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Systemic Triage: Implicit Racial Bias in the Criminal Courtroom

Crook County: Racism and Injustice in America's Largest Criminal Court
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INTRODUCTION

The criminal justice system is broken. Its policies and policing practices flood courtrooms in urban environments with too many cases to handle given available resources. Many are cases involving indigent individuals of color accused of nonviolent offenses. Scholars like Sasha Natapoff, Jenny Roberts, and Issa Kohler-Hausmann are bringing much needed attention to this serious issue, focusing primarily on misdemeanor adjudications.[1]

In a groundbreaking new book, *Crook County: Racism and Injustice in America's Largest Criminal Court*, Professor Nicole Gonzalez Van Cleve[2] adds an important, novel dimension to this problem. She exposes the deeply flawed operation of the criminal justice system by focusing on how felonies are processed in Cook County, Illinois. Her disturbing ethnography of the Cook County-Chicago criminal courts, the largest unified criminal court system in the United States,[3] is based upon 104 in-depth interviews with judges, prosecutors, public defenders, and private attorneys; her own experiences clerking for both the Cook County District Attorney's Office and the Cook County Public Defender's Office; and one thousand hours of felony courtroom observations conducted by 130 court watchers.[4] This mix of perspectives, all of which focus on the court professionals "whose actions define the experience and appearance of justice,"[5] provides a chilling account of how racialized justice is practiced in the Cook County criminal justice system, despite the existence of due process protections and a court record. By "turn[ing] the lens on those in power as they do the marginalizing,"[6] Van Cleve reveals how judges, defense lawyers, and prosecutors transform race-neutral due process protections into the tools of racial punishment.

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1. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639-53 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

2. Nicole Gonzalez Van Cleve is an Assistant Professor at Temple University in the Department of Criminal Justice with courtesy appointments in the Department of Sociology and the Beasley School of Law. She is a recipient of the 2014-2015 Ford Foundation Fellowship Postdoctoral Award and was a Visiting Scholar at the American Bar Foundation.

3. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT xii (2016).

4. *Id.* at xiii, 6-7, 9-10, 54.

5. *Id.* at xiii.

6. *Id.*

An important theme of Van Cleve's book is that the racism practiced in the Cook County courts is not "more enigmatic than the overt racism of the past."[7] Rather, it is equally "pervasive, direct, and violent."[8] To substantiate this point, she exposes deeply problematic and explicitly racist practices that courtroom actors engage in, despite holding seemingly contradictory perspectives. This is one of the more compelling aspects of her book, since it is unusual to encounter such blatant racism on display in this ostensibly colorblind and post-racial era. She explains how these actors "claim their behavior as 'colorblind' through coded language, mimic fairness through due process procedures, and rationalize abuse based on morality—all while achieving the experience of segregation and de facto racism."[9]

In this Review, I complicate the theory of racism underlying Van Cleve's ethnography. Although she never states this explicitly, her theory rests on the assumption that racial bias is visible and conscious, even if expressed in ways that mask its presence. This is demonstrated not only by the examples she uses, but also by the book's conclusion, which encourages readers to go to court to observe the racist practices she describes and thus shame courtroom actors into changing them.

However, I argue that the problem of racial bias is not so limited. Rather, research from the past several decades reveals that implicit racial biases can influence the behaviors and judgments of even the most consciously egalitarian individuals in ways of which they are unaware and thus unable to control. Additionally, the effects of implicit biases may not be open and obvious. Importantly, then, the absence of discernible racism does not signal the absence of racial bias. Furthermore, since it is not possible to detect the influence of implicit biases on decision making simply through observations and interviews, it is difficult to ferret out and even more difficult to address. Yet, the absence of overtly racist practices does not make the problem of racial bias any less concerning.

Despite the fact that implicit biases operate in the shadows, I argue that there is strong reason to suspect that they will influence the judgments of courtroom actors in Cook County, even after blatantly racist practices disappear. This is because criminal courthouses in jurisdictions across the country, including those in Cook County, are bearing the brunt of "tough on crime" policies and policing practices that disproportionately target enforcement of nonviolent and quality of life offenses in indigent, urban, and minority communi-

7. *Id.* at 11.

8. *Id.* at 9.

9. *Id.* at 186.

ties. These policies and practices burden the system with more cases than it has the capacity to handle, resulting in what I refer to as systemic triage.

Triage denotes the process of determining how to allocate scarce resources. In the criminal justice context, scholars typically use the term triage to describe how public defenders attempt to distribute zealous advocacy amongst their clients because crushing caseloads limit their ability to zealously represent them all.[10] In this Review, I build upon my prior work examining public defender triage[11] and use the phrase *systemic* triage to highlight that *all* criminal justice system players are impacted by such expansive criminal justice policies and policing practices – not only public defenders, but also the entire cadre of courtroom players, including prosecutors and judges.

I argue that under conditions of systemic triage, implicit racial biases are likely to thrive. First, these criminal justice policies and policing practices will strengthen the already ubiquitous association between subordinated groups and crime by filling courtrooms with overwhelming numbers of people of color. Second, implicit biases flourish in situations where individuals make decisions quickly and on the basis of limited information, exactly the circumstances that exist under systemic triage. In sum, the problem of racial bias will likely persist under conditions of systemic triage, even when it is not accompanied by patently racist behaviors. This problem is even more pernicious because its subtle nature makes it more challenging to expose and correct.

This Review proceeds in three parts. Part I summarizes and analyzes Van Cleve's ethnographic evidence and conclusions. Importantly, because her account is primarily qualitative, I cannot quantify the frequency with which the problematic practices she identifies occur nor determine how representative her examples are. Part II argues that racism in the criminal justice system is more problematic and pernicious than even Van Cleve's account suggests. Relying on social science evidence demonstrating the existence of implicit racial biases, I argue that these biases can influence the discretionary decisions, perceptions,

10. Other discussions of triage in the criminal justice system tend to focus on public defender triage. *See, e.g.*, Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (arguing that trial judges face the task of rationing public defense services); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 475 (2007) (describing "the rise in total number of cases requiring appointment of counsel and the inadequacy of indigent defense budgets" (footnote omitted)); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1225 (1994) ("[T]his Article suggests the [public] defender's work is better described by the medical/disaster theory of allocation in chaos – triage."); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (arguing that public defender triage presents a way for implicit racial bias to affect legal outcomes).

11. Richardson & Goff, *supra* note 10.

and practices of even the most well-meaning individuals in ways that are not readily observable. We should be especially concerned about implicit bias in courtrooms experiencing systemic triage. Finally, Part III offers some solutions to reduce the racialized effects of systemic triage.

I. RACISM IN PRACTICE

Van Cleve's haunting ethnography argues that the existence of "myriad due process protections, legal safeguards, and a courtroom record supposedly holding judges and lawyers accountable"[12] does little to prevent racism from manifesting in the criminal courtrooms of Cook County. Rather, her work reveals how these courts are "transformed from central sites of due process into central sites of racialized punishment."[13] This punishment takes multiple forms, including treating people of color as criminals even when they are members of the public appearing in court as jurors, witnesses, or researchers;[14] ridiculing defendants with stereotypically black-sounding names;[15] mocking the speech patterns of black defendants by employing a bastardized version of Ebonics;[16] using lynching language during plea negotiations;[17] and subjecting people of color to degrading and humiliating treatment.[18] Van Cleve argues that courtroom actors also routinely punish defendants of color for attempting to exercise their due process rights.

