveals similar disproportionality: 81% of those sentenced to LWOP using the state's habitual offender statute are Black." ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 19 (2021); LIZ KOMAR, ASHLEY NELLIS & KRISTEN M. BUDD, THE SENT'G PROJECT, COUNTING DOWN: PATHS TO A 20-YEAR MAXIMUM PRISON SENTENCE 7 (2023). Disparities exist as well in states like Massachusetts. Jared B. Cohen, *Careful Scrutiny: The SJC and Mandatory Sentencing Laws*, 65 BOS. BAR J. 16, 16 (2021) (citing ELIZABETH TSAI BISHOP ET AL., HARV. L. SCH., CRIM. JUST. POL'Y PROGRAM, RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 2 (2020)).

sentencing law.[137] Black defendants were almost twice as likely to be Third Strikers as White defendants,[138] even though Black defendants were only 6.5% of the population.[139] While Black defendants made up only 21.7% of the individuals arrested on felony charges, they made up 44.7% of the defendants subjected to a third strike; in contrast, White defendants made up 35.7% of the individuals arrested on felony charges but only 25.4% of the individuals subjected to a third strike.[140]

During the first six months that California's Three Strikes law operated, Black people constituted 57.3% of those charged with a third strike, while White people made up only 12.6%.[141] A subsequent review of 171,000 individual data records from California's prison system found racial and ethnic disparities in the application of the State's Three Strikes law.[142] While the law was publicized as an effort to address violent offenders, research established that the laws were widely used for—and disparities were larger for—property and drug offenses rather than for violent crimes.[143]

While California modified the rule in 2012, "the law has lengthened the sentences of nearly 60,000 prison admissions since 2015 and affects the sentences of over a third of the currently incarcerated, many of whom were convicted of non-serious, nonviolent offenses."[144] While the number of people currently serving second strikes is less today than it was in 2004 (35,462 to around 28,000 in 2022), the number of individuals serving three strikes is essentially the same (7,458 in 2004 and around 7,500 today).[145] Significantly, "Black Californians are disproportionately affected by Three Strikes, relative to the population of California and the prison population. They are heavily over-represented among people serving sentences with third-strike enhancements, and to a lesser degree, among those with a double-sentence enhancement."[146] A recent analysis of California's Three Strikes law found that "[n]early half of California's third-strikers are Black in a state that is just six percent Black. As of January 2022, the median age of third-strikers was 56

---

137. EHLERS, SCHIRALDI & LOTKE, *supra* note 130, at 3; *see also* Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 610 (2007) ("African-American male prisoners have been disproportionately impacted by these laws.").

138. *See* EHLERS, SCHIRALDI & LOTKE, *supra* note 130, at 3 fig. 1 (noting 44.7% of Third Strikers were Black but only 25% of Third Strikers were White).

139. *Id.*

140. *Id.*

141. Vincent Schiraldi & Michael Godfrey, *Racial Disparities in the Charging of Los Angeles County's Third "Strike" Cases*, CTR. ON JUV. & CRIM. JUST., Oct. 1994, at 1–2.

142. Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law*, 6 J. ETHNICITY CRIM. JUST. 83, 84–85 (2008).

143. *Id.* at 98.

144. Sean Coffey, *Report Provides In-Depth Look at Three-Strikes Law in California*, CAL. POL'Y LAB (Aug. 30, 2022), https://capolicylab.org/news/report-provides-in-depth-look-at-three-strikes-law-in-california/ [https://perma.cc/FG4P-5QP5].

145. *See* MIA BIRD ET AL., CAL. POL'Y LAB, THREE STRIKES IN CALIFORNIA 13 (2022).

146. Coffey, *supra* note 144.

for offenses that were committed at age 35, according to an analysis by the California Policy Lab."[147] Further research indicates that within California, the geographic circumstance of the third strike plays an essential factor in whether a defendant was sentenced as a habitual offender.[148]

2. Florida

California is not the only state revealing significant racial disparities in recidivist sentencing. Black people in Florida make up 14.5% of the population,[149] but 55% of the incarcerated population and 75% of those serving time under the habitual-offender laws.[150] Their most common charge was armed robbery, not homicide.[151]

All of the research focused on Florida's habitual-offender laws has demonstrated the pervasive nature of racial disparities. A study of Florida's habitual-offender laws found that racial discrepancies in charging decisions could not be explained by anything other than the defendant's race.[152] In a different study focused on admissions between 1992 and 1993, Black defendants were significantly disadvantaged, especially "for drug offenses and property crimes that have relatively high victimization rates for Whites (larceny and burglary)."[153]

In Florida, "2,100 of the state's permanent lifers, or about 15%, are in prison" because of habitual-offender laws, with many receiving life without parole for offenses such as "robbing a church of a laptop, holding up motel clerks for small amounts of cash and stealing a television while waving a knife."[154]

---

147. Willis, *supra* note 91.

148. Joshua E. Bowers, *"The Integrity of the Game is Everything": The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1180 (2001) (noting defendants in San Diego are much more likely to be subject to a third-strike than defendants in Almeda County or San Francisco, and that particularly with respect to "wobbler" offenses "racial disparities compound the underlying problem of Three Strikes geographic disparity").

149. *See Florida*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Florida?g=040XX00US12#race-and-ethnicity [perma.cc/VR2A-9C5G] (last visited Sept. 28, 2025).

150. Cary Aspinwall, Weihua Li & Dan Sullivan, *Two Strikes and You're in Prison Forever*, THE MARSHALL PROJECT (Nov. 11, 2021, at 06:00 ET), https://www.themarshallproject.org/2021/11/11/two-strikes-and-you-re-in-prison-forever [https://perma.cc/N7DC-AGJD].

151. Dan Sullivan, Cary Aspinwall & Weihua Li, *He Got a Life Sentence When He Was 22–for Robbery*, THE MARSHALL PROJECT (Nov. 11, 2011, at 06:00 ET), https://www.themarshallproject.org/2021/11/11/he-got-a-life-sentence-when-he-was-22-for-robbery [https://perma.cc/P57M-PGQQ]; *see also* Crawford, Chiricos & Kleck, *supra* note 128, at 498–99 (noting significant disparities in Florida in application of habitual sentencing law to Black defendants with prior convictions for drug and property crimes).

152. Luna, *supra* note 18, at 27; Nkechi Taifa, *Three-Strikes-and-You're-Out—Mandatory Life Imprisonment for Third Time Felons*, 20 DAYTON L. REV. 717, 724 (1995).

153. Crawford, Chiricos & Kleck, *supra* note 128, at 481.

154. Aspinwall, Li & Sullivan, *supra* note 150.

3. Louisiana

Black Louisianans make up less than a third of the state's population but account for more than 75% of those incarcerated under habitual-offender laws.[155] As of June 30, 2023, 2,738 individuals were incarcerated under habitual-offender statutes, over 2,000 of whom are Black.[156] Most are serving life or life-equivalent sentences.[157]

Racial disparities exist not just across Louisiana but also across parishes. Parishes with homogenous populations have lower rates of habitual-offender use. For instance, a jurisdiction with a heterogenous population like Orleans Parish[158] sentences 18% of people under habitual-offender laws[159] (478 of 2,637 inmates as of December 31, 2024).[160] Black defendants make up 94% of the people sentenced under habitual-offender statutes in Orleans.[161] Indeed, Orleans Parish has sentenced the most people and has the highest percentage of people in prison under a habitual sentence.[162]

In contrast, in a parish with a predominately homogenous population like Livingston Parish,[163] individuals incarcerated under Three Strikes legislation make up only 1% of the incarcerated population (10 of 767 individuals).[164] Moreover, while Black defendants only make 25% of the individuals incarcerated out of Livingston Parish, they still make up 40% of the individuals sentenced under a habitual-offender statute.[165]

---

155. *Compare* America Counts Staff, *Louisiana's Population Was 4,657,757 in 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021) https://www.census.gov/library/stories/state-by-state/louisiana.html#race-ethnicity [perma.cc/29MV-AUUR] (noting that white people made up 57.1% of the population in 2020), *with* JOHN BEL EDWARDS & JAMES M. LE BLANC, LA. DEP'T OF PUB. SAFETY & CORR., BRIEFING BOOK 20, 39 (2023) (demonstrating that in Louisiana, while Black citizens make up 31.4% of the State's population, they also make up 64.6% of the total population of the Department of Corrections and 76.0% of the individuals incarcerated on habitual-offender charges are Black).

156. EDWARDS & LE BLANC, *supra* note 155, at 394.

157. Tana Ganeva, *'Habitual Offender' Laws Imprison Thousands for Small Crimes—Sometimes for Life*, THE APPEAL (Sept. 26, 2022), https://theappeal.org/habitual-offender-laws-imprison-thousands-for-small-crimes-sometimes-for-life/ [https://perma.cc/MKT3-ZMM6].

158. In Orleans Parish, White people make up 32.9% of the population. America Counts Staff, *supra* note 155.

159. Prior to the intervention of the Orleans Parish District Attorney's Civil Rights Division, in December of 2020, almost 1/3 of the individuals incarcerated out of Orleans were sentenced under habitual-offender sentences. *See* Cohen, *supra* note 15, at 38 (noting "In Orleans, in December of 2020, more than one thousand individuals were incarcerated on habitual offender sentences. This number was almost one-third of the 3,386 people in the entire state serving habitual offender sentences.").

160. *See Demographic Dashboard for Website*, LA. DEP'T OF CORR. (Dec. 31, 2024) https://doc.louisiana.gov/demographic-dashboard/ [perma.cc/4XQJ-SE4E].

161. *Id.*

162. *Id.*

163. *See* America Counts Staff, *supra* note 155.

164. *See* LA. DEP'T OF CORR., *supra* note 160 (10 out of 767 individuals).

165. *Id.*

When Jason Williams was newly elected as District Attorney in Orleans Parish, he rejected the use of prior convictions to enhance sentences.[166] As Williams described it, "We absolutely want to use the discretion differently than how it's been applied in the past."[167] The Chief of the Orleans Parish District Attorney's newly created Office Civil Rights Division explained that in order to address "racial disparities in the criminal legal system, and mass incarceration, and unequal opportunities," it was essential to limit the use of the habitual-offender laws, as "the crimes of a first offense, second offense—are crimes that everyone is committing, but only Black people are policed for."[168]

4. Georgia

Studies of recidivist laws in Georgia, which adopted a "Two Strikes" sentencing law, reveal significant racial disparities.[169] The Georgia statute allows for a person to be sentenced to life without parole for two strikes[170] or a life sentence for a fourth conviction for the sale of cocaine.[171] Researchers have noted that Georgia's law "disproportionately impact[s] people of color, making people of color

166. Nick Chrastil, *'Every Single Person in that Office Has to Understand the Culture Shift': How Jason Williams Plans to Remake Prosecution in New Orleans*, THE LENS (Dec. 11, 2020), https://thelensnola.org/2020/12/11/every-single-person-in-that-office-has-to-understand-the-culture-shift-how-jason-williams-plans-to-remake-prosecution-in-new-orleans/ [perma.cc/AD23-N7E7].

167. Nick Chrastil, *Jason Williams Has Vowed Never to Use the Habitual Offender Statute. What Does that Mean for Criminal Justice in New Orleans?*, THE LENS (Feb. 5, 2021) (quoting Jason Williams), https://thelensnola.org/2021/02/05/jason-williams-has-vowed-never-to-use-the-habitual-offender-statute-what-does-that-mean-for-criminal-justice-in-new-orleans/ [perma.cc/T8GB-3XEU].

168. It is significant to note that this brought Orleans Parish into the consensus use of habitual-offender proceedings for much of the rest of the state. Justice Crichton, concurring in a writ decision, acknowledged Chief Justice Johnson's view that the "abusive frequency with which a *de minimis* number of jurisdictions invoke habitual offender laws against non-violent actors appears to do little to protect the people of Louisiana, and depletes the already scarce fiscal resources" and that "the imposition of life sentences on non-violent offenders at a certain point lacks any meaningful social value and may constitute aberrant cruelty." State v. Guidry, 221 So. 3d 815, 831 (La. 2017) (Crichton, J., concurring); *see also* State v. Floyd, 254 So. 3d 38, 44 (La. 2018) (affirming the constitutionality of a habitudinal offender's sentence); State v. Thompson, 359 So. 3d 1273, 1276 (La. 2023) (vacating a defendant's life sentence and remanding to a trial court for "a term of imprisonment that is not unconstitutionally excessive"); State v. Smith, 275 So. 3d 266, 267 (La. 2019).