Evidence from her ethnography reveals that judges, prosecutors, defense lawyers, and sheriff's deputies engaged in these racialized practices. Even more disturbingly, bad racial actors were not the only ones to treat people of color more harshly.[19] Van Cleve's ethnography would be slightly less chilling if this were the case because then one could take some comfort knowing that the problems would disappear once all the bad apples were removed from the system. However, Van Cleve's observations foreclose this simplistic account. Rather, she includes examples of even well-meaning judges, prosecutors, and defense lawyers participating in and sustaining this system of racial punishment.

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12. VAN CLEVE, *supra* note 3, at xi.
13. *Id.* at 11.
14. *See generally id.* ch. 1 (describing the various forms of racialized punishment in Cook County).
15. *Id.* at 60-61.
16. *Id.* at 43.
17. *Id.* at 108.
18. *See, e.g.*, *id.* at 59-65.
19. *Id.* at 6.

The obvious question is how can actors who "subscribe to the principles of due process, . . . learn ethical standards in law school[,] . . . speak in sympathetic ways about justice, fairness, colorblindness, and even identify bias in the system," engage in and rationalize their racialized practices?[20] As I discuss in Section I.A, Van Cleve argues that racism in the courts is accomplished through a process of acculturation that begins at the courthouse doors with sheriff's deputies enforcing racial boundaries. In Section I.B, I present Van Cleve's assessment of how this racialized culture is maintained through the aggressive policing and harsh treatment of anyone, including courtroom actors, who fails to observe its practices.[21] I also describe Van Cleve's explanation for how judges, prosecutors, and defense attorneys rationalize their racist behaviors by divorcing their perspectives from their practices or "duties" within the system. It is in this way, she argues, that they deflect blame, assuage their guilt, and abdicate responsibility for their role in maintaining the system of racialized punishment. Finally, Section I.C explores some limitations of her powerful and disturbing account.

A. Policing Racial Boundaries

Van Cleve suggests that the "double system of justice"[22] that exists in Cook County begins as defendants, family members, jurors, and witnesses arrive at the courthouse during the morning "rush hour." She argues that armed sheriff's deputies, who are the first institutional players the public encounters, begin the process of teaching people of color that they are second-class citizens within this space.[23] To support this point, she shares accounts of court watchers who observed deputies single out people of color for racial mockery and disrespect, making white court watchers acutely aware of their white privilege.[24] She explains that some white court watchers, no matter how they were dressed, reported being asked why they were there and whether they were lawyers or students, while some black court watchers "were mistaken for defendants and treated like criminals."[25]

She also provides anecdotes of sheriff's deputies continuing to police racial boundaries in the courtrooms by subjecting people of color to hostile and dis-

20. *Id.* at 133.

21. *Id.*

22. *Id.* at 16.

23. *Id.* at 22-28.

24. *Id.* at 25-26.

25. *Id.* at 25, 41-42.

respectful treatment for actions as simple—and reasonable—as daring to ask questions. When Van Cleve was a clerk in the prosecutor's office, she observed an incident that occurred when an elderly black woman attempted to ascertain where her son's case would be heard. The deputy "tore the woman up with insults" and finally stated to a prosecutor walking into the courtroom, "Tell her: 'Your son is executed.'"[26] In contrast, Van Cleve also observed the different treatment of an older, gray-haired white woman—wearing a diamond wedding ring and sporting "perfectly coiffed" hair and "manicured and pristine" nails—who crossed the barrier separating the gallery from the courtroom to talk to the court clerk. This woman "was able to finish her question, was answered respectfully, and then the sheriff kindly told her to sit down—acting more like an usher than the abuser who had been barking at the public all afternoon."[27] These are just a few of the disturbing examples of sheriff's deputies demeaning people of color while treating the few privileged whites who appeared in the courthouse differently.

Van Cleve's book does not share a single story in which courtroom actors chastised deputies for the hostility and aggressiveness they heaped on people of color. Instead, she argues that courtroom actors were socialized within the courthouse culture to avoid commenting on racial abuse and racial divides.[28] This is discussed next.

B. Culture and the Race-Blind Code

Sheriff's deputies were not the only courtroom actors to engage in racist behaviors. Van Cleve shares anecdotes of judges, prosecutors, and defense lawyers helping to create and sustain a system of racial punishment. Based on her ethnographic evidence, she explains that courtroom professionals learn to code race out of the picture by conflating criminality, morality, and race. This is done primarily by labeling certain defendants as "mopes," a construct that implies immorality.[29] The term is used by courtroom actors to refer to "someone who is uneducated, incompetent, degenerate, and lazy."[30] According to her, mope is a synonym for "nigger."[31]

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26. *Id.* at 35-36.
27. *Id.* at 66.
28. *Id.* at 32-35.
29. *Id.* at 57-61.
30. *Id.* at 61.
31. *Id.*

Defendants who were labeled mopes were typically charged with nonviolent offenses, such as possession of drugs and shoplifting, that "imply social dysfunction rather than criminal risk."[32] Because these defendants were overwhelmingly black and brown, "the moral rubric applied to defendants by courtroom professionals" was racially inscribed.[33] As such, the "'immorality' of defendants . . . is both a criminal distinction and a racial one . . . ."[34] Van Cleve argues that by using this colorblind logic, courtroom professionals convinced themselves that the "disdain" they showed to people of color was "not based upon the color of their skin but upon the moral violations they embody."[35] She concludes that this "race-blind" code "allow[ed] racism to exist in the courthouse space without professionals being 'racists.'"[36]

Defendants labeled as mopes received "due process for the undeserving."[37] This entailed "(1) the streamlining of scripted due process requirements, (2) the curtailing of due process through informal sanctions that are often not part of the court record, and (3) the absolute exclusion of mopes from participation in the legal process—even in cursory ways mandated by law."[38] Van Cleve shares stories of courtroom actors punishing those labeled as mopes for attempting to exercise their due process rights. In one disturbing example, Van Cleve overheard a sheriff's deputy bragging to prosecutors about wrapping an electrical cord around a defendant's seat, plugging it into the wall to feign an electric chair, and saying, "OK, you're all plugged in and ready to go."[39] This was done simply because the defendant had asked for a jury trial.[40] Prosecutors "laughed, and never questioned the legal ethics of such a practical joke."[41] White defendants, she argues, were generally not subjected to the same treatment,[42] unless they "perform[ed] underclass whiteness" through their speech patterns or demeanor.[43]

32. *Id.* at 115.
33. *Id.* at 58.
34. *Id.* at 53.
35. *Id.* at 60.
36. *Id.* at 68-69.
37. *Id.* at 73.
38. *Id.*
39. *Id.* at 63.
40. *Id.*
41. *Id.*
42. *Id.* at 65-69.
43. *Id.* at 68.

One of the most important aspects of Van Cleve's ethnography is her explanation for how racism becomes entrenched in institutional culture such that it persists regardless of "the racial identity and political leaning of any one person at the helm."[44] For instance, some prosecutors expressed serious misgivings about the way the system treated criminal defendants, and some of them also viewed drug laws as draconian.[45] Ironically, one prosecutor even critiqued the "factory mill" practices of the system, which was only concerned with disposing of cases as quickly as possible.[46] Yet, based on their statements during interviews, Van Cleve concludes that prosecutors learned to rationalize their racialized behaviors by separating their perspectives from their practices.[47] They viewed their practice of law as a "duty" that did not necessarily reflect their actual beliefs.[48] Additionally, she found that prosecutors justified the curtailment of due process rights by convincing themselves that spending time on cases involving mopes "literally obstructs 'real justice'"[49] by taking resources away from the important cases involving serious crimes with actual victims.[50] Their incentive was to resolve their cases as quickly as possible because due process for mopes, in the words of one prosecutor, was "a waste."[51]

Similarly, defense lawyers were sympathetic to "the plight of defendants," "provide[d] critiques about substantive justice and the abuse of defendants by prosecutors and judges,"[52] and commented on the "obvious racial disparities and divisions in the ways prosecutors and judges treated their indigent clients."[53] Yet, they too engaged in racialized practices. This occurred because defense lawyers learned that "[t]here were dire consequences for fighting too hard, pursuing 'too many' motions and trials, or pushing due process necessities beyond the absolute minimum."[54] Defense attorneys who engaged in vigorous and zealous advocacy often "were labeled 'clueless,' 'difficult,' 'incompe-

44. *Id.* at 133.
45. *Id.* at 13-16, 138.
46. *Id.* at 138.
47. *Id.* at 133.
48. *Id.* at 135, 137.
49. *Id.* at 73.
50. *Id.* at 71-73.
51. *Id.* at 73.
52. *Id.* at 180.
53. *Id.* at 97. Private attorney responses were more mixed, with about half expressing that bias existed and the other half expressing that it did not. *Id.* at 97-98.
54. *Id.* at 83.

tent,' or worse: 'mopes,'"[55] and were humiliated and punished in ways that were not reflected in the court record.[56] For example, one attorney was locked up with her client.[57] Additionally, the clients of defense attorneys who engaged in zealous advocacy were sometimes punished with harsher treatment.[58]

As a result of this socialization, one defense lawyer explained that he had to carefully weigh how much capital he expended on a client because capital was "finite and scarce."[59] He had to "determine whether a defendant [wa]s worth the fight"[60] by separating those who were "native" to the system from the "tiny subset of outliers" who deserved zealous advocacy.[61] He deflected personal responsibility for the problematic choices he made, saying that "these are the sorts of decisions you find yourself having to make as a practical matter because that's the system that exists and [it's] bigger than you."[62]

In sum, Van Cleve's book explains how criminal justice system professionals dispense, legitimize, and defend racialized justice. She argues, "Colorblind racism is more than just a 'doing' of rhetoric; it is a type of complicated habitus that informs institutional practices and cultural memberships, and even aids in the organizational efficiency of the criminal courts . . . . [This is] how professionals . . . 'do racism' while 'doing justice.'"[63] Her own efforts to fit into the system and maintain her privileged access within it powerfully underscores the importance of entrenched institutional culture to sustaining racial disadvantage.[64] She describes her time embedded in the Cook County criminal justice system as "an indoctrination: the prosecutors, judges, and defense attorneys took me under their wings. It was through this process that I learned the rules of the racialized court system—rules that included both how to process cases efficiently and the proper moral and professional justifications for such practices."[65]

55. *Id.*
56. *Id.* at 83, 103.
57. *Id.* at 85.
58. *Id.* at 84.
59. *Id.* at 159.
60. *Id.* at 160.
61. *Id.* at 160-61.
62. *Id.* at 161.
63. *Id.* at 53.
64. *See, e.g.*, *id.* at 8, 9, 61.
65. *Id.* at 8.

C. *Limitations*

Van Cleve's account of how racism is practiced in the era of colorblindness is important and compelling. However, it is limited by a number of features typical of ethnographies. First, her observations are not necessarily generalizable to jurisdictions beyond Cook County.[66] Second, the absence of quantitative evidence makes it difficult to determine how frequent, representative, and pervasive the overtly racialized practices she exposes are.[67] Including some explanation of how she coded her data and how she determined which stories to include and exclude, as well as sharing the complexity of her evidence by discussing cases that did not fit neatly into her theory, could have helped address some of these problems and allowed readers to more readily evaluate her claims.

However, despite these limitations, there are reasons to believe that her qualitative accounts are representative of the culture of the Cook County criminal courts. Her ethnographic evidence is the result of nine months of observations collected over the course of seven years (1997-2004);[68] interviews she conducted during the same period; 104 interviews conducted by others in 2006;[69] and data collected by 130 court watchers from 2008-09.[70] Thus, her data "incorporate[] multiple vantage points on the same site"[71] and span over twelve years. Furthermore, the observations remain consistent over this period of time. All of this provides support for the pervasiveness of the practices she recounts and lends some external reliability to her findings.[72] Additionally, the

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66. John D. Brewer, *The Ethnographic Critique of Ethnography: Sectarianism in the FUC*, 28 SOC. 231, 233 (1994) ("Ethnography falls short because findings cannot be generalised; and when ethnographers make claims about empirical generalisation they often fail to establish that the setting is typical of the larger population to which the data are thought to be relevant.").

67. In one instance, she does provide some quantitative data to support her powerful qualitative account. For instance, when discussing whether defense lawyers believed that defendants were treated fairly regardless of race or class, she included two tables providing the percentage of attorneys who answered the question in the affirmative, in the negative, or failed to answer the question at all. VAN CLEVE, *supra* note 3, at 97. However, no similar empirical evidence was provided for any of her other claims.

68. *Id.*

69. *Id.* at 197.

70. *Id.* She explains that she used this multifaceted approach because in an era where people avoid expressing negative racial attitudes, it is difficult to measure the influence of race using a single method. *Id.* at 195-96.

71. *Id.* at 196.

72. *See* Margaret D. LeCompte & Judith Preissle Goetz, *Problems of Reliability and Validity in Ethnographic Research*, 52 REV. EDUC. RES. 31, 32 (1982) ("External reliability addresses the

lack of quantitative evidence is not a reason to dismiss her compelling conclusions. As one of the great ethnographers, Howard Becker, once observed in a classic article, qualitative methods "do not lend themselves to . . . ready summary"[73] and "frequently consist of many different kinds of observations which cannot be simply categorized and counted without losing some of their value as evidence."[74]

Overall, the importance of Van Cleve's ethnography is its exposure of how some courtroom professionals in Cook County practice and rationalize racism in the era of colorblindness. She explains how racism thrives despite constitutional safeguards and courtroom actors who are well versed in ethics and who often hold perspectives that are consistent with notions of fairness, equality, and justice.[75] Van Cleve's account of racism in the Cook County criminal courts is concerning and important to expose even if it is difficult to determine how pervasive these overtly racialized practices are.

In Part II, my goal is to supplement Van Cleve's account of how racial bias operates. Van Cleve concludes that the practice of racism in Cook County is virtually indistinguishable from the racist practices of the Jim Crow era.[76] In support of this theory, she only shares examples of courtroom actors engaging in overtly problematic racialized practices in cases involving individuals labeled as mopes.[77] By restricting her examples, her account leaves the impression that the problem of racism in Cook County is limited to that which is overt, explicit, and conscious. However, in Part II, I argue that racism in the criminal justice system is even more problematic. Relying on social science evidence demonstrating the existence of implicit racial biases, I contend that explicitly racist practices are not the only form of racism about which we should be concerned.

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issue of whether independent researchers would discover the same phenomena or generate the same constructs in the same or similar settings.").

73. Howard S. Becker, *Problems of Inference and Proof in Participant Observation*, 23 AM. SOC. REV. 652, 659-60 (1958).

74. *Id.*; *see also* ERVING GOFFMAN, ASYLUMS 7-9 (1968) (explaining that the author did not gather statistical evidence because a good way to learn about any social world is to obtain ethnographic detail instead).

75. *See* VAN CLEVE, *supra* note 3, at 11-13.

76. *See id.* at 186.

77. The only instance she offers of normative professionalism involved a defense lawyer who was not part of any particular courtroom workgroup. According to Van Cleve, this lawyer's outsider status protected her from the culture of the Cook County courts. *Id.* at 77-78. Van Cleve does not explain why she provides no accounts of courtroom actors engaging in positive interactions with those labeled mopes. The reader is thus left wondering whether these examples existed but she chose not to include them, or whether she and others simply did not observe professional conduct in cases involving mopes.