169. Mason Oruru, *Three Strikes, then, Two Strikes You're Out: Effects of Mandatory Sentencing Laws on Incarceration, the Impact in Georgia*, SCHOLARWORKS@GSU 64 (2024), https://scholarworks.gsu.edu/items/83d7f3f3-ee7e-4e3b-9d5f-9a3c3b139fe4 [https://perma.cc/B68Q-XPQG] ("A statistical breakdown of the incarceration impact of the 'Two Strikes You are Out' law by race shows that Black people were adversely and disproportionately affected more than Whites.").

170. *Id.* at 63.

171. Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1101, 1141 (2013).

more likely to be charged with and convicted of sentencing enhancements contained in habitual-offender laws."[172]

5. Federal Law

Under the Violent Crime Control and Law Enforcement Act of 1994, prosecutors can use a Three Strikes provision to secure a life or life-equivalent sentence against defendants.[173] The Three Strikes provision was applicable not just to defendants convicted of serious violent felonies but also to defendants facing ordinary drug trafficking charges, transforming sentences from a ten-year statutory minimums to mandatory life sentences after notice of two prior drug offenses.[174]

Federal sentencing enhancements based upon prior drug convictions disproportionately impact Black and Latino defendants.[175] The United States Sentencing Commission considered the impact of these sentencing enhancements on racial groups in 2016, finding "the data demonstrates that the provisions applied most frequently to Black offenders and that such offenders therefore were most significantly impacted."[176] In the federal system, there are 3,672 individuals

172. *Id.* at 1147–48 (citing Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 30–31 (2007)).

173. *See* 18 U.S.C. § 3559(c) (providing for a mandatory life imprisonment if the defendant is convicted in federal court of a "serious violent felony" and has two or more prior convictions in federal or state courts, at least one of which is a "serious violent felon[y] or serious drug offense[]"). Section 3559(c) requires prosecutors to file notice under 21 U.S.C. § 851(a) if they elect to ask the court to sentence a defendant under the Three Strikes provision. *See* Memorandum from Jo Ann Harris, Assistant Att'y Gen., Crim. Div., U.S. Dep't Just., to All U.S. Attorneys (Mar. 13, 1995), https://www.justice.gov/archives/jm/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law [perma.cc/AH3Z-MP4V] ("[W]e have a powerful new federal tool, the so-called 'Three Strikes, You're Out' provision, to help us deal with violent repeat offenders.").

174. WILLIAM H. PRYOR ET AL., U.S. SENT'G COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 10 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf [perma.cc/777H-2JCL].

175. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1139 (2009) (citing PAUL J. HOFER ET AL., U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 133–34 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [https://perma.cc/Y2QE-HM75]); *see also* Starr & Rehavi, *supra* note 124, at 2 (finding significant racial disparities in charge severity).

176. PRYOR ET AL., *supra* note 174, at 32–33 ("Black offenders comprised an increasingly larger proportion of offenders as they progressed through each of these stages. Black offenders were the majority (51.2%) of offenders for whom the government actually filed an information seeking the enhancement, followed by White offenders (24.3%), Hispanic offenders (22.5%) and Other Race offenders (2.0%). The prevalence of Black offenders was even more pronounced for offenders who remained subject to an enhanced mandatory minimum penalty at sentencing (57.9%).").

sentenced to life imprisonment.[177] Almost 25% of these individuals were sentenced for drug offenses,[178] with the vast majority of these individuals receiving the mandatory minimum sentence as recidivists.

The United States Sentencing Commission has reported that "[t]he demographic characteristics of offenders sentenced to life imprisonment differed from that of federal offenders generally. Black offenders comprised the largest proportion of offenders sentenced to life imprisonment (43.6%), followed by Hispanic offenders (27.1%), White offenders (22.3%), and Other race offenders (7.1%)."[179] Noting the results of "disproportionately severe sentences for certain defendants and perceived and actual racial disparities in the criminal justice system," then Attorney General Merrick Garland cautioned against the use of these enhancements.[180] This guidance was rescinded and replaced by Attorney General Bondi, who directed prosecutors to charge "the most serious offenses" and "those with the most significant mandatory minimum sentences (including under the Armed Career Criminal Act and 21 U.S.C. § 851) and the most substantial recommendation under the Sentencing Guidelines."[181]

II. SETTING THE STAGE: THREE STRIKES RULES AND THE SCIENCE OF IMPLICIT BIAS

Despite the deep interconnection between Three Strikes and race in America we demonstrated in Part I, our thesis—that Three Strikes laws were created because of bias, retained because of bias, and are used because of bias—requires further examination and exploration. Despite the raw data we presented in Part I, as well as years of sharp legal commentary circling around these concepts, approved social science methods have not explored how repeat-offender laws correlate with racial discrimination.

Before the implicit cognition revolution, which allowed researchers to painstakingly examine implicit bias in a variety of domains, social science methodology tended to undertake large, data-set-driven empirical examinations of race in the criminal justice system. Much of this work began with the landmark analysis of capital sentencing schemes known as the "Baldus studies," which revealed that the race of a defendant alone—but especially in combination with the

177. *Sentences Imposed*, FED. BUREAU OF PRISONS (Nov. 15, 2025), https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp [perma.cc/W7PJ-94M9].

178. STEPHEN W. CRAUN & ALYSSA PURDY, U.S. SENT'G COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 7–8 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Life.pdf [perma.cc/XQR3-MZZW].

179. *Id.* at 11.

180. Memorandum from Merrick Garland, Att'y Gen., U.S. Dep't. of Just., to All Fed. Prosecutors, at 3 (Dec. 16, 2022), https://www.justice.gov/d9/2022-12/attorney_general_memorandum_general_department_policies_regarding_charging_pleas_and_sentencing.pdf [perma.cc/5MYA-2DQX].

181. Memorandum from Pam Bondi, Att'y Gen., U.S. Dep't. of Just., to All Fed. Prosecutors, at 2 (Feb. 5, 2025), https://www.justice.gov/ag/media/1388541/dl?inline [perma.cc/G7GX-WXEU].

race of a victim—introduced arbitrariness into the administration of justice.[182] Researchers followed up this groundbreaking work by identifying disparities in the criminal legal system in the crack–powder divide,[183] pretrial detention,[184] and the sentencing of children to life without parole.[185] Other research documented that Black children—and especially Black children accused of killing White victims—were more likely to have their case transferred to an adult court where they are

182. *See* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 689–92, 707–10 (1983); G. Ben Cohen, McCleskey's *Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 66–71 (2012) (providing a much more in-depth discussion of the research). This research demonstrated that arbitrariness appeared to arise most clearly in cases involving less aggravation and where jurors and decision-makers were allowed to make assessments of moral culpability from inference. *See* Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 229, 235–36 (Justin D. Levinson & Robert J. Smith eds., 2012). Despite the findings of the Baldus studies, however, the U.S. Supreme Court rejected the challenge to the constitutionality of the death penalty. McCleskey v. Kemp, 481 U.S. 279, 314–15 (1987) (denying the petitioners claim, reasoning that if "McCleskey's claim [was] taken to its logical conclusion, [it] throws into serious question the principles that underlie our entire criminal justice system. . . . Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty"); *see also id.* at 339 (Brennan, J., dissenting) (disagreeing with the majority and arguing that the "statement seems to suggest a fear of too much justice"). Justice Scalia observed in a memo to his colleagues that, "[i]t is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable." Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 405 (2003) (citing EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 211 (Geoff Shandler ed., Times Books 1998) (quoting untitled Scalia memorandum)).

183. *See, e.g.*, LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 383–84 (2011) (citing Craig Reinarman, *5 Myths About that Demon Crack*, WASH. POST (Oct. 14, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/10/09/AR2007100900751.html [https://perma.cc/HJJ7-VL7Z]); *see also* U.S. Attorney General, *Memorandum to All Federal Prosecutors, Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases*, 35 FED. SENT'G REP. 161, 162 (2023) (noting history of racial disparities in charging and sentencing in drug cases).

184. *See* Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1266 (2021) (noting in the federal context that "white defendants are significantly more likely to be released pending trial than Black and Hispanic defendants"); Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [perma.cc/LCJ4-TVEA].

185. *See, e.g.*, JOSH ROVNER, SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 4 (Apr. 2023), https://www.sentencingproject.org/app/uploads/2023/04/Juvenile-Life-Without-Parole.pdf [perma.cc/E7NL-6KQZ]; *Case: Juvenile Life Without Parole*, LEGAL DEF. FUND (Feb. 16, 2018), https://www.naacpldf.org/case-issue/juvenile-life-without-parole/ [perma.cc/4XM4-GMX5].

prosecuted as an adult and found guilty of murder despite a lack of evidence of a specific intent to kill.[186]

Since these groundbreaking studies using traditional data-set methodologies were published, researchers have employed newer methods of examining hypotheses related to implicit and explicit bias in the criminal justice system. Such studies have leveraged a range of tests, such as the Implicit Association Test ("IAT"),[187] which measures reaction time in milliseconds. These modern projects have investigated the ways in which race can wreak havoc in the administration of justice,[188] including empirically studying the role of implicit bias in the ways jurors remember case facts,[189] determinations of criminal guilt,[190]

---

186. *See, e.g.*, Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 941 (2021) (footnote omitted) ("[E]ighty percent of all juvenile offenders serving life or virtual life sentences are people of color, with over fifty percent being Black."); Michael T. Moore, Jr., *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment's Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison*, 16 LOY. J. PUB. INT. L. 99, 106–07 (2014) ("When teen violence increased in the early 1990s the media predicted a wave of juvenile 'superpredators' that never came to fruition. This hype helped fuel a push for juveniles to be more easily transferred to adult courts, which began to occur with greater frequency. Juveniles transferred to adult courts were exposed to the harshest punishments, including the death penalty" (footnotes omitted)).

187. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 6 (1995) (discussing how "priming" and "context" affect empirical studies); 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, 1464 (1998) (defining Implicit Association Tests).

188. *See generally* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019) (describing the science of cognition and how race shapes the experience of the world, including the law enforcement); ALEXANDER, *supra* note 12 (detailing how the criminal legal system, under the guise of colorblindness, has created a racial caste system); CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA (2010) (exploring the way race operates within the criminal legal system through the analysis of the mistaken arrest of Harvard professor Henry Louis Gates); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (examining the way in which the criminal legal system replaced forced enslavement through convict leased system); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011) (noting science of implicit social cognition can inform understanding of police behavior as it relates to nonwhites, and stating "[t]he science of implicit social cognition demonstrates that individuals of all races have implicit biases in the form of stereotypes and prejudices that can negatively and nonconsciously affect behavior to blacks.").

189. *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. 345, 374–381 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (testing and confirming the hypothesis that race impacts the way participants remember facts, and that participants were significantly likely to remember aggressive facts where the protagonist was Black).

190. *See generally* 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.

foundational principles of retribution,[191] and assessments of defendants' future dangerousness.[192] Our own work has focused on specific legal rules or doctrines that invite or activate implicit bias. For instance, in a national study of implicit bias, we identified a specific statutory scheme, known as future-dangerousness determinations, that invited implicit bias while playing an outsized role in capital sentencing schemes. In another empirical study,[193] we tracked how implicit racial bias related to race-group associations (as well as White individualization) sustains the felony murder rule and the accomplice liability doctrine, and leads to racially disparate outcomes. This Article builds on these studies by examining whether implicit and explicit bias are deeply intertwined with specific legal doctrines and applying modern social science methods to examine Three Strikes rules in particular.

A. Implicit Bias and Criminal Justice

Scholars have begun to address how implicit bias operates throughout the criminal legal system, searching for locations where largely unconscious associations can exacerbate racial disparities while perpetuating mass incarceration. Stereotypes surrounding the perceived criminality of Black and Latino people operate to undermine principles of fairness, while stereotypes of individuality privilege White defendants.[194] This Section furthers our social-cognition-based examination of the relationship of implicit bias to Three Strikes laws by examining what is already known about implicit bias in the criminal justice system, by considering relevant social science that ties Black and Latino people to Three Strikes-relevant notions of repeat criminality, and by exploring the cognitive interconnectedness underlying anchoring effects and racial stereotypes when both are present.

Few studies have examined empirically how implicit or explicit bias functions within Three Strikes laws. Existing projects, however, have empirically investigated racial bias across various related criminal law domains, from the

187 (2010) (demonstrating in an empirical study that participants had strong associations between Black men and guilty verdicts).

191. *See generally* 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) (discovering that Americans automatically associate the concepts of payback and retribution with Black and the concepts of mercy and leniency with white).

192. *See generally* 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) (empirically testing and establishing that understanding of dangerousness is impacted by race).

193. *See generally* G. Ben Cohen, Justin D. Levinson & Koichi Hioki, *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 DENV. L. REV. 65 (2024) (empirically testing and establishing that assessments of group culpability are informed by race).

194. Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 875–76 (2015).

presumption of innocence[195] to sentencing.[196] Between these poles, research has probed how jurors and judges may selectively recall and evaluate case facts in racially biased ways,[197] how citizens automatically racialize conceptions of punishment theories,[198] how prosecutors and jurors assess a defendants' future dangerousness,[199] and how these trends can emerge throughout the criminal justice system.[200]

A notable aspect of previous studies is the development and implementation of customized IATs designed to examine legal hypotheses, including the Three Strikes hypothesis we offer in this Article.[201] The IAT—a game-like measure—pairs an "attitude object" (such as women or Muslim Americans) with an "evaluative dimension" (positive or negative) and measures response speed and accuracy to reveal automatic associations.[202] Participants, typically using a keyboard at their own computer, are instructed to quickly match an attitude object (e.g., Muslim or Christian, woman or man) with either an evaluative dimension (positive or negative) or an attribute dimension (moral or immoral, valuable or worthless).[203] In one task, for instance, participants press a designated key (say, "E") when a Muslim name or positive word appears; in another, they press a different key (say, "I") when a Christian name or negative word appears. Differences in response

---

195. *See* Levinson, Cai & Young, *supra* note 190.

196. *See generally* Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017) (empirically tests proposition that federal judges have negative implicit biases against minorities); Mark W. Bennett, Justin D. Levison & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939 (2017) (analyzing judicial sentencing based upon sentencing philosophies, religion and political affiliation).

197. *See* Levinson, *Forgotten Racial Equality*, *supra* note 189; 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, 337 (2010).

198. *See* Levinson, Smith & Hioki, *supra* note 191.

199. Levinson, Cohen & Hioki, *supra* note 192; Cohen, Levinson & Hioki, *supra* note 193.

200. Levinson & Smith, *supra* note 6, at 407.

201. "Priming is a term imported from cognitive psychology that describes a stimulus that has an effect on an unrelated task . . . . Simply put, priming studies show how causing someone to think about a particular domain can trigger asscociative networks related to that domain." Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Levinson, Young & Rudman, *A Social Science Overview*] (first citing Levinson, *Forgotten Racial Equality*, *supra* note 189; and then citing Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009)); *see also* Levinson, *Forgotten Racial Equality*, *supra* note 189, at 356–58 (describing priming studies that demonstrated "shooter bias" in which the participants were more likely to "shoot Black perpetrators more quickly and more frequently than White perpetrators" in a video game instructing participants "to shoot perpetrators . . . as fast as they can").

202. This description of the IAT in this paragraph and the next is derived heavily from our prior description of it. *See* Levinson, Young & Rudman, *A Social Science Overview*, *supra* note 201, at 10–15.

203. *See* Greenwald, McGhee & Schwartz, *supra* note 187, at 1466 (discussing the IAT keyboard procedure).

times indicate the strength of the implicit attitude[204]—faster responses in the first task suggest an implicitly positive view of Muslims, while quicker responses in the second indicate implicit, religion-based stereotyping.[205]

Targeted studies using the IAT, among other methods, illustrate how racial bias can be scrutinized within particular legal doctrines. For example, Justin Levinson, Huajian Cai, and psychologist Danielle Young developed a specialized IAT to determine whether individuals automatically link race with the legal concepts of guilty and not guilty.[206] Their findings revealed that participants significantly associated White individuals with not guilty and Black individuals with guilty, raising concerns about the presumption of innocence's efficacy in protecting Black men charged with crimes.[207]

In another study employing priming techniques, a method in which study participants are exposed to racialized imagery or concepts,[208] Levinson and Young investigated whether exposing mock jurors to the image of a dark-skinned perpetrator would influence their assessment of evidence.[209] Participants first read an account of an armed robbery and then viewed five crime scene photos for a few seconds each.[210] Although four photos were identical across conditions, the key manipulation was one photo: half the mock jurors saw a darker-skinned perpetrator, while the other half viewed a lighter-skinned one.[211] When later evaluating various pieces of trial evidence, jurors primed with the darker-skinned image tended to

---

204. Levinson, Young & Rudman, *A Social Science Overview*, *supra* note 201, at 16–17 (explaining "strength of . . . attitude").

205. Social scientists Nilanjana Dasgupta and Anthony Greenwald have accurately summarized the logic underlying the IAT: "When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty." Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 803 (2001). Social psychologists Laurie Rudman and Richard Ashmore concur: "The ingeniously simple concept underlying the IAT is that tasks are performed well when they rely on well-practiced associations between objects and attributes." Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GRP. PROCESSES & INTERGROUP RELS. 359, 359 (2007).

206. *See* Levinson, Cai & Young, *supra* note 190, at 201–04 ("Results of the Guilty/Not Guilty IAT confirmed our hypothesis that there is an implicit racial bias in the presumption of innocence.").

207. *See id.* at 204 ("These results suggest that participants held an implicit association between Black and Guilty.").

208. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 8–9 (1989) (explaining the studies that examined "automatic stereotype priming effects").

209. Levinson, Young & Rudman, *A Social Science Overview*, *supra* note 201, at 22 (discussing Levinson & Young, *supra* note 197); *see also* Levinson & Young, *supra* note 197, at 310–11 (describing a study that provided "identical photos except in one key respect," the color of the perpetrator's skin, and found discrepancies based on differing skin tones).

210. Levinson & Young, *supra* note 197, at 332.

211. *Id.*

interpret the evidence as more indicative of guilt.[212] This finding underscores how mere exposure to skin tone can sway jurors' evaluation of critical case facts and defendants.[213]

Another study examined whether jurors' memory for case facts is influenced by implicit racial bias.[214] Levinson hypothesized that when case details align with racial or ethnic stereotypes, mock jurors would recall those details more accurately.[215] The results confirmed this: jurors who read about a Black aggressor recalled the aggressions more frequently than those who read about a White aggressor.[216]

Additional research has adapted IATs to probe implicit bias in legally relevant contexts such as accomplice liability, felony murder, and death penalty cases. For instance, Levinson, Smith, and Young investigated whether mock jurors exhibit racial biases concerning the value of human life—automatically associating Black with worthlessness and White with value.[217] Their results confirmed this bias, prompting concerns about the legal system's capacity to render equitable decisions when human lives are at stake.

Major legal constructs, including theories of punishment, have also been tested using implicit methods in the context of racial bias. Levinson, Smith, and Hioki employed their IAT to assess whether retributive punishment has become cognitively intertwined with race.[218] In their study of American adults, participants implicitly linked retributive concepts with Black individuals and leniency with White individuals.[219] Specifically, White faces were automatically paired with terms like "forgive," "compassion," and "redemption," whereas Black faces were paired with "punish," "payback," and "revenge."[220]

---

212. *Id.* at 337.

213. *Id.* ("Participants who saw the photo of the perpetrator with a dark skin tone judged ambiguous evidence to be significantly more indicative of guilt than participants who saw the photo of a perpetrator with a lighter skin tone." (footnote omitted)).

214. *See* Levinson, *Forgotten Racial Equality*, *supra* note 189, at 347, 353 (arguing "that implicit racial bias automatically causes jurors (and perhaps even judges) to misremember case facts in racially biased ways" (footnote omitted)).

215. *Id.* at 352–53, 380–81 (showing a study that draws on "cognitive science studies that show the fragility of the human memory and connect memory failures to racial biases").

216. *Id.* at 398–99.

217. 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, 537–38, 565 (2014) (explaining "that death-qualified participants more rapidly associate[d] White subjects with the concepts of 'worth' or 'value' and Black subjects with the concepts of 'worthless' or 'expendable'").

218. *See* Levinson, Smith & Hioki, *supra* note 191, at 844, 854, 874–75 (proposing that "the historical use of punishment in racialized ways has led to the cognitive inseparability of race and retribution" and discussing the development and use of the "Retribution IAT").

219. *Id.* at 844.

220. *Id.* at 844, 874–75, 879.

In 2022, we deployed a distinct IAT—the Future Dangerousness IAT—to explore capital punishment's future-dangerousness inquiry.[221] In this national study, participants paired Latino, Black, and White groups with words denoting either danger or safety. As predicted, the findings showed that participants associated both Black and Latino groups with future danger, while White groups were linked with future safety.[222] We then connected these results to criminal law's future-dangerousness requirements, particularly in the context of the death penalty. Collectively, these studies illustrate how innovative implicit methods like the IAT can be adapted to test new hypotheses within the legal process.

In 2024, we again employed a unique IAT to assess implicit bias within a different doctrinal context—that of accomplice liability and felony murder.[223] This national, empirical study revealed that Americans tend to automatically individualize White men while perceiving Black and Latino men as collective group members.[224] Moreover, mock jurors in that study assigned higher levels of intentionality and criminal responsibility to men with Latino-sounding names compared to those with White- or Black-sounding names, specifically in the context of a group robbery and subsequent homicide.[225] Given the troubled racial history of felony murder and accomplice liability rules, which is quite similar to the racial history of Three Strikes laws, these findings support calls for abandoning the felony-murder doctrine in group liability cases.[226]

Thus far, only one empirical study has begun to look empirically at the interaction between Three Strikes laws and implicit bias. A study by Rebecca C. Hetey and Jennifer L. Eberhardt involved researchers showing Californians photographs depicting over-incarceration in the wake of the state's highly criticized Three Strikes law. The study found that a significantly larger percentage of citizens were willing to sign a real petition urging the repeal of California's Three Strikes law when the prison population was depicted in the photographs as less Black.[227]

B. Stereotypes of Black and Latino Repeat Criminality

Despite the now compelling body of implicit bias research in the criminal justice system, as well as Hetey and Eberhardt's groundbreaking study—which supports the notion that implicit bias drives the retention of Three Strikes laws—social cognition projects have yet to investigate the racial purposes and implementation of Three Strikes laws. An exploration of underlying social science, however, can help to lay the foundation for that analysis. Such work is plentiful. Social scientists have long examined the racialized notion of criminality in numerous studies. Even though many such studies are not perfectly situated within the legal context—and, notably, do not require legal actors to make judgments concerning issues like criminality or the likelihood of recidivism—they provide

---

221. *See* Levinson, Cohen & Hioki, *supra* note 192, at 274.
222. *Id.* at 274, 281–82.
223. Cohen, Levinson & Hioki, *supra* note 193, at 71–73.
224. *Id.* at 73–74.
225. *Id.* at 108–10.
226. *See id.* at 88.
227. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1950–51 (2014).

important theoretical support for the hypothesis that the implementation of Three Strikes laws is driven by implicit and explicit bias.