Rather, implicit racial bias can also influence the discretionary decisions, perceptions, and practices of even the most well-meaning individuals in ways that are not readily observable. Thus, my theory of racism is broader than one that focuses solely on the overt racism Van Cleve exposes. While her account of explicitly racist conduct is deeply troubling, I argue that the problem of implicit racism is even more pernicious.

II. SYSTEMIC TRIAGE AND ITS RACIALIZED CONSEQUENCES

Judges, prosecutors, and defense lawyers in many criminal courtrooms across the country are laboring under the weight of far too many cases to give each one individualized treatment. This has systemic consequences as these professionals struggle to quickly sort defendants into those who are deserving of time and attention and those who are not, a process I describe as systemic triage. As I will explain, racialized justice is a foreseeable consequence of systemic triage because of the influence of implicit, i.e. unconscious, racial biases on behaviors, perceptions, and judgments. Section II.A summarizes the well-established social science research on implicit racial biases. Section II.B sets forth my theory of systemic triage. Finally, Section II.C argues that under conditions of systemic triage, even well-meaning, consciously egalitarian actors will likely engage in practices that sustain significant and problematic racial disparities.

A. Implicit Racial Bias

Research demonstrates that many of our decisions result from mental processes that occur without our conscious awareness, intent, and control.[78] These processes help us to cope with all the information that confronts us by making quick, automatic, and unconscious associations in response to a stimulus.[79] For instance, we might automatically and unconsciously associate "nurse" with

78. *See* John A. Bargh, *The Four Horsemen of Automaticity: Awareness, Intention, Efficiency, and Control in Social Cognition*, *in* 1 HANDBOOK OF SOCIAL COGNITION 1 (Robert S. Wyer, Jr. & Thomas K. Srull eds., Psychology Press 2014) (1994).

79. *Id.* at 31 (stating that automatic processes "enable[] a reduction of the massive amount of stimulation and information bombarding one at any given moment into a more manageable subset of important objects, events, and appraisals"); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 485 (2004) ("[T]he view of stereotypes as largely unconscious is consistent with social cognition research on the cognitive heuristics or shortcuts that perceivers must employ to manage the vast amount of social information with which they must deal." (citation omitted)).

"compassion" and "hospital." These unconscious associations can influence our perceptions, judgments, and behaviors without our conscious intent.

Implicit racial biases refer to the unconscious stereotypes and attitudes that we associate with racial groups.[80] These biases are pervasive and can influence real world behaviors. For instance, a meta-analysis of 122 implicit bias studies found evidence that implicit racial biases predict racial disparities in employment and healthcare.[81]

There is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality[82] and whites with innocence. In a recent article, Professors Robert Smith, Justin Levinson, and Zoë Robinson coined the phrase "implicit white favoritism" to distinguish it from unconsciously negative racial attitudes and beliefs toward people of color.[83] They define implicit white favoritism as "the automatic association of positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for persons of that group."[84] Their analysis of existing studies reveals that white men are unconsciously "*disassociated* with violence" and associated with positive, law-abiding behavior.[85] Implicit racial biases are activated by cues present in the environment such as skin color.[86] Once activated, they can influence the

80. The scholarship on implicit racial bias is vast. For a summary of the literature on implicit racial bias, particularly as it relates to the criminal justice system, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); and L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

81. Anthony G. Greenwald et al. , *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 558 (2015).

82. *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years." (citations omitted)); Graham & Lowery, *supra* note 79, at 485 (describing the "pernicious belief" that African American youth are "violent, aggressive, dangerous, and possess adult-like criminal intent"); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) ("There is overwhelming evidence that young Black men are stereotyped as violent, criminal, and dangerous.").

83. *See* Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 873 (2015).

84. *Id.* at 874-75 (footnote omitted).

85. *Id.* at 898 (emphasis added).

86. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 241-42 (1996). Bargh writes, "To the extent that an individual repeatedly has the same reaction to a social stimulus event, the representation of that response should come eventually to be activated automatically on the mere occurrence of that event." *Id.* at 231.

behaviors and judgments of even the most egalitarian individuals in ways that sustain problematic and unwarranted racial disparities.[87]

The influence of implicit biases on behaviors and judgments is not inevitable, however. Rather, certain environments are more conducive to their operation than others. Implicit biases flourish in situations where information and time are limited, decision makers are mentally drained and distracted, and decision making is highly discretionary.[88] As I will discuss next, these conditions exist under systemic triage.

B. Systemic Triage

Under an ideal model of criminal justice, courtroom professionals would have sufficient resources to give time and attention to every case. However, today's criminal justice system operates very differently. In large urban environments like Cook County, public defenders, prosecutors, and judges are inundated with far more cases involving nonviolent offenses than they are equipped to handle. This makes it difficult to give each individual accused of misconduct the care and consideration he or she deserves and is constitutionally entitled to receive.[89] For instance, public defenders in Rhode Island each handle more than 1,700 cases per year, on average. The equivalent figures for individual public defenders in Dallas and Arizona are 1,200 and 1,000 respectively.[90] A re-

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87. *See generally* Greenwald et al., *supra* note 81, at 553 (describing how small, implicit biases can have a societally significant impact either by influencing many people in small ways or by repeatedly affecting individuals); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (describing implicit racial bias studies). For a summary of critiques of the implicit association test and responses to those critiques, see Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 41-45 (2014).

88. *See infra* Section II.C.

89. *See, e.g.*, Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1043 (2013) (noting the pressure to treat people as groups rather than as individuals, which "is in deep tension with core precepts of criminal law, most fundamentally the idea that criminal guilt is an individuated concept reflecting the defendant's personal culpability"); Natapoff, *supra* note 1, at 1317-18; Lisa C. Wood et al., *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 26 (2016) (noting that "the problem of excessive workloads is systemic" and that "[f]or years, tough-on-crime policies, mandatory minimum sentences, collateral consequences, and broken-windows policing pushed workloads ever higher"); *see also* Kohler-Hausmann, *supra* note 1, at 639 (describing the large increase in the number of misdemeanor arrests in New York City from 1980 to 2011).

90. Wood et al., *supra* note 89, at 20, 22.

cent article reports that "in upstate New York, one attorney represented over 2,200 clients; and in Illinois, a public defender handled 4,000 cases during the course of a year."[91] These excessive caseloads impact defense lawyers, prosecutors, and judges alike,[92] creating pressure on each of these courtroom actors to engage in triage – the process of allocating scarce resources.

Typically, analysis of triage within the criminal justice system is focused on public defender offices. Scholars have discussed how public defenders attempt to distribute zealous advocacy amongst their clients since crushing caseloads prevent them from providing it fully to all clients.[93] As Phillip Atiba Goff and I previously observed,

> [T]he provision of indigent defense is often likened to medical triage. Similar to hospital emergency rooms, [public defender] offices face demands that far outpace their resources. In order to save time to defend the cases that they find deserving, attorneys may plead out other cases quickly or go to trial unprepared. This reality means that for most [public defenders], the question is not "how do I engage in zealous and effective advocacy," but rather, "given that all my clients deserve aggressive advocacy, how do I choose among them?"[94]

Despite this robust discussion of public defender triage, however, little attention has been paid to the fact that judges and prosecutors also face intense pressure to quickly determine which cases can be resolved with little time and effort and which cases require or deserve the individualized attention associated with due process. I refer to this situation of pressurized decision making by all courtroom actors as *systemic triage*.

Systemic triage primarily results from criminal justice system policies and policing practices such as the War on Drugs and broken windows policing[95]

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91. *Id.* at 20.