1. Black Men and Stereotypes of Criminality

There is no shortage of compelling studies investigating the connection between Black men and stereotypes of danger, threat, and repeat criminality.[228] Studies of priming and race are one domain where this research has flourished. Such work has repeatedly shown that stereotypes connecting Black Americans to criminality are essentially ready to be activated and can be triggered even by normal occurrences, such as listening to music.[229] For example, participants in a study by psychologists Rudman and Lee listened to either rap or pop music for 13 minutes and were later asked to make judgments about a person's ambiguously hostile and sexist actions.[230] Rudman and Lee found that listening to rap music for only a few minutes activated negative racial stereotypes associated with violence.[231] Furthermore, the researchers found that rap music even led to elevated judgments of a fictional person's hostility when he had a Black-sounding name (but not when he

228. *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004) (discussing study results finding that "Black faces looked more criminal to police officers; the more Black, the more criminal"); *see also* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1325 (2002) [hereinafter Correll et al., *The Police Officer's Dilemma*] (discussing study participants' decisions to either shoot or not shoot targets and finding that "the decision to fire on an armed target was facilitated when that target was African American, whereas the decision not to shoot an unarmed target was facilitated when that target was White"); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 190 (2001) (finding "that the race of faces paired with objects does influence the perceptual identification of weapons," that the results of the study "showed that when time was unlimited, Black primes facilitated the identification of guns, relative to White primes," and that "when response time was constrained, Black primes caused race-specific errors"); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 773 (2018) ("The stereotyping of Blacks' predisposition to crime and dangerousness is rooted in the beliefs formed during slavery by Whites that Blacks were more animalistic than human."). Studies on Latino men are not as numerous.

229. *See* Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GRP. PROCESSES & INTERGROUP RELS. 133, 138–39 (2002) (finding that "exposure to violent and misogynistic rap music had the generalized effect of strengthening the association between Black men and negative attributes").

230. *See id.* at 135–36, 140 (describing the study's methodology). Participants' self-reported (explicit) prejudice levels did not predict participants' racialized judgments, indicating that automatic biases can leak into people's decision-making processes without their endorsement or awareness. *See id.* at 145–46 (discussing the fact that "self-reported stereotyping" only "weakly predicted" a participant's racialized judgments).

231. *See id.* at 144–46 (finding that the results of the study showed direct evidence that "rap music automatically activates negative Black stereotypes").

had a White-sounding name).[232] This study further demonstrates that racial stereotypes of danger and criminality can be easily and automatically activated, with concerning results.[233]

A similar study by researchers James Johnson, Sophie Trawalter, and John Dovidio primed participants by playing segments of either a violent or nonviolent rap song.[234] After listening to the music, participants read stories of violent behavior (e.g., breaking car windows) and were asked to make judgments about the cause of those actions.[235] Participants who heard rap music made harsher dispositional attributions about ambiguous behavior, particularly when a Black-sounding name was involved.[236] Similarly, Johnson, Trawalter, and Dovidio demonstrated that violent rap music led participants to attribute a Black defendant's aggressive behavior to dispositional factors (e.g., a violent personality) rather than situational factors (e.g., alcohol or stress related to a break-up).[237] When people make dispositional attributions for criminal behavior, such as believing that a person acted because of a violent character rather than a bad situation, there are clear implications for sentencing based upon prior criminal convictions under a habitual-offender status.

In a different type of priming study, Keith Payne investigated how even brief exposure to images of Black or White faces could influence the speed of object identification when those objects were related to violence and criminality.[238] In his study, participants were shown a photograph of a Black or White face for 200 milliseconds (too short a time to be recognized and processed fully) followed immediately by an image of an object. Their only task was to quickly categorize the object when it appeared on the screen. Payne informed participants that the face images were merely cues signaling the upcoming object. The results revealed a pattern: participants were significantly faster at identifying guns when they had first seen a Black face and quicker at identifying tools when preceded by a White face.[239] This study demonstrates how racial associations regarding criminality and violence

---

232. *See id.* at 145 (finding that "primed subjects rated Kareem as more sexist, as well as more hostile and less intelligent than Donald, and they did so irrespective of their prejudice level").

233. *See id.* at 138 ("In sum, these results are consistent with our expectation that rap music would strengthen automatic associations between Blacks and negative attributes . . . .").

234. James D. Johnson, Sophie Trawalter & John F. Dovidio, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 J. EXPERIMENTAL SOC. PSYCH. 233, 239–40, 245–49 (2000) (outlining the study's methodology and discussing its results).

235. *Id.* at 240–41.

236. *Id.* at 240–43.

237. *Id.* at 245 ("When compared to control participants and those exposed to nonviolent Black artists, participants exposed to the violent rap music made more negative dispositional attributions of violence to a Black, but not to White, target person.").

238. Payne, *supra* note 228, at 184. The objects consisted of guns and non-gun objects, such as a socket wrench and a drill.

239. *Id.*

can be activated automatically within milliseconds, shaping perception and response in ways that reinforce stereotypes.

In the context of Three Strikes, where prior behavior is already used to predict future danger, such automatic dispositional attributions can unjustly elevate perceptions of threat. Shooter-bias studies use simulated video games to examine race-based differences in responses to potentially threatening or criminal individuals.[240] In these studies, participants play a video game where they must quickly "shoot" armed perpetrators (holding guns) while refraining from shooting unarmed individuals (holding non-weapon objects, such as cell phones). The term "shooter bias" refers to the consistent pattern found in these experiments: participants tend to shoot Black perpetrators more quickly and more frequently than White perpetrators and more quickly and frequently refrained from shooting White bystanders rather than Black bystanders.

Further research has explored the cognitive and neurological roots of shooter bias, hypothesizing that it may be linked to brain processes involved in detecting threats and regulating behavioral responses. To investigate this, Correll and his team measured participants' event-related brain potentials ("ERPs")—electrical brain activity associated with cognitive processing—while they played the shooter-bias video game.[241] The results revealed distinct racial disparities in neural activity: participants exhibited stronger threat-related brain responses when viewing Black actors, even when unarmed, and showed more control-related brain activity when viewing White actors. Moreover, these neural patterns correlated with behavior—the greater the bias in brain activity, the more pronounced the shooter bias in participants' responses.

2. Latino Men and Stereotypes of Criminality

Although research projects investigating stereotypes of the Latino community have been somewhat less abundant, there have indeed been empirical examinations that link Latino stereotypes with conceptions of violence and repeat criminality.[242] A 2017 study by Sadler and colleagues employed the classic "shooter bias" paradigm and measured automatic responses in a way that illuminates the automaticity of stereotypes of Latino danger.[243] Recall that in the classic shooter-bias studies, researchers have found that people shoot more rapidly when they see a Black person holding a gun compared to a White person holding a gun.[244] Similarly,

240. Correll et al., *The Police Officer's Dilemma*, *supra* note 228, at 1315.

241. Joshua Correll et al., *Event-Related Potentials and The Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCH. 120, 121–22 (2006).

242. *See infra* notes 243–52.

243. Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 289–92 (2012) ("The current research examined implicit racial bias in the decision to shoot White, Black, Latino, and Asian male targets in a FPS task in two studies.").

244. *See, e.g.*, Correll et al., *The Police Officer's Dilemma*, *supra* note 228, at 1325 (finding that "[b]oth in speed and accuracy, the decision to fire on an armed target was facilitated when that target was African American"); *see also* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1013 (2007) (finding that participants reacted more quickly in the

participants are more likely to "shoot" unarmed Black men than unarmed White men.[245] When expanding the "shooter bias" paradigm to include images of Latino men in a study of actual police officers, Sadler and colleagues found that study participants indeed "shot" Black and Latino men significantly faster than White and Asian men.[246] Furthermore, they found that the quicker reaction times to shoot Latino men were associated with police officers' danger- and aggression-related stereotypes of Latinos.[247] The researchers summarized, "The more aggressive their personal stereotype of Latinos, the less able officers were to accurately distinguish objects."[248]

The shooter-bias results associating Latinos with criminality and threat can be contextualized within other studies showing anti-Latino implicit bias. For example, Galen Bodenhausen and Meryl Lichtenstein investigated stereotypes of Hispanic aggression in the criminal justice system and found that study participants judged defendants to be more aggressive (and more guilty) when they were depicted as Hispanic as compared to when they were not.[249] In yet another study, this time using methods from psychology's field of attention and perception, Steffanie Guillermo and Joshua Correll studied attentional biases and compared how people visually paid attention to Latino, Black, and White faces.[250] The researchers found that Latino faces captured study participants' attention faster and kept their attention longer than Black or White faces.[251] The researchers surmised that "[s]ince Latinos

---

decision to shoot when the shooting targets "were Black, rather than White"); Charles M. Judd, Irene V. Blair & Kristine M. Chapleau, *Automatic Stereotypes vs. Automatic Prejudice: Sorting out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCH. 75, 78–79 (2004) (finding that responses to categorize an object in a photograph as a gun were faster when the participants had seen Black face primes than White face primes).

245. *See* Correll et al., *The Police Officer's Dilemma*, *supra* note 228, at 1325 ("[T]he decision to fire on an armed target was facilitated when that target was African American, whereas the decision not to shoot an unarmed target was facilitated when that target was White.").

246. *See* Sadler et al., *supra* note 243, at 301 (providing context that "[o]fficers showed racial bias in the decision to shoot Latinos relative to Whites and Asians").

247. *See id.* at 305 ("The more officers endorsed stereotypes of Latinos as violent and dangerous, the faster they tended to respond to armed than unarmed Latino targets.").

248. *Id.* at 306.

249. Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871, 875 (1987) ("[S]ubjects saw the Hispanic defendant as more aggressive, more likely to be aggressive in the future, more likely to be guilty, and more likely to commit criminal assault in the future than a nondescript defendant . . . ."). The comparison group was described by the authors as being "ethnically nondescript." *Id.* at 872.

250. *See* Steffanie Guillermo & Joshua Correll, *Attentional Biases Toward Latinos*, 38 HISP. J. BEHAV. SCIS. 264, 265 (2016) ("The goal of the present research was to examine preferential attention, or attentional bias, toward Latinos.").

251. *Id.* at 274 ("The current research provides the first evidence that Latino faces capture attention faster and hold attention longer than White faces when participants are White. We demonstrated this effect across two studies, and [found the same] even when the racial context included Black faces . . . .").

are stereotypically associated with threat, it is plausible that threat stereotypes are related to attention toward Latino faces."[252]

In our studies on future dangerousness[253] and felony murder,[254] we similarly found statistically significant implicit bias against Latino individuals. Our research on future dangerousness found that jurors possess implicit biases associating Latino men with danger and hostility, paralleling similar biases against Black men.[255] Using a Future Dangerousness IAT that compared Latino men to White men, the study found that jurors automatically associated Latino men with future danger, while associating White men with future safety.[256] Our study on felony murder and accomplice liability rules identified how these rules aggregate group responsibility for individual actions, disproportionately impacting Latino people by precognition discrimination. The research detailed how implicit biases cause jurors and decision-makers to hold groups (including Latino communities) collectively responsible for the actions of one member. This "group association" leads to harsher judgments for Latino defendants, and notably so in the context of violent crime.

Here, our study attempts to look at stereotypes of Latino criminality at a historical moment in the wake of a presidential campaign launched under the stereotype-stoking threat of Mexico sending us "rapists" and "bringing drugs" and "crime,"[257] along with allegations that people seeking asylum in the United States were "animals," eating pets,[258] and that "monsters" from the MS-13 gang are coming to the United States to murder children.[259]

---

252. *Id.*

253. *See* Levinson, Cohen & Hioki, *supra* note 192, at 234.

254. *See* Cohen, Levinson & Hioki, *supra* note 193, at 65–66**.**

255. *Id.* at 108–09.

256. *Id.* at 99–100.

257. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, at 11:35 ET), https://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/8J68-SAAV] ("Donald Trump kicked off his presidential bid more than a year ago with harsh words for Mexico. 'They are not our friend, believe me,' he said, before disparaging Mexican immigrants: 'They're bringing drugs. They're bringing crime. They're rapists.'").

258. Daniel Arkin & David Ingram, *Trump Pushes Baseless Claim at Debate About Immigrants 'Eating the Pets,'* NBC NEWS (Sept. 10, 2024, at 19:49 MT), https://www.nbcnews.com/politics/2024-election/trump-pushes-baseless-claim-immigrants-eating-pets-rcna170537 [https://perma.cc/WB5Q-2BY5].