92. *Id.* at 21 (citing Honorable Sean C. Gallagher, *A Judge's Comments*, 42 LITIG. 21 (2016)).

93. *See, e.g.*, Brown, *supra* note 10; Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1180-81 (2003); Mitchell, *supra* note 10, at 1224-25; Richardson & Goff, *supra* note 10; *see also* Hashimoto, *supra* note 10, at 475 ("Lawyers carrying caseloads that far exceed national standards cannot adequately consult with their clients or provide sufficient investigation.").

94. Richardson & Goff, *supra* note 10, at 2632.

95. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 184 (2010) (arguing that "the War on Drugs is the engine of mass incarceration"); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 309 (2015) (finding that "the policies pursued under the War on Drugs disproportionately held African-Americans accountable for their transgressions"); *see also*

that overwhelm courtroom professionals with more cases involving nonviolent offenders than they have the capacity to handle. This creates pressure on these actors to develop shortcuts for determining who deserves due process and who does not. For instance, under conditions of systemic triage, prosecutors will not have time, in every case, to interview victims and witnesses, and to make careful and considered judgments about how to exercise their enormous discretion according to their ethical mandate as ministers of justice.[96] Similarly, rather than providing effective and zealous advocacy to each of their clients by conducting investigations,[97] communicating and developing relationships with clients,[98] filing motions,[99] researching the law, preparing for trials, negotiating pleas, and otherwise engaging in vigorous advocacy,[100] defense lawyers instead will find ways to quickly determine when these time-consuming activities are necessary. Finally, judges will be constrained in their ability to carefully consid-

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Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005) (noting the huge impact of the War on Drugs on blacks); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing As a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 393-95 (2011) (recounting the War on Drugs' effect on blacks living in New York); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276-80 (2009) (critiquing broken windows policing); Natapoff, *supra* note 89, 1063-66 (noting that police focus arrests on young men of color); Al Baker, *New York Minorities More Likely To Be Frisked*, N.Y. TIMES (May 13, 2010), http://www.nytimes.com/2010/05/13/nyregion/13frisk.html [http://perma.cc/79DV-GPVM]; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html [http://perma.cc/NKK6-6QZZ]. Some scholars, such as Jeffrey Fagan and Garth Davies, conclude that broken-windows policing "is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places." Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000). *See generally* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [http://perma.cc/YBP7-VJSS] (discussing broken windows policing).

96. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2014).

97. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, ABA § 4-4.1 (4th ed. 2016), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html [http://perma.cc/9F26-DG3X].

98. *Id.* §§ 4-3.1, 4-3.3, 4-3.9, 4-5.1.

99. *Id.* §§ 4-5.2, 4-7.11, 4-8.1.

100. *Id.* § 4-4.6 (discussing counsel's obligation to research the law); *id.* §§ 4-6.1 to -6.3 (discussing counsel's obligation to negotiate). These ethical obligations apply regardless of the lawyer's workload, *see id.* § 4-4.1(a) ("Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges."), and whether or not defendants want to plead guilty, *id.* §§ 4-4.1(b), 4-6.1(b).

er motions, ensure that defendants understand their rights, and make individualized sentencing decisions after careful review of the evidence.[101]

However, the concept of systemic triage does not simply consider the triage decisions of individual public defenders, prosecutors, and judges in isolation. Rather, it highlights the symbiotic nature of triage decision making, attending to how the resource allocation decisions of an actor in one institution, such as the prosecutor, influences the workload of actors in the other institutions, i.e. public defenders and judges. For instance, a defense lawyer's decision to take a case to trial does not simply increase her workload; it also has consequences for prosecutors and judges. As a result of the defense lawyer's decision, the prosecutor will have to devote time and resources to tasks such as becoming familiar with the evidence and responding to motions. Similarly, judges will have to dedicate time to reviewing pleadings, issuing rulings, and overseeing jury selection, to name a few of the tasks associated with trials.

Systemic triage pays attention to this interdependent relationship amongst institutional actors. It highlights the fact that while the pressure created by systemic triage comes chiefly from the overwhelming number of cases that flood the system, it also stems from the resource allocation decisions of all actors within the system. Thus, each individual actor, i.e. each prosecutor, defense lawyer, and judge, has a vested interest in overseeing how the others exercise their discretion.

For this reason, attending solely to the triage decisions of one individual institutional actor, such as the prosecutor, is insufficient to understand the systemic effects of triage. Rather, each institutional actor will police the resource allocation decisions of the others. The policing of decisions across institutions can create a racialized culture if resource allocation decisions typically favor individuals of one race over another. For instance, courtroom actors will punish the decision to grant due process rights to an individual who they conclude is undeserving. As I discuss next, the decision that an individual is undeserving is more likely to occur when that individual is a person of color, due to implicit racial bias. Hence, under conditions of systemic triage, a culture of decision making within a courthouse that sustains racially biased decision making is predictable.

101. See *infra* note 144 and accompanying text for an example of a judge in Cook County engaging in triage behaviors.

C. Implicit Bias Under Conditions of Systemic Triage

I theorize that racialized justice is the foreseeable consequence of systemic triage, regardless of the conscious racial motives of judges, prosecutors, and criminal defense lawyers, and even in the absence of overtly racist practices. That is because implicit racial biases are likely to impact decision making under conditions of systemic triage for a number of reasons. First, the proactive policing practices that create the conditions leading to systemic triage also result in the disproportionate representation of people of color in criminal courtrooms. Filling criminal courtrooms with overwhelming numbers of people of color will likely strengthen the already ubiquitous conscious and unconscious association linking people of color with crime and whites with innocence because simply rehearsing associations strengthens them.[102] Strengthening these associations can occur even if many of the cases are dismissed[103] and even if judges, prosecutors, and defense lawyers understand on an intellectual level that this disproportionate representation is the predictable result of focusing law enforcement efforts on communities of color.

Second, under conditions of systemic triage, prosecutors and defense lawyers are likely anxious and distracted by all of the tasks simultaneously pulling at their attention, such as listening to the judge, negotiating with opposing counsel, quickly reviewing case files, thinking about what they will say when their cases are called, and answering questions from clients or witnesses. This multitasking can cause cognitive depletion, which is one of the classic situations in which implicit biases are likely to influence decisions and judgments.[104]

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102. These negative associations are not just practiced in the courthouse, but within offices too. For instance, in Cook County, Van Cleve shares how the Gang Unit of the State's Attorney's Office wallpapers its office with mug shots of black and Latino defendants. VAN CLEVE, *supra* note 3, at 1.

103. Kohler-Hausmann, *supra* note 1, at 642-43 (noting that many misdemeanor offenses in New York City are dismissed).

104. *See* Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991) (finding that once stereotype activation occurred, cognitive "busyness" increased the application of stereotypes); Olesya Govorun & B. Keith Payne, *Ego-Depletion and Prejudice: Separating Automatic and Controlled Components*, 24 SOC. COGNITION 111, 111-12 (2006) (discussing cognitive depletion); Graham & Lowery, *supra* note 79, at 486 (discussing the impact of information deficits); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 18 (reviewing researchers' finding that "time pressure on a judgment task (thereby reducing attentional resources available for the task) increased the level of ethnic stereotyping in subjects' judgments"); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibili-*

Additionally, because courtroom actors handle large numbers of cases, they will feel compelled to make quick decisions in the face of enormous information deficits about which cases can be disposed of quickly and which cases are worthy of time and effort. For instance, prosecutors may offer plea bargains and pressure defense lawyers into convincing their clients to accept them despite the fact that neither actor had the time to thoroughly investigate the case and interview all the potential witnesses.[105] Implicit biases are more likely to influence judgments when individuals make discretionary decisions quickly, based upon incomplete information.[106]

Implicit racial biases can affect decision making in ways that create and sustain problematic racial disparities. For instance, these biases can cause people to interpret ambiguous information in racially disparate ways. In one study demonstrating this, mock jurors were asked to evaluate evidence that was ambiguous as to guilt or innocence.[107] The results showed that as a result of implicit racial biases, jurors were significantly more likely to conclude that the evidence was probative of guilt when the case involved a dark-skinned perpetrator versus a light-skinned perpetrator.[108] In another study involving an assault, mock jurors were more likely to conclude that the defendant was less aggressive and "more honest and moral" when he was white as opposed to black.[109] These differences in judgment were correlated with implicit bias.