259. Robert E. Kessler & Nicole Fuller, *Trump, Barr: Feds to Seek Death Penalty in Slaying of Two Brentwood Teens, Other Killings*, NEWSDAY (July 15, 2020, at 22:48), https://www.newsday.com/long-island/ms13-murders-long-island-trump-barr-s01244 [https://perma.cc/C5RG-CNFU] (providing that in a briefing with reporters in the Oval Office, Trump stated, "We believe the monsters who murder children should be put to death" and that "We seem to have quite a good agreement on that. These people murder children and they do it as slowly and viciously as possible. We will not allow these animals to terrorize our communities. And my administration will not rest until every member of MS-13 is brought to justice"); Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends 'Animals' Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html

C. The Role of Anchoring Effect and Race—A SuperBias?

A unique psychological feature of Three Strikes laws warrants additional consideration in the context of racialized sentencing and should be considered when developing an empirical study to test potential racial effects of Three Strikes laws. Because Three Strikes laws provide a built-in option for significantly enhanced sentencing, during which attorneys, the court, and counsel are all exposed to a harsher potential sentence than the individual crime would warrant, Three Strikes cases fit squarely within the behavioral economic category of anchoring effects.[260] Anchoring effects describe the phenomenon whereby people are influenced by uninformative or extreme numbers.[261] When people are asked to make a decision that requires a numerical judgment or estimate, even random numbers presented to those people impact their ultimate answers.[262] A famous study on anchoring effects conducted by Amos Tversky and Daniel Kahneman asked participants whether the percentage of African nations in the United Nations was greater than an arbitrary number (e.g., either 10% or 65%).[263] Participants were then asked to estimate the actual percentage. The researchers found that participants were heavily influenced by the anchor information. Participants in the low-anchor category estimated that the percentage of African nations in the United Nations was 25%, compared to participants in the high anchor category, who estimated the number at 45% percent.[264] As Thomas Mussweiler and his colleagues describe, anchoring effects have been shown to be "a truly ubiquitous phenomenon that has been observed in a broad array of different judgmental domains."[265] Hence, anchoring effects have been

---

[https://perma.cc/NY26-SMLZ] (providing that President Trump "defended his use of the word 'animals' to describe dangerous criminals trying to cross into the United States illegally" and that these remarks follow his bitter complaint "about a wave of migrants from Central America" seeking asylum at the United States Border).

260. A substantial portion of this overview of anchoring effect and its potential theoretical interaction with implicit racial bias derives sometimes verbatim from one of the author's prior work. *See generally* Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591 (2012).

261. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE. 1124, 1128 (1974) (noting anchoring effect is also referred to as "anchoring and adjustment effect.").

262. *Id.*

263. Participants were aware that the anchors were arbitrary, as they were derived when the participants spun a "wheel of fortune." The researchers had rigged the results of the "wheel" such that half of the participants would see the low (10%) anchor and half would see the high (65%) anchor. *Id.* The random selection of anchors helps demonstrate that anchoring effects occur even when the anchor values are clearly uninformative or even extreme. Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSONALITY & SOC. PSYCH. BULL. 1142, 1143 (2000). In one study by Strack and Mussweiler, participants asked to estimate the age of Mahatma Gandi were influenced by an unreasonably high anchor value of 140 years. *Id.* (citing Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCH. 437 (1997)).

264. Tversky & Kahneman, *supra* note 261, at 1128.

265. Mussweiler, Strack & Pfeiffer, *supra* note 263, at 1142 (noting that the anchoring effect has "clear practical relevance for many decisions in real-world settings").

found not only in frequency estimates, but also in medical decision-making and in legal decision-making.[266]

The increased accessibility of information related to an anchor causes anchoring effects.[267] When people see an anchor, they first quickly evaluate whether it might be the correct response.[268] As part of this process, people rely on their memories to recall instances that might confirm the truth (or prove the untruth) of the anchor.[269] Once they recall information relating to the response, people make adjustments to the anchor in order to make a decision. This process of adjusting the anchor to a more correct result leads participants to biased results.[270] Because people are focused on comparing the anchor to the truth, rather than simply evaluating the truth without outside influence, they rely too much on information related to the anchor, and the anchoring effect (and corresponding lack of sufficient adjustment) asserts itself.[271]

Consider, for example, criminal sentences. If people are asked whether the minimum jail sentence for attempted murder is greater or less than two years, they will search their memories for information relating to sentence length. If the idea that sentences for violent crimes are too short is a prevalent one in society, this information may become particularly salient. If, however, people are asked whether the minimum jail sentence is greater or less than 100 years, information in which an overly punitive government cracks down on crime may become salient. When these people are next asked to identify the exact length of the minimum sentence for attempted murder, one could predict that the low (two-year) or high (100-year) anchor they were exposed to will exert influence on their cognitive process and thus on their final judgment.[272]

---

266. Noel T. Brewer et al., *The Influence of Irrelevant Anchors on the Judgments and Choices of Doctors and Patients*, 27 MED. DECISION MAKING 203, 208 (2007); Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCH. BULL. 188, 197 (2006) [hereinafter Englich, Mussweiler & Strack, *Playing Dice*].

267. Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments are Insufficient*, 17 PSYCH. SCI. 311, 316 (2006). Additional research on anchoring effects have demonstrated that anchors are not just a product of insufficient adjustment, but also of people's willingness to stop adjusting once their estimates enter a range of plausible responses. *Id.* at 316–17.

268. *Id.* at 312.

269. The importance of memory in anchoring effects raises the issue of whether implicit racial biases in memory processes (including storage and retrieval) may introduce implicit racial biases into anchoring effects. *See* Levinson, *Forgotten Racial Equality*, *supra* note 189, at 374 (providing more information on implicit memory biases).

270. Epley & Gilovich, *supra* note 267, at 312.

271. *See* Strack & Mussweiler, *supra* note 263, at 444–45.

272. The effect of even randomly generated sentencing anchors has been confirmed in empirical studies. *See* Englich, Mussweiler & Strack, *Playing Dice*, *supra* note 266, at 188–90 (finding that even when prosecutor and judge participants generated anchors randomly by throwing dice, they were still influenced by anchoring effect).

In legal scholarship, a significant amount of attention has focused on the power of anchoring effects in the tort litigation context.[273] Much of this attention has been empirical in nature and indicates that jurors cannot help but be affected by the amounts requested by attorneys.[274] A project by John Malouff and Nicola Schutte in the civil context, for example, examined how mock jurors responded to plaintiffs' requests for damages depending upon whether the request was for $100,000 or $500,000.[275] The results of the study showed that the anchors were powerful; although the cases were identical, participants in the $100,000 group awarded $90,000 on average while participants in the $500,000 group awarded $300,000 on average.[276] A similar study on anchoring in punitive damages by Jennifer Robbenolt and Christina Studebaker found that mock jurors displayed anchoring effects in response to caps on punitive damages, both in increasing and decreasing award amounts.[277]

---

273. *See* Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 355–64 (1999).

274. John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCH. 491, 495–96 (1989).

275. *See id.* at 493; *see also* Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 456 (1999) (finding strong anchoring effects in mock juror decisions).

276. Malouff & Schutte, *supra* note 274, at 495.

277. *See* Robbennolt & Studebaker, *supra* note 273, at 361. Other work on anchoring has focused on the influence of anchoring on settlement decisions. In two studies by Russell Korobkin and Chris Guthrie, the researchers found that mock parties to litigation would be more likely to settle if the final settlement offer they received was much higher than an original anchor offer. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1101 (2000) (citing Russell Korobkin & Chris Guthrie, *Opening Offers and Out of Court Settlement: A Little Moderation Might Not Go a Long Way*, 10 OHIO ST. J. DISP. RES. 1 (1994)); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 139–42 (1994). This finding occurred even though the final offers were identical, highlighting the influence of the original anchor offer. Other legal scholarship has found anchoring effects on mock juries in criminal sentencing and has even shown that judges display anchoring effects in making decisions. Englich, Mussweiler & Strack, *Playing Dice*, *supra* note 266, at 191. Other empirical studies of anchoring effects have been conducted in related fields. *See, e.g.*, Brewer et al., *supra* note 266, at 204; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777, 778 (2001); Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCH. 1535, 1535 (2001) (using trial judges as study participants); Birte Englich, Thomas Mussweiler & Fritz Strack, *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 705 (2005); *see also* Birte Englich, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 LAW & POL'Y 497, 497 (2006) (noting anchoring effect in courtroom setting where prosecutor's sentencing demand affects even experienced defense attorneys).

D. A "SuperBias" Anchoring Effect?

The anchoring effect, despite its predictability and strength, may yield to an implicit need to maintain the racial status quo, a phenomenon that could potentially impact Three Strikes sentencing. When a juror, judge, or prosecutor is exposed to a notably long potential sentence, they may be unable to fully disregard the high anchor when they determine the actual sentence.[278] Beginning at the high anchor and adjusting downwards, the sentencer may ultimately select a number when the sentence length in their mind comports with legitimate examples or memories they can retrieve. But is such an adjustment possible without bias when race is introduced into a Three Strikes case?

Imagine, in the civil law context, that a pedestrian sues after being injured by faulty machinery while walking past a construction site. If the victim–plaintiff is White, a juror's mental search in response to a high anchor proposed by counsel may proceed differently than if the victim–plaintiff is Black. Specifically, when considering potential damages in response to the high anchor proposed, the juror's mental search will yield more cognitive "hits." This result can be explained because it is common for a Black male to be stereotyped as poor and lazy.[279] So long as the jurors are aware of this stereotype, even if they do not consciously embrace it, their downwards adjustment to the plaintiff's high anchor may continue for the Black plaintiff long after they would have settled on a reasonable adjustment for an otherwise identical White plaintiff. In the case of low anchors (offered by the defense attorney), it will conversely be easier for the jurors to find a cognitive representation closer to the low anchor when the plaintiff is Black. Simply embracing the contents of one's own mind (which contain stereotypic representations of reality) allows for a Black plaintiff to be harmed through implicit racial bias in the anchoring effect.

Racial stereotype-influenced anchoring could also help to explain documented racial disparities in Three Strikes cases. Assuming that prosecutors' requests for Three Strikes were equal for defendants in similar situations, anchoring effects in this context (longer sentences) might be traced to judges' failure to adjust anchors sufficiently. For example, judges may make stereotype-influenced judgments of repeat criminality that can corrupt the anchoring adjustment process. To the extent that judges hold (even implicit) stereotypes of Black male defendants as being repeat criminals, stereotype-consistent memories will prove more accessible than if the same defendants were White. Thus, in making a particular sentencing decision, a judge may have an easier time recalling an analogous Black male who was an eligible repeat criminal than an analogous White male. Such

---

278. Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237, 252 (2008) (citing EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 152–54 (2003)).

279. Results of the Black–White stereotype IAT consistently show that people associate Black with traits such as lazy and hostile, and White with traits such as ambitious and calm. *See, e.g.*, Rudman & Ashmore, *supra* note 205, at 361–62; Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GRP. DYNAMICS 101, 102 (2002) (reporting results from 600,000 IATs on the popular online website, including significant Black–White IAT results).

memory-driven stereotypes could account for some of the Three Strikes sentencing disparities discussed in Part I.

Our theory is that the combination of anchoring and implicit bias plays a dramatic role in the operation of Three Strikes laws. Like a juror assessing the value of the lawsuit, prosecutors, aware of stereotypes of Black defendants as repeat offenders and White defendants as law-abiding members of society, superimpose the anchor of a Three Strikes sentence on Black defendants while extending mercy or privilege to White defendants.

We sought to determine whether the connection between implicit bias and anchoring exacerbates the racial disparities in sentencing that mark the criminal justice system. Taken together with our hypothesis that Three Strikes laws originate because of race, are retained because of race, and are implemented because of race, we designed a study to test these hypotheses empirically.

III. THE EMPIRICAL STUDY

To test our hypotheses, we conducted a national, empirical study designed to explore the impact of racial bias on decision-making regarding White, Black, and Latino defendants in the context of Three Strikes laws. The study sought to understand how implicit bias, explicit bias, or both influence the application of these laws. This Part presents the methodology and results of the study and discusses and contextualizes the results.

A. Methodology

1. Participants

The study involved 1,000 participants nationally who were recruited through the CloudResearch online platform[280] and randomly assigned to a range of different conditions based on race/ethnicity and Three Strikes eligibility.[281] To take part in the study, participants were required to be 18 years or older and be jury-eligible citizens of the United States.[282] The resultant participant pool for the study was diverse, as indicated by several measures. For example, 51.81% of the participants were women. Participants represented a wide range of ages, with ages ranging from 18 to 80+. Within that range, the largest group (32.76%) of participants were ages 31–40. The second most common age range was 21–30, with 22.76% falling in this range. The third most common age range was 41–50, with 19.69%

280. CloudResearch is an online platform that allows researchers to connect with participants to gather data on surveys and studies. *See* CLOUDRESEARCH, https://www.cloudresearch.com/ [https://perma.cc/P477-GB9D] (last visited Feb. 27, 2025). Participants were compensated $1.50 for their participation.