Under conditions of systemic triage, it is probable that implicit racial biases will cause judges, prosecutors, and defense lawyers to draw adverse inferences from ambiguous facts more readily when defendants are black, especially when nonviolent offenses involving drugs are at issue, since young black men are

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ties, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 318 (2007) (discussing dominant group anxiety during interracial interactions).

105. Van Cleve's book provides evidence of this type of behavior. *See, e.g.*, VAN CLEVE, *supra* note 3, at 122 (discussing her observation that prosecutors rarely read the case files of "mopes"); *id.* at 83-87 (discussing how public defenders are punished for engaging in zealous advocacy).

106. *See* Graham & Lowery, *supra* note 79, at 486 (discussing the impact of information deficits); Greenwald & Banaji, *supra* note 104, at 18 (reviewing researchers' finding that "time pressure on a judgment task (thereby reducing attentional resources available for the task) increased the level of ethnic stereotyping in subjects' judgments").

107. 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).

108. *Id.* at 337-39.

109. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 212 (2001). These differences disappeared when race was made salient. *Id.* at 212-13.

closely associated with drugs in our conscious and unconscious minds.[110] Thus, the confluence of a black defendant and a drug charge will likely make it cognitively easier to form a judgment that the defendant is guilty and will not benefit from more process. Conversely, when the defendant is white, implicit white favoritism will likely make judgments of guilt more difficult, resulting in the decision that due process will make a difference to the case.

Furthermore, implicit biases can also influence feelings of empathy. Empathy sensitizes people to injustice[111] and plays an important role in discretionary decision making. In one study, for instance, researchers found that people who felt more empathy for white defendants than black defendants would give white defendants more lenient sentences, even when everything else about the case was identical.[112] Moreover, social scientists have found that there is a racial empathy gap, meaning that empathy for the pain experienced by another does not occur or occurs with less intensity when white subjects witness or imagine pain inflicted on black individuals.[113] This empathy gap is related to levels of

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110. *See, e.g.*, Eberhardt et al., *supra* note 82, at 883 (discussing the implicit association of blacks with crime); Trawalter et al., *supra* note 82, at 1322 ("There is overwhelming evidence that young Black men are stereotyped as violent, criminal, and dangerous."); Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815 (2001) (discussing how context influences the activation of implicit bias). In prior work, Phillip Atiba Goff and I have referred to this quick judgment of criminality as the "suspicion heuristic." L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012).

111. *See* John F. Dovidio et al., *Empathy and Intergroup Relations*, *in* PROSOCIAL MOTIVES, EMOTIONS, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 399 (Mario Mikulincer & Phillip R. Shaver eds., 2010); Matteo Forgiarini et al., *Racism and Empathy for Pain on Our Skin*, 2 FRONTIERS PSYCHOLOGY 1, 1 (2011).

112. James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1215 (2002). Additionally, the jurors were more likely to attribute the actions of white defendants to the situation. *Id.* at 1216.

113. Studies have found that witnessing or imagining another individual experiencing pain causes our own brains to react as if we were experiencing pain ourselves. Forgiarini et al., *supra* note 111, at 1 ("[E]xperimental data indicate that when people witness or imagine the pain of another person, they map the other['s] pain onto their brain using the same network activated during firsthand experience of pain, as if they were vicariously experiencing the observed pain." (citations omitted)). However, in one study, the brains of white individuals exhibited less activation when observing pain inflicted on black individuals than on white individuals. *Id.* at 2, 4-6. The study did not involve black subjects. To the extent that this racial empathy gap works both ways, that is, that black decision makers would show the same lack of empathy toward whites experiencing pain, racial disparities would still exist since blacks are underrepresented in the legal field.

implicit racial bias.[114] The more implicit anti-black bias subjects had, the greater was the difference in their empathic responses towards black and white individuals.[115]

Empathy can cause courtroom actors to take time to ensure that an individual's due process rights are protected, to respond with more sympathy and listen with more care and attention to a defendant's concerns, and to pay more attention to the circumstances of the case. Prosecutors and judges may respond more favorably to defense counsel's arguments concerning mitigating circumstances and the hardships their clients might suffer as a result of incarceration. Empathy may also result in prosecutors being more willing to offer treatment or other rehabilitative options instead of incarceration, and judges being more willing to accept these recommendations. Empathy can also influence defense lawyers' decisions about which clients are worthy of zealous advocacy and expending precious capital. However, because the conditions of systemic triage are likely to trigger implicit biases, courtroom actors might feel less empathy toward defendants of color. Thus, the benefits of empathy will accrue more to whites than blacks, resulting in significant racial disparities even in the absence of conscious bias and overtly racist behaviors. In fact, decision makers will be completely unaware that unconscious biases influenced their judgments.

The operation of implicit bias under conditions of systemic triage also explains how a courtroom culture can develop that routinely denies due process to black individuals and others stereotyped as criminal even in the absence of the type of overt and consciously biased decision making Van Cleve highlights in her book. Cook County is a paradigmatic case of systemic triage. As Van Cleve observes, "Cases bombard the system; the average felony prosecutor in Cook County has three hundred or more open cases at any one time,"[116] and in 2005, each public defender resolved approximately 229 felonies, meaning that they likely worked on many more.[117] In one disturbing demonstration of how this pressure played out in perverse ways, Van Cleve describes an instance when sheriff's deputies "act[ed] as go-betweens to update judges and courtroom workgroups on which court [was] 'winning.' One court watcher noted a judge screaming, "'Let's go! Do something!' at his colleagues when there was a brief pause in a stream of plea bargains."[118]

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114. *Id.* at 4.

115. *Id.*

116. VAN CLEVE, *supra* note 3, at 72.

117. *Id.* at 159; *see also id.* at 28-29, 58 (discussing the extreme time pressure under which defense attorneys and prosecutors work).

118. *Id.* at 58.

Additionally, the association between blacks and crime is well rehearsed in Cook County given the disproportionate number of people of color charged with nonviolent offenses.[119] Of the almost ten thousand individuals housed in the Cook County jail, approximately 86.3% are black and Latino men charged with nonviolent offenses.[120] Van Cleve provides evidence of the strong conceptual association between blacks and crime that exists in Cook County.[121] For instance, she describes courtroom actors becoming so accustomed to seeing black individuals within the courthouse that they become desensitized to the racial disparities that shocked them when they first encountered the system.[122] The disproportionate representation of blacks in the criminal courthouse becomes natural and expected. Thus, even if the system in Cook County evolves to such an extent that judges, prosecutors, and defense lawyers no longer engage in race-conscious decision making that apportions due process rights based on whether or not someone is characterized as a mope,[123] and even if overtly racist practices disappear, it is probable that implicit racial biases will continue to influence behaviors in racially problematic ways.

III. RECOMMENDED REMEDIES

Consistent with her theme that racism in the Cook County courts is akin to Jim Crow racism, Van Cleve ends her book by encouraging readers to go to court to observe the racist practices she describes. Doing so, she argues, is "a type of activism [that can] lend a conscience to an otherwise unaccountable system."[124] In Section III.A, I raise questions about the efficacy of her solution, and in III.B, I offer alternatives.