281. The study was preregistered on the Open Science Framework. Justin Levinson, G. Ben Cohen & Koichi Hioki, *Implicit Bias and Criminal Laws: A Focus on Repeat Offender Laws*, OSF REGISTRIES (May 17, 2024), https://osf.io/3a8sd [https://perma.cc/BP8G-RLP9].

282. Participants who reported prior felony convictions (n=0, because we used filter on cloud research) were refused participation due to laws in many states that exclude felons from jury service. *Id.* In addition, participants that failed to meet quality control expectations on the IAT and that failed to finish all questionnaires (n=77) following suggestions in modern research, were excluded. *Id.*

falling in this age range. Participants were geographically diverse as well, residing in 48 U.S. states.

Study participants represented a diverse range of ethnic, racial, and religious backgrounds. Starting with race and ethnicity, 72.96% of participants identified themselves as White, 11.63% identified themselves as Black or African American, 9.59% identified themselves as Asian American, 9.59% identified themselves as Hispanic or Latino, and 4.49% identified themselves as more than one race. Furthermore, a range of self-reported political preferences was present, with an overall participant pool that leaned from neutral to liberal. For example, 40.71% reported affiliating strongly or moderately with liberal positions, 17.25% reported affiliating strongly or moderately with conservative positions, and the remainder reported agreeing slightly more often with liberal positions (15.92%) or slightly more often with conservative positions (10.82%). The remainder of participants identified as being ideologically neutral (15.31%).

2. Materials

Participants completed a range of measures, as described in detail below. First, participants viewed a set of mugshots of 20 arrestees.[283] They then read descriptions of four separate criminal cases and were asked to render a prison sentence for each one.[284]

---

283. These mugshots were drawn from the pretested photos in a research database. *See* Debbie S. Ma, Joshua Correll & Bernd Wittenbrink, *The Chicago Face Database: A Free Stimulus Set of Faces and Norming Data*, 47 BEHAV. RSCH. METHODS 1122, 1133 (2015).

284. The full text of the four case vignettes is as follows:

> **Case 1:** DEFENDANT broke into a garage of a home and stole a toolset and a gas can. He caused a small amount of damage to the garage door. DEFENDANT was caught on video committing the offense. He was identified by police from the video as a person known to law enforcement. Defendant has been charged with the crime of LARCENY. PRIOR CONVICTIONS: DEFENDANT has two prior convictions: one for burglary and one for attempted robbery. SENTENCE: If DEFENDANT is convicted for the crime of larceny, he faces a sentence between 0-5 years in prison. THREE STRIKES SENTENCE: Due to the DEFENDANT'S prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment.
>
> ---
>
> **Case 2:** DEFENDANT was caught fleeing the scene of a sporting goods store with four golf clubs hidden in his jacket. While being detained by the mall security guard, the DEFENDANT punched the security guard in the back of the head and took off running. The police were called and detained the DEFENDANT three blocks away. Two golf clubs were still in his possession. The security guard was treated for minor injuries at a local hospital and released. DEFENDANT has been charged with AGGRAVATED BATTERY, a felony. PRIOR CONVICTIONS: DEFENDANT has two prior convictions, one for burglary and a second for drug possession. SENTENCE: If DEFENDANT is convicted for the crime of aggravated battery, he faces a sentence between 2-20 years in prison. THREE STRIKES SENTENCE: Due to the DEFENDANT'S

After completing the sentencing task, participants then completed an IAT—the Three Strikes IAT we devised—as described in detail below. Following the Three Strikes IAT, participants next answered a range of questions, including the Symbolic Racism Scale 2000 (which is a measure of anti-Black explicit bias), a measure of anti-Latino explicit bias, a dangerousness assessment focused on future-dangerousness predictions of the four defendants, an assessment of the likelihood of reoffending for people who commit one or more crimes, a measure regarding the generalized intentionality of crimes, a punishment philosophy scale, a memory-based manipulation check, and demographic questions. Additional details on these tasks are detailed below:

Criminal Case Judgments—Sentencing: Mock jurors read four criminal case vignettes (presented to them in randomized order, in order to lessen order effects).[285] In each of the case vignettes, a defendant has been charged with a crime. Each defendant has also been previously convicted of two prior crimes (in two case vignettes, both prior convictions were for nonviolent crimes, and in two case vignettes, at least one prior conviction was for a violent crime). Constructing such a

---

prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment.

Case 3: DEFENDANT was stopped and cited by police for speeding. A search of his vehicle revealed eight grams of cocaine in the glove compartment. The cocaine was packaged in eight separate plastic bags hidden inside a brown paper bag. Additionally, officers found small amounts of marijuana in the car. DEFENDANT told police that he was heading to a friend's house and admitted that the cocaine was his. He denied the intent to sell the cocaine. He has been charged with a felony of DRUG POSSESSION WITH INTENT TO DISTRIBUTE. PRIOR CONVICTIONS: DEFENDANT has two prior convictions, one for cocaine possession and one for aggravated battery. SENTENCE: If DEFENDANT is convicted for the crime of drug possession with intent to distribute, he faces a sentence between 0-5 years in prison. THREE STRIKES SENTENCE: Due to the DEFENDANT'S prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment.

Case 4: DEFENDANT was arrested after a fight following a community event. According to witnesses, the DEFENDANT instigated the fight after exchanging words with the victim. The victim suffered a concussion, a fractured face-bone, and a laceration that required eleven stitches. The DEFENDANT was charged with assault and aggravated battery. PRIOR CONVICTIONS: DEFENDANT has two prior convictions, one for burglary and one for armed robbery. SENTENCE: If DEFENDANT is convicted for the crime of assault and aggravated battery he faces a sentence of 2-20 years in prison. THREE STRIKES SENTENCE: Due to the DEFENDANT'S prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment.

285. *See id.*

set of cases would presumably allow the examination of the overall anchoring effect of Three Strikes laws and would facilitate an understanding of whether there are potentially different results across types of crimes. For example, the case we called "Case 4" read:

> DEFENDANT was arrested after a fight following a community event. According to witnesses, the DEFENDANT instigated the fight after exchanging words with the victim. The victim suffered a concussion, a fractured face-bone, and a laceration that required eleven stitches. The DEFENDANT was charged with assault and aggravated battery.
>
> PRIOR CONVICTIONS: DEFENDANT has two prior convictions, one for burglary and one for armed robbery.
>
> SENTENCE: If DEFENDANT is convicted for the crime of assault and aggravated battery he faces a sentence of 2-20 years in prison.
>
> THREE STRIKES SENTENCE: Due to the DEFENDANT'S prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment.

Three Strikes Condition: Half of the participants were randomly assigned to a Three Strikes jurisdiction (where participants were told both the sentencing range for the new crime itself and also the potential to sentence a defendant to an enhanced, longer sentence, due to the prior convictions). The other half of the participants were randomly assigned to a non-Three Strikes jurisdiction (where participants will only be given the sentencing range for the new crime itself). Participants were then asked to sentence the defendant in years and months. For example, in the above Case 4 example, half of the participants saw the instruction: "THREE STRIKES SENTENCE: Due to the DEFENDANT'S prior convictions, the prosecutor can charge him under the Three Strikes Law, which would allow for an enhanced sentence ranging from 20 years to Life Imprisonment." The other half saw the identical case information, including prior convictions, but were not told of the Three Strikes sentence option.

Mugshot Race Manipulation: Participants were also randomly assigned to one of three group membership conditions of the case. This condition varied the percentage of White, Black, and Latino mugshots displayed on the screen prior to the case vignette task. Importantly, defendant group membership was not indicated in the sentencing task. Thus, the study tests whether mock-juror expectations about the defendants, based upon the visually apparent race/ethnicity of the overall group of arrestees (e.g. higher percentages of Black, Latino, or White arrestees), will affect sentencing judgments. If, for example, jurors were primed by the race of the photos they saw, it might be expected to affect their subsequent responses to stimuli.

The Three Strikes IAT: We designed a novel IAT to measure implicit racial biases related specifically to repeat-offender laws. The purpose of this IAT was to measure whether jurors automatically perceive members of some racial or ethnic groups as repeat criminals who would be expected to reoffend or as generally law-abiding individuals who may sometimes make discrete criminal choices. Presumably, defendants with prior criminal convictions who are automatically

perceived more as repeat criminals, and less as law-abiding individuals who sometimes make criminal choices, will be likely to be charged under so-called Three Strikes laws and will be more likely to be sentenced harshly. By comparison, defendants who are perceived more as law-abiding individuals who sometimes make criminal choices would be less likely to be charged under Three Strikes laws and relatedly less likely to be sentenced harshly. If participants automatically associate groups such as White, Black, or Latino with repeat criminality, it would raise significant additional concern about the fairness underlying Three Strikes laws, as well as decisions to implement Three Strikes charging and/or sentencing in specific cases.

The IAT measure was thus designed to home in on potentially specific, implicit racialized biases regarding repeat-offender laws. Two distinct versions of the "Three Strikes IAT" were created: the White–Black Three Strikes IAT and the White–Latino Three Strikes IAT. We selected the following stimuli to represent the category of Repeat Criminal: Delinquent, Felon, Law-Breaker, Criminal, Guilty, Offender, and Culprit. We selected the following stimuli to represent the category of Law-Abiding: Innocent, Law-Abiding, Obedient, Blameless, Moral, Decent, and Honest. White-sounding names were selected as stimuli for the White category, Black-sounding names were selected as stimuli for the Black category, and Latino-sounding names were selected as stimuli for the Latino category.[286]

Sentencing Philosophies. After completing the sentencing task, participants were given an explicit measure: asking mock jurors about their views on sentencing. Participants were asked how much they agree with certain statements representing differing sentencing theories, such as: "people who commit serious crimes often should receive treatment instead of punishment," and "a person who commits the harshest crime deserves the harshest punishment." We included these questions due to prior research demonstrating that people implicitly associate Black faces with payback and White faces with mercy.[287]

Explicit Bias—Racialized Attitudes. Beyond implicit bias, we measured two types of explicit bias. Measuring explicit bias is important because there are indeed members of society who are willing and able to reflect on and report their own biases. Prior research has demonstrated that in addition to implicit bias, explicit bias indeed can play an important role in criminal law decision making. The first type of explicit bias we measured is a scale of anti-Black racial biases that participants would potentially be willing to self-report. For this measure, we employed the Symbolic Racism 2000 Scale.[288] In this measure, participants are asked to state how much they agree or disagree with statements such as, "How much of the racial tension that exists in the United States today do you think Blacks are responsible for creating?" and: "It's really a matter of some people not trying hard

---

286. We used the following names for these category stimuli: For Black names, "Darnell, Demetrius, Jermaine, Tyrone, Odell, Malik." For White names, "David, John, Richard, Mark, Thomas, Jake." And for Latino names, "Jose, Juan, Carlos, Pedro, Manuel, Miguel."

287. Levinson, Smith & Hioki, *supra* note 191, at 875.

288. P.J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCH. 253, 253 (2002).

enough; if Blacks would only try harder they could be just as well off as Whites." This explicit bias measure was employed for participants who take the White–Black Three Strikes IAT. A separate, but similar explicit bias measure, which was modified to measure explicit biases toward the Latino community, was employed for participants who took the White–Latino Three Strikes IAT.[289] These measures of explicit bias would allow us to investigate the role of both types of bias, implicit and explicit, in the Three Strikes setting.

Recidivism Assessments. Participants were then asked a series of questions regarding their overall views of the likelihood that people who commit one crime will also commit other crimes. For example, "How likely is it that people who commit multiple crimes will reoffend in the future?" and: "How likely is it that people who commit crimes do so somewhat unintentionally?" This measure's purpose was to understand participants' baseline assumptions around repeat criminality and to be able to measure whether the racial/ethnic composition of mugshots, implicit bias scores, explicit bias scores, or some combination, affects those assumptions.

Memory Assessments. Finally, participants were asked questions testing their memory concerning the racial and ethnic demographics in the initial slide. Specifically, they were asked whether they recall the number and percentage of individuals in the initial slide who are Black, Latino, and White. There were two primary purposes behind these assessments. First, we were interested in determining how much attention was paid to the mugshot slides. And second, we wished to determine whether seeing mugshots from some groups would lead study participants to either remember or forget seeing those mugshots.

B. Hypotheses

Prior to the study, we formulated a range of highly specific hypotheses, which we documented and memorialized pre-study using the Open Science Foundation's preregistration process.[290] These hypotheses can be summarized in four substantive topic categories, as described below:

1. Implicit Bias and Three Strikes

We hypothesized that participants would display significant anti-Black and anti-Latino repeat-offender implicit biases, whereby they will automatically associate Black and Latino names with repeat criminality and White names with law-abiding behavior. Such results would be found on the Black–White Three Strikes IAT and on the Latino–White Three Strikes IAT.

---

289. This measure included a range of questions that were modified from the Symbolic Racism 200 Scale, such as, "How much of the racial tension that exists in the United States today do you think Hispanics are responsible for creating?" *See, e.g.*, Matt A. Barreto, Sylvia Manzano & Gary Segura, *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos*, NAT'L HISP. MEDIA COAL. (2012), https://www.chicano.ucla.edu/files/news/NHMCLatinoDecisionsReport.pdf [https://perma.cc/XA6P-CAXY].

290. *See* Levinson, Cohen & Hioki, *supra* note 281 (providing a specific list of preregistered hypotheses).

2. Race, Sentencing Philosophy, Recidivism Predictions, and Dangerousness

Participants' Anti-Black and Anti-Latino implicit and explicit biases will relate to, and predict, a range of their legal and moral judgments, including punishment philosophies, judgments of defendants' dangerousness, recidivism predictions, and recommended sentences on the four cases.

3. Race-Based Priming Effects

Participants who view a higher percentage of Black or Latino mugshots will sentence race-unknown defendants to longer sentences than participants exposed to a higher percentage of White mugshots. They will also self-report more retributive sentencing philosophies and will display stereotype-based memory effects when recalling the mugshots they saw.

4. Three Strikes and Anchoring Effects

Participants in the Three Strikes Condition will be anchored by the availability of the stated Three Strikes sentencing option and will sentence defendants to longer sentences for the same crimes when compared to participants in the non-Three Strikes Condition. Furthermore, there will be an interaction between Race of Mugshots and Three Strikes Conditions, such that racialized sentencing will increase in the Three Strikes Condition.

C. Results

To test our hypotheses, we conducted several statistical analyses, including analysis of variance ("ANOVA"), t-tests, as well as regression analysis. Below, our results are presented based upon the four substantive hypothesis categories we presented above. Several, but not all, of our hypotheses were supported by the study results.

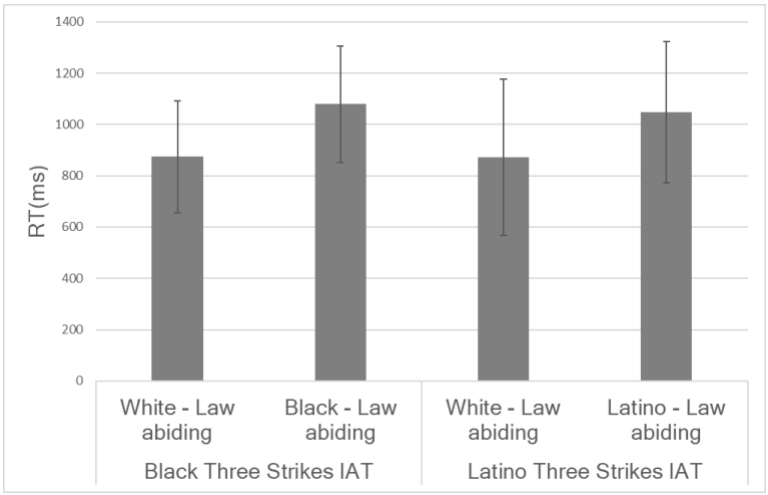
1. Implicit Bias and Three Strikes

The White–Black Three Strikes IAT confirmed that participants implicitly linked Black with repeat criminality and White with law-abiding behavior. Similarly, the White–Latino IAT confirmed that participants automatically associated Latino individuals with repeat criminality and White with law-abiding behavior.[291] These findings underscore the presence of automatic racial associations regarding criminality and confirm our hypothesis that people automatically associate Black and Latino people with repeat offending while associating White people with law-abiding. The following graph demonstrates these findings, with results presented in milliseconds. For example, participants were approximately 200 milliseconds faster, on average, in associating White names with law-abiding as compared to Black names and law-abiding. Similarly, participants were approximately 175 milliseconds faster in associating White names with law-abiding as compared to Latino names and law-abiding.

---

291. A t-test comparing with 0 revealed that the White–Black Three Strikes IATd score was significantly lower than 0 ($t(481) = 29.37$, $p<.001$). A t-test comparing with 0 revealed that the White–Latino Three Strikes IATd score was significantly lower than 0 ($t(497) = 25.84$, $p<.001$).

Repeat Criminality Reaction Times



2. Race, Sentencing Philosophy, and Recidivism Predictions

Participants' anti-Black and anti-Latino explicit biases related to—and often predicted—sentencing philosophy,[292] assessments of future dangerousness,[293] and predicted recidivism judgments,[294] as well as case-specific sentencing decisions.[295] Although implicit biases also marginally correlated with certain sentencing-related measures, such as leniency-based sentencing philosophy judgments,[296] their correlative and predictive power was notably less robust compared to explicit biases.[297] Specifically, the explicit bias-driven results demonstrated that the stronger a participant's explicit bias was, the more likely that participant assessed the defendants as dangerous, the more likely they believed

292. Rs between Symbolic Racism score (hereinafter, "SR") and retributive philosophy (R = .24, p < .001), and leniency philosophy (R = -.45, p < .001) were significant.

293. Rs between averaged sentences for all four cases and SR (R = .18, p < .001), retributive philosophy (R = .13, p < .001), leniency philosophy (R = -.17, p < .001), Future Dangerousness (hereinafter "FD"), (R = .18, p < .001) were significant. R between averaged sentences for all four cases and IATd was not significant (R = -.03, ns.).

294. We ran a 4 regression analysis on recidivism assessments (model: recidivism assessments = beta1 x SR + beta2 x IATd score + c, stepwise, excluding mismatched conditions (e.g., exposed to a higher percentage of Black mugshots & Latino IAT condition and exposed to a higher percentage of Latino mugshots & Black IAT condition)). The results showed that on all regressions only symbolic racism score was significant predictor of recidivism assessment (model: adjR^2s > .01, Fs > 9.68, ps < .01, SR: ts > 3.11, ps < .01).

295. We ran a 12 regression analysis on averaged sentences for all four cases (model: averaged sentence = beta1 x SR + beta2 x retributive philosophy + beta3 x leniency philosophy + beta4 x FD + beta5 x IATd score + c). This hypothesis was confirmed for explicit bias in a majority of conditions and for implicit bias in only one condition.

296. Rs between IATd and leniency philosophy were marginally significant (R = .06, p = .07). Rs between IATd and retributive philosophy were not significant (R = -.04, ns.).

297. Explicit bias and implicit bias were, however, correlated with each other Rs between IATd and SR (R = -.17, p < .001), FD were significant (R = -.12, p < .001).

criminals would reoffend, and the more likely they were to render harsh sentences to the race-neutral defendants in our study.

3. Race-Priming Effects

This hypothesis was only partially confirmed. Participants who saw more mugshots of Black faces (and fewer of White and Latino faces) sentenced race- and ethnicity-unidentified defendants to longer sentences, but that finding was only in one case.[298] However, participants who saw more Latino mugshots did not sentence ethnicity-unknown defendants to longer sentences compared to those who saw more White mugshots and Black mugshots.[299] Sentencing philosophies did not vary based on mugshot exposure.[300] Regarding race-based memory effects, participants in the White mugshot condition overrepresented the percentage of Black and Latino individuals they saw. For example, participants in the White mugshot condition reported an average of nine non-White faces (of 20), when in fact there were only five.

4. Three Strikes and Anchoring Effect

Our primary hypothesis regarding the anchoring effect, that Three Strikes sentencing would anchor participants' sentences, was confirmed. Participants in the Three Strikes Condition sentenced defendants to significantly longer prison sentences than those who weren't, even though the facts of the crimes (as well as defendants' prior two convictions) remained the same.[301] In fact, sentences nearly doubled just by virtue of informing the participants of the Three Strikes law. Such results were quite strong in that they held regardless of the participants' self-reported sentencing philosophies or recidivism assessments.[302] The interaction-effect hypothesis, whereby we hypothesized that Black and/or Latino mugshots would exacerbate anchoring effects, was confirmed for Black mugshots for the most violent defendant—in Case 4—but was not confirmed in the other three cases. This interaction on Case 4 between Three Strikes anchoring and racialized priming showed that participants who viewed a higher number of Black mugshots in the

298. On all four cases, the 3x2 between participants ANOVAs (3 (Majority race of the prime): White/Black/Latino) x (2 (Three Strikes Law: told/not told)) on sentencing showed significant effects of Three Strikes laws condition (Fs (1, 974) > 35.42, ps < .001). Other significant effects were revealed on case 4, only. On case 4, the most violent case, there were significant interaction effect between Race and Three Strikes laws (F (2, 974) = 3.58, p = .03). A post hoc test showed significant Race effect only on "told" condition ($F_{case4\text{-}"told"}(2, 974) = 4.81$, $p < .01$, $F_{case4\text{-}"nottold"}(2, 974) = 0.39$, ns.). Pairwise comparisons (with Bonferroni correction) revealed that there were significant difference only on between "White" and "Black" conditions ($M_{case4\text{-}"told"\text{-}White} = 127.61$(SD = 166.93), $M_{case4\text{-}"told"\text{-}Black} = 189.46$(SD = 289.02), $M_{case4\text{-}"told"\text{-}Latino} = 160.04$(SD = 243.98)).

299. Note that based upon our memory results, as discussed *infra* Subsection III.C.5, it is possible that participants did not distinguish between the Latino and White faces.

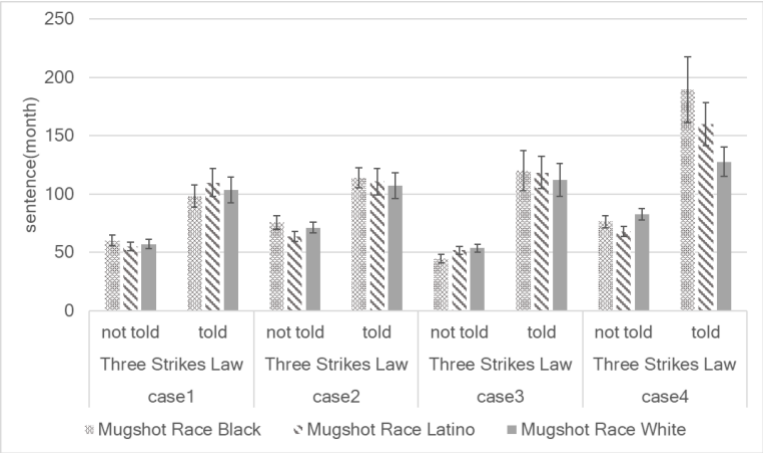
300. Participants in these conditions did not report noticeably different sentencing philosophies compared to participants in the White mugshot condition.

301. *See supra* note 298.

302. The 2x3x2 mixed factorial ANOVA (2 (sentencing philosophy: leniency/retribution, within) x 3 (Race: White/Black/Latino) x2 (Three Strikes laws: told/not told)) on self-report sentencing philosophies showed that there were no significant effect (Fs < .69, ns.).

Three Strikes Condition sentenced the race-unknown defendant to a longer sentence than participants in the same condition who saw a higher number of White mugshots. These results are depicted in the graph below.