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119. *See id.* at 20-21.

120. *Id.* at 19 (noting that 67.3% are young black men between the ages of twenty-one and thirty years, and Latinos and other people of color constitute nineteen percent); *id.* at 7 (noting that most of the black and Latino defendants appearing in felony court were charged with "possession of drugs, theft, intent to sell drugs, or other non-violent offenses").

121. *See supra* note 25 and accompanying text (discussing instances in which sheriff's deputies treated black researchers like criminals).

122. *See* VAN CLEVE, *supra* note 3, at 27, 32, 101-02.

123. *See supra* notes 59-62 and accompanying text (discussing pricing decisions made by defense lawyers).

124. VAN CLEVE, *supra* note 3, at 189.

A. Problems with Court Watching

Van Cleve urges readers to help "rectify the . . . racial violence inflicted by the courts"[125] by engaging in court watching. The practice of court watching can be a powerful tool to expose the workings of a court system that operates in the shadows,[126] especially if courtroom actors do not realize that court watchers are there. Van Cleve's ethnography is a testament to that. Additionally, if court watchers are open and obvious, their mere presence might lead judges, prosecutors, and defense lawyers to practice the professionalism that should accompany their role.

However, as a long-term solution to the problem of racial bias, court watching will be ineffective. One reason is that once court watchers leave, courtroom actors might revert back to their problematic behaviors. Van Cleve shares an instance of exactly this. When she was clerking at the prosecutor's office, a prosecutor cautioned her to be on her "best behavior" after noticing a court watcher sitting in the gallery.[127] Then the judge and prosecutor "began to 'perform' the normative professionalism that one would associate with their roles" until the court watcher left.[128] Afterwards, they all burst out laughing.[129]

Additionally, court watching might even stymie efforts at addressing bias at the structural level if people expect to witness overtly racist practices similar to the ones Van Cleve recounts.[130] This is likely since she asks readers to "[r]eplicate my data until you change the findings in Cook County-Chicago and perhaps in other jurisdictions."[131] The problem is that court watchers may not encounter any of these racialized practices since judges, prosecutors, and defense lawyers may behave differently in their presence, preventing the watchers from getting an accurate view of the system. Furthermore, many of Van Cleve's examples did not occur in open court, but rather during plea negotiations, in conversations with clients, or during interviews of courtroom actors. Such sources of information may not be available to the average court

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125. *Id.*

126. *See, e.g.*, Kathleen Daly, *Black Women, White Justice*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH 209 (Austin Sarat & Marianne Constable eds., 1998) (sharing stories of courtroom encounters that reveal how black women experience the justice system).

127. VAN CLEVE, *supra* note 3, at 44.

128. *Id.*

129. *Id.*

130. She writes that court watching will allow people "to see racial degradation ceremonies performed in the name of criminal justice." *Id.* at 189.

131. *Id.*

watcher. If people do not witness these practices, they may conclude that the system is no longer racially biased and that nothing more needs to be done to address racism in the criminal courts. However, as I argued in Part II, racial bias exists even when it is not discernible.

The problem of racial bias in the criminal justice system defies easy solutions. The influence of race on decision making will be difficult to flush out either because people may be unaware of the effect of implicit biases on their judgments or because they will hide their consciously racist beliefs. Furthermore, the enormous discretion wielded by prosecutors, defense lawyers, and judges facilitates racial bias, both conscious and implicit. The most effective solution would be to rethink the criminal justice policies and policing practices that not only create the conditions for systemic triage but also sustain the negative association between people of color and crime. Nevertheless, until that day arrives, there are some interim solutions that can help to safeguard against the influence of implicit racial biases. These are discussed next.

B. Individual, Institutional, and Systemic Solutions

The conditions of systemic triage allow implicit racial biases to thrive. Importantly, however, their effects are not inevitable. In this Section, I discuss some individual, institutional, and systemic mechanisms that together may help to reduce the influence of implicit biases on behaviors and judgments.

At the individual level, two interventions have proven promising: awareness of implicit bias[132] and doubting one's objectivity.[133] Both of these interventions work by encouraging people to exercise care when making judgments and by helping people understand that their judgments might be biased even if they are not consciously aware of it.[134] These tools are especially likely to be successful when individuals are internally motivated to reduce biased judg-

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132. Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 346 (Shelly Chaiken & Yaacov Trop eds., 1999); Jack Glaser & Eric D. Knowles, *Implicit Motivation To Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 171 (2008); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 56-57 (2009); Devin G. Pope et al., *Awareness Reduces Racial Bias* (Nat'l Bureau of Econ. Research, Working Paper 19765, 2014) (on file with author).

133. Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210-11 (2007).

134. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37, 39 (2007).

ments rather than externally motivated by concerns that others will judge them.[135]

These interventions also highlight why the ideology of colorblindness is problematic. As Eduardo Bonilla-Silva argued in *Racism Without Racists*, at the heart of colorblind racism is the "myth" that "race has all but disappeared as a factor shaping the life chances of all Americans."[136] Furthermore, this ideology allows "whites [to] enunciate positions that safeguard their racial interests without sounding 'racist.'"[137] To the extent that courtroom actors engage in colorblindness, it will stymie efforts to reduce the effects of implicit racial bias on behaviors and judgments.[138] In fact, in social science studies, colorblindness "has been shown to generate greater individual expressions of racial bias on both explicit and implicit measures."[139]

One practical method for increasing awareness and encouraging people to doubt their objectivity is through training. Across the country, state and federal public defenders, prosecutors, and judges are being trained on what implicit biases are and how they can influence the decision making of even the most egalitarian individuals.[140] In fact, people who hold perspectives that are genuinely egalitarian can be the perpetrators of biased conduct based on implicit bias, especially if holding these perspectives makes them less likely to question their objectivity. The Department of Justice recently made these trainings mandatory for prosecutors and law enforcement officers.[141]

In addition to awareness and questioning objectivity, other individual interventions such as slowing down decision making; engaging in mindful, de-

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135. E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation To Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 824-28 (1998).

136. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 302 (2014).

137. *Id.* at 4.

138. Van Cleve highlights numerous instances of colorblindness amongst courtroom actors. *See supra* notes 27-33.

139. Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 COURT REV. 190, 193 (2013) (citing Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004)).

140. I have conducted these trainings for police departments, federal and state prosecutors, and public defenders.

141. Office of Pub. Affairs, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, U.S. DEP'T JUST. (June 27, 2016), http://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel [http://perma.cc/P3K2-JFF4].

liberate information processing;[142] and gathering more information can prevent reliance on implicit stereotypes and attitudes.[143] The problem is that the pressure of systemic triage can make these interventions difficult to accomplish.[144] However, engaging in triage is a choice, not a requirement. In fact, triage in the criminal justice context arguably violates constitutional and professional mandates. Thus, prosecutors and defense lawyers should refuse to bow to the pressure to resolve cases hastily simply to deal with the realities of an overburdened system.

Professor Jenny Roberts explains that defense lawyers could "refus[e] to process individuals quickly through the lower criminal courts" by "litigat[ing] some of the many factual and legal issues" raised by these cases.[145] As for prosecutors, they should live up to their special responsibilities as "ministers of justice,"[146] which require them, among other things, "to see that the defendant is accorded procedural justice."[147] Judges, too, should similarly avoid pressuring defense counsel and prosecutors to rush through jury selection and trials. Some may object to these proposals because giving defendants the individualized justice and zealous advocacy to which they are entitled will lead to longer delays and may also raise speedy trial concerns. However, the answer cannot be to simply continue to short circuit justice in the name of expediency. If giving defendants the process they are due leads the system to grind to a halt, then perhaps this will put pressure on criminal justice system decision makers to re-

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142. Bargh, *supra* note 78, at 28.