Three Strikes Anchoring & Race Effects



5. Additional Findings

A few additional findings were revealed during our statistical analysis that we had not hypothesized in advance. Interestingly, participants with higher anti-Black and anti-Latino implicit bias scores erroneously reported seeing more Black and Hispanic mugshots than they actually had in the memory recall questions. That is, people with stronger implicit biases reported seeing more criminals of color, regardless of which condition they were actually in.[303]

D. Discussion

Our study results first show that Three Strikes laws undermine the integrity of criminal legal system by inviting an implicit association between race, ethnicity, and recidivism. Racial disparities in sentencing reflect this implicit association, greasing the cognitive pathway between a particular Black or Latino defendant and their eligibility for recidivist sentencing enhancements. By comparison, White defendants may receive the benefits of a cognitive dissonance fueled by the association between Whiteness and lawfulness, heightened by enhanced associations between empathy and individualization. Disturbingly, but perhaps better understood in the context of our study results, despite widespread criticism of the effect of Three Strikes laws, they may have avoided legislative correction

303. We calculated Pearson's Rs between the recalled majority race ratio (recalled number / total faces in the mugshots (20), all cases had over 190 data) and IATd score. The recalled Blacks ratio was negatively correlated with White–Black IATd score (R = -.23, p = .01). Also, the recalled Latino ratio was negatively correlated with White–Latino IATd score (R = -.15, p = .04). And the recalled White ratio was positively correlated with White–Black IATd score (R=.15, p=.05) but not with White–Latino score (R = .10, ns.).

because voters and legislators implicitly associate the application of these laws with Black defendants.

Writing a memorandum to his colleagues concerning a study that established significant disparities in sentencing based upon race, Justice Scalia observed, "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."[304] Justice Scalia's response to this perspective that "irrational sympathies, antipathies, including racial" pervaded the criminal justice system was to accept their inevitability.[305]

In contrast, this Article suggests that there are feasible and attainable changes to the functioning of the criminal legal system that can reduce the operation of such irrational "sympathies" and "antipathies." First, and foremost, legislatures can dramatically restrain the application of Three Strikes laws or remove them from operation. Rather than providing for mandatory minimum sentences for Three Strikes laws, legislatures could simply allow judges to exercise the broad discretion in imposing sentences that they have historically maintained.[306] A defendant's prior criminal history is exactly the kind of information that a judge normally takes into consideration when deciding what sentence to impose, without resorting to habitual-offender statutes that exponentially increase the length of a defendant's sentence.

Courts should also consider the constitutionality of Three Strikes laws. While the U.S. Supreme Court has upheld life and life-equivalent sentences for habitual offenders under the Eighth Amendment,[307] the Court has not addressed the validity of these sentences under the Fourteenth Amendment.[308] Moreover, even if the Supreme Court's jurisprudence is unlikely to extend constitutional protections to address racial disparities in the application of Three Strikes laws, state supreme courts are responsive both to the individual circumstances of cases and the widespread application of laws.[309] In 2024, the California Supreme Court granted a

---

304. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994) (quoting Memorandum from Antonin Scalia, J., U.S. Sup. Ct., to the Conf. of the Justs., U.S. Sup. Ct. (Jan. 6, 1987) (on file with the Washington & Lee University Law Review)).

305. *Id.*

306. *See, e.g.*, Oregon v. Ice, 555 U.S. 160, 163 (2009) (noting the historical discretion that judges have in imposing a sentence, including deciding whether sentences should run concurrently or consecutively).

307. *See* Ewing v. California, 538 U.S. 11, 30–31 (2003); Lockyer v. Andrade, 538 U.S. 63, 72–74 (2003).

308. *See* McCleskey v. Kemp, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting) ("Analysis of this case in terms of the Fourteenth Amendment is consistent with this Court's recognition that racial discrimination is fundamentally at odds with our constitutional guarantee of equal protection. The protections afforded by the Fourteenth Amendment are not left at the courtroom door.").

309. *See* State v. Gregory, 427 P.3d 621, 634, 642 (Wash. 2018) (vacating operation of death penalty statute despite lack of "indisputably true social science to prove that our death penalty is impermissibly imposed based on race").

petition for review, requiring the Department of Corrections and Rehabilitation to show cause why the racial disparities in "sentencing under the Three Strikes Law" do not satisfy the statutory requirements for disclosure of discovery and appointment of counsel under the California Racial Justice Act.[310] In addition to reviewing the constitutionality of Three Strikes laws under the Fourteenth Amendment, courts have the authority to review the constitutionality of individual sentences[311] and to do so in light of the evidence addressed here detailing the automatic associations between implicit racial bias and views of recidivism.[312]

Importantly, prosecutors can set a policy that limits the use of Three Strikes sentencing. Jurisdictions that have homogenous populations may already have prosecutors who never or hardly ever use habitual-offender statutes.[313] Prosecutors elected under commitments to undo racial disparities and promote fairness can resist using the tool or ensure that the use of the tool is limited in such a way that prevents introduction of explicit or implicit bias.[314]

Finally, it is important for defense counsel to interrogate the way that habitual sentencing has been used and to vigorously contest application of seemingly race-neutral laws that disparately impact Black people and rely on implicit bias and unconscious associations between Black people and recidivism.[315] Defense counsel

---

310. *In re* Davis, No. S286256, 2024 Cal. LEXIS 5460, at *1 (Cal. Oct. 2, 2024) ("The petition for review is granted.").

311. *See, e.g.*, State v. Harris, 340 So. 3d 845, 851 (La. 2020) (reviewing excessiveness of life sentence imposed based upon habitual-offender statute); *cf.* People v. Johnson, No. B327269, 2024 Cal. Ct. App. LEXIS 3532, at *8–*9, *19–*20 (Cal. Ct. App. July 7, 2024) (noting trial court exercised discretion to strike three one-year priors and reduce the sentence accordingly and declining to review the case under the Racial Justice Act as the proper protocol involved filing a motion or petition for writ of habeas corpus).

312. *See* Juan Villaseñor & Laurel Quinto, *Judges on Race: The Power of Discretion in Criminal Justice*, LAW360 (Jan. 10, 2021, at 20:02 ET), https://www.law360.com/articles/1330865/judges-on-race-the-power-of-discretion-in-criminal-justice [https://perma.cc/K33G-CSDE] ("While there's no silver bullet, by equipping herself with relevant data on potential points of disparate treatment along the criminal justice system, a judge may better address each defendant's situation with a holistic approach. Such a holistic and informed approach may lead to more effective controls for racial biases, from the initial stop and what charges are brought to what plea offers and sentencing recommendations are presented to the court.").

313. *See* BUREAU OF JUST. ASSISTANCE., U.S. DEP'T OF JUST., NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 68 (1996), https://www.ojp.gov/pdffiles/strsent.pdf [https://perma.cc/4XEK-KNPT].

314. The policy was amended in 2023 to permit use of habitual-offender laws in cases involving violent offenses with approval of the First Assistant and District Attorney. *See* Arielle Brumfield, *Orleans DA Invokes Habitual Offender Law; Applies it to 1st Case*, WDSU NEWS (Mar. 16, 2023, at 18:26 CT), https://www.wdsu.com/article/orleans-da-invokes-habitual-offender-law-applies-it-to-1st-case-orlando-brown-violent/43341116 [https://perma.cc/U2RP-2SR9].

315. In this context it is important for defense counsel to examine any of their own implicit or explicit racial bias. *See* Sanchez v. Super. Ct. of San Bernardino Cnty., 106 Cal. App. 5th 617, 624–25 (2024) (finding that the trial court did not err in removing defense counsel after receiving a declaration from the prosecutor that defense counsel, during the course of plea negotiation, stated: "'I really don't care.' . . . '[R]ead between the lines I

can do this by litigating the constitutionality of the use of Three Strikes laws under the Eighth Amendment, but also under traditional equal protection rules that have held "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[316] For individuals sentenced under Three Strikes laws in California, the Racial Justice Act gives defendants the opportunity to challenge sentences that are based upon implicit racial bias.[317] Chief Justice Roberts has explained that the toxin of race discrimination, even in small doses, violates the Constitution;[318] our research establishes that recidivist sentencing enhancements are not small doses of toxic poison—but rather, perhaps, the drink itself. Defense counsel can use evidence of the implicit associations between Blackness and recidivism, along with disparity in application of Three Strikes laws to challenge a prosecutor's decision to seek an enhanced sentence under a traditional equal protection analysis.[319]

CONCLUSION

Our examination of Three Strikes laws supports the contention that these laws exist because of race, are retained because of race, and are implemented because of race. Not only do recidivist sentencing laws circumvent the constitutional commitment to even-handed decency, but our examination suggests that they are inextricably intertwined with racial bias. As such, these laws cannot serve a valid penological purpose. The results of our examination of Three Strikes and race should

---

am a white man. What do I care? It's not my people we are incarcerating.'" The Court noted that when the prosecutor asked for clarification about the remarks, the deputy public defender stated that he expected the prosecutor to show more "leniency because the prosecutor and defendant appeared to be the same race, stating: '[Y]ou are part of the problem. Look around you, all the people being incarcerated are your people. I will just look like a mean defense attorney. You should be part of the solution.'"); *see also* Walter I. Gonçalves Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinos*, 18 SEATTLE J. SOC. JUST. 333, 335–37 (2020) (noting defense lawyers have implicit bias and that race-consciousness can blunt negative impact of implicit bias and racial stereotypes); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004) (using Implicit Association Test to identify implicit racial bias in capital defense attorneys).

316. Rose v. Mitchell, 443 U.S. 545, 555 (1979).

317. Young v. Super. Ct. of Solano Cnty., 79 Cal. App. 5th 138, 149 (2022) ("Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system.").

318. Buck v. Davis, 580 U.S. 100, 121–22 (2017) (explaining that "[s]ome toxins can be deadly in small doses").

319. McCleskey v. Kemp, 481 U.S. 279, 351–52 (1987) (Blackmun, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986) (arguing that to successfully assert a violation of equal protection, a defendant must prove that purposeful discrimination exists and establish a prima facie case "'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' . . . Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case. 'The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.' The State must demonstrate that the challenged effect was due to "'permissible racially neutral selection criteria.'" (citations omitted)).

also be contextualized within broader findings of race in the criminal legal system. Our prior research has shown, for example, that implicit bias is associated on its own with criminal guilt,[320] with theories of punishment,[321] in operation of the death penalty,[322] with future-dangerousness determinations,[323] and with concepts of accomplice liability and felony murder.[324] Our undertaking in this Article adds a critical piece of this examination of implicit bias in the criminal legal system, empirically connecting implicit and explicit bias to a widely used and long-criticized doctrine.

Although many critiques of racial bias in the criminal justice system do not have a clearly aligned criminal response (i.e., implicit racial bias in discretionary charging is difficult to eliminate structurally), Three Strikes laws may be narrowed or eliminated without substantial cost or change to the criminal legal system. As Justice White said in *Turner* v. *Murray*, "[T]he risk [of] racial prejudice" must be assessed in "light of the ease with which that risk could have been minimized."[325] Here, Three Strikes laws have been shown to provide little or no deterrent effect while generating significant, and now explained, racial disparities in sentencing. They are vestigial elements from a Jim Crow era that sought to reenslave Black people, which were brought back to flourish in the post-Civil Rights Movement War on Crime, and today they continue thrive through implicit and explicit bias.[326]

Whether it be through legislative action, prosecutorial discretion, or through judicial ruling, the elimination of Three Strikes laws would remedy the specific harm we have identified. Such a response would indeed be a substantive development that would meaningfully lessen the impact of racial bias in criminal sentencing.

---

320. Levinson, Cai & Young, *supra* note 190, at 190.

321. Levinson, Bennett & Hioki, *supra* note 196, at 68.

322. Justin D. Levinson & Rachel Schafer, *Flawed Framework, Fatal Discretion: Unraveling Implicit Bias in Capital Punishment Decisions*, 75 CASE W. RSRV. L. REV. (forthcoming 2025) (manuscript at 23–24) (on file with author).

323. *See* Levinson, Cohen & Hioki, *supra* note 192, at 225.

324. *See* Cohen, Levinson & Hioki, *supra* note 193, at 73.

325. Turner v. Murray, 476 U.S. 28, 36 (1986).

326. *See* FORMAN JR., *supra* note 47 (demonstrating how racism has influenced the decision-making of representatives, thus shaping the American legal system).