143. *Id.* ("[I]t is possible to gain control [over automatic processes] by 'making the hard choice' and spending the additional cognitive effort to avoid pigeonholing or stereotyping an individual. Instead, the person can effortfully seek out additional individuating information and integrate it into a coherent impression." (citation omitted)); Marilynn B. Brewer, *A Dual Process Model of Impression Formation*, *in* 1 ADVANCES IN SOCIAL COGNITION 1 (Thomas K. Scrull & Robert S. Wyer, Jr. eds., 1988); Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, *in* 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (Mark P. Zanna ed., 1990).

144. Sometimes there is good reason to attempt to resolve cases quickly. For instance, sometimes a defendant can get released from custody immediately or have his case dismissed instead of languishing in jail.

145. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1131 (2013); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [http://perma.cc/A87K-7SWR].

146. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2014).

147. *Id.*

think the policing practices and criminal justice policies that create the conditions of systemic triage in the first place.

None of these interventions will be easy to accomplish. However, once people are aware that there are steps they can take to address implicit biases, the failure to do so is as culpable as acting on the basis of conscious racial bigotry.[148] Judges, prosecutors, and defense lawyers should accept responsibility for taking steps to reduce the influence of implicit biases; otherwise they are complicit in continuing to sustain a racialized system. There is reason for optimism that some courtroom actors will engage in these efforts. For instance, Federal District Court Judge Mark M. Bennett attempts to reduce the effects of implicit racial biases on his sentencing judgments by stripping photos and all racial indicators from his presentence reports.[149]

While individual interventions are important, they must be accompanied by interventions at the institutional level in order to increase the chances of success. If this does not occur, it might be difficult for one individual to withstand the pressure to conform by speeding up case adjudications. For instance, Van Cleve relates how prosecutors and judges punished defense lawyers who attempted to engage in zealous advocacy.[150] This is unsurprising given the symbiotic nature of systemic triage, where the resource allocation decisions of one actor influence the workload of the others. Thus, even if an individual public defender decides to slow down in order to safeguard against the influence of implicit biases on decision making, the pressure and formal and informal punishments that the individual will suffer from judges and prosecutors because of his or her efforts may result in that individual succumbing to the pressure.

The leaders of prosecutor and public defender offices can assist by making it clear that they will support the efforts of their line personnel to do what is necessary to ensure that they are living up to their ethical and constitutional obligations. This will help reduce the influence of implicit bias not only because it will give individuals the courage to resist the pressure to dispose of cases quickly, but also because people are motivated to conform their beliefs to those of the people around them.[151] Thus, institutions should clearly com-

148. One important caveat needs to be made here. My argument is not that moving swiftly through a case is always problematic. For instance, there are circumstances when defense counsel may want to quickly resolve a case because doing so will result in a better outcome for her client. Rather, I am simply making the point that rushing through cases solely to deal with the pressures of triage is problematic.

149. This knowledge is based on conversations with Judge Bennett.

150. *See supra* notes 54-58.

151. Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 651 (2001).

municate that making efforts to reduce the influence of implicit biases is important and provide institutional backing for those efforts. This will make individuals more likely to accept the punishment they might face from other institutional actors for refusing to engage in triage decision making and help them fight the pressure to practice racialized justice. Institutional support can also facilitate the creation of a cohort of like-minded individuals, making it easier to maintain one's commitment to do what is necessary to address implicit biases.

Some institutions are already engaged in these efforts. For instance, San Francisco Public Defender Jeff Adachi has established safeguards in his office to reduce implicit biases' pernicious effects. These safeguards include asking his attorneys to use checklists that require them to answer questions such as, "how would I handle this case different[ly] if my client was another race or had a different social background."[152] Additionally, one district attorney's office in North Carolina has asked an implicit bias expert to embed herself in the office to help line prosecutors determine how to reduce the influence of implicit biases on their discretionary decisions.[153] Both of these examples send the message throughout the office that the institution believes these efforts are important, thereby helping to motivate individuals to conform their behaviors to meet this expectation.

Finally, even if individuals and institutions make efforts to reduce the influence of implicit racial biases, the gold standard would be coordinated change among different arms of the criminal justice system—that is, the prosecutor's office, the public defender's office, and judges working together to address these biases. As I discussed in Part II, systemic triage attends to the interaction between criminal justice system institutions and the ways in which the resource allocation decisions of one influence the other. Thus, even if one institution encourages its personnel to engage in efforts to reduce implicit bias, the others might resist the increase in their workload that this might cause.

All three institutions should instead work together to ensure that the goal of efficiency does not override the important values of fairness, equality, and protection of constitutional rights. They should encourage each other to practice normative professionalism and pressure each other to align their practices with their beliefs in due process, legal ethics, and other values that likely motivated them to practice criminal law in the first place. If this occurred, it would

152. Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST (June 7, 2016), http://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients [http://perma.cc/S98M-9CRG].

153. This information is based on my conversations with this implicit bias expert.

slow down the system to such an extent that policymakers would be forced to confront the problem of overburdened courts and insufficient resources. This might provoke changes to current criminal justice policies and policing practices that not only create the conditions for systemic triage, but, by filling criminal courtrooms with individuals of color charged with nonviolent offenses, also help to strengthen the association linking black and brown individuals with crime and whites with innocence.

While it might sound unrealistic to think that institutions could work together to reduce implicit racial bias, aspects of this are already occurring in Seattle, Washington. A group consisting of two federal district court judges, the U.S. Attorney and an Assistant U.S. Attorney, the Federal Public Defender, an ACLU director and an ACLU staff attorney, two civil lawyers, and a law professor are working together to develop jury instructions and a jury orientation video to help address the probable effects of implicit biases on jury decision making.[154] The commitment of this diverse group to address the effects of implicit racial bias provides reason for optimism that other courthouses across the country might engage in similar efforts. While the Seattle project is currently limited to jury decision making, it is possible that the awareness of implicit bias underlying this undertaking and the trust and relationships that have developed during the process will translate into a joint effort to reduce triage decision making in the courthouse.

CONCLUSION

As this Review argues, racialized practices need not be overt, punitive, and extreme, and courtroom actors need not be consciously biased in order for race to have pernicious and disturbing consequences on behaviors and judgments. However, to the extent that people today are more likely to be consciously egalitarian than not, there is reason to hope that educating criminal justice actors about implicit racial biases and how systemic triage makes it more challenging to safeguard against the influence of these biases might help encourage actors to fight for institutional and structural changes. Changing the institutional and structural conditions that allow implicit biases to flourish is important because this "new" racism is, as Van Cleve concludes about colorblind racism, "just as punitive and abusive"[155] as old-fashioned bigotry. In fact, this new racism is in some ways more dangerous and pernicious than racial bigotry because it is ephemeral and difficult to eradicate.

154. This is a project with which I am involved.

155. VAN CLEVE, *supra* note 3, at 186.

Van Cleve's important ethnography brings to light the hidden and pernicious workings of the criminal justice system that often operates in the shadows. Based on the model of systemic triage introduced in this Review, it is likely that the racialized practices she exposes also exist in many other jurisdictions with overburdened courts, although these practices may not operate in a similarly overt and explicit fashion. Even more troubling is the probability that these practices will thrive under conditions of systemic triage despite the existence of constitutional protections, a court record, and prosecutors, defense lawyers, and judges who are ostensibly committed to lofty principles of justice and fairness. The problematic practices of racism without racists make a mockery of justice that should trouble us all.