

# RACIAL CUMULATIVE DISADVANTAGE: THE CUMULATIVE EFFECTS OF RACIAL BIAS AT MULTIPLE DECISION POINTS IN THE CRIMINAL JUSTICE SYSTEM

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## I. INTRODUCTION

Everything is connected.<sup>1</sup> In the criminal justice system, racial bias at individual stages connects to create cumulative disadvantage for defendants of color. Cumulative disadvantage occurs when prior negative events (e.g., pretrial detention) increase the likelihood of later negative events (e.g., imprisonment).<sup>2</sup> Racial bias is not sequestered within a single stage but spread throughout multiple stages; it is not a singular phenomenon, but a multifarious phenomenon that cumulates.

Racial cumulative disadvantage is a form of modern discrimination that is more elusive and difficult to detect.<sup>3</sup> Although opaque, it is nonetheless real. The reality of cumulative racial disadvantage, which is less obvious than single instances of overt animus, is a reason for enduring racial inequality in the twenty-first century. Although overt racial bias has lessened covert forms of bias such as cumulative disadvantage persist.<sup>4</sup>

Cumulative disadvantage exists in the criminal justice system because racial bias infects all stages of the criminal justice process—including the stop, arrest, prosecution, and sentencing

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1. ALBERT-LÁSZLÓ BARABÁSI, LINKED: HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE, AND EVERYDAY LIFE 7 (Penguin Group ed., 2003).

2. John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 189 (2015).

3. Jason A. Nier & Samuel L. Gaertner, *The Challenge of Detecting Contemporary Forms of Discrimination*, 68 J. SOC. ISSUES 207, 208 (2012).

4. *Id.*

stages.<sup>5</sup> Racial bias is not confined to a single stage, but builds on successive stages within the criminal justice system.<sup>6</sup> Indeed, people of color can suffer from cumulative disadvantage even before encountering the criminal justice system.<sup>7</sup> Accordingly, cumulative disadvantage in the criminal justice system forms part of the “biographical racism” disadvantage that people of color suffer throughout their life histories.<sup>8</sup>

Racial discrimination can cumulate through three paths: across generations, across domains (e.g., inequality in the housing domain may lead to inequality in the educational domain), and across processes within a domain.<sup>9</sup> This Article addresses the third path dealing with processes within the criminal justice system domain. The focus is not on flagrant bias by a single actor but on “little” biases by multiple actors—including police who decide whether to arrest a suspect, prosecutors who decide whether to dismiss a case, and judges who decide whether to grant bail.<sup>10</sup> The little biases become significant because they accrue over multiple actors and across multiple stages in the criminal justice system.<sup>11</sup> Section II identifies multiple stages penetrated by racial bias. Section III reveals how multi-stage biases cumulate to create disadvantageous outcomes for defendants of color. Section IV explicates policies that can ameliorate the problem of racial cumulative disadvantage in the criminal justice system.

## II. RACIAL BIAS OCCURS AT MULTIPLE STAGES OF THE CRIMINAL JUSTICE SYSTEM

The criminal justice system is a complex system comprised of multiple stages. Racial bias seeps into various stages of the

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5. Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 877 (2015).

6. SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 2 (2008).

7. *See id.* at 1–2.

8. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1557 (2004); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 594 (2011).

9. NAT'L ACAD. OF SCI., MEASURING RACIAL DISCRIMINATION 223–24 (Rebecca M. Blank et al. eds., 2004).

10. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 124 (Princeton Univ. Press ed., 2015).

11. *Id.*

criminal justice system. Defendants of color navigating the criminal justice system encounter bias not merely at a single stage but at multiple stages.<sup>12</sup>

### A. Stop

One study found that “African Americans are almost *three times* more likely than Whites to be stopped in investigatory police stops.”<sup>13</sup> Another study of major cities in Ohio revealed that “[B]lacks were twice as likely to be stopped by police as non-[B]lacks.”<sup>14</sup> A study of San Diego, California, revealed that “[B]lacks were nearly 60% more likely to be stopped and Hispanics 37% more likely to be stopped than White drivers.”<sup>15</sup>

### B. Search

After being stopped, drivers of color suffer from disproportionately high rates of searches.<sup>16</sup> A study of Los Angeles, California, “indicated that police were 127% more likely to search stopped [B]lacks than stopped [W]hites and 43% more likely to search stopped Hispanics than [W]hites,” even though they were less likely to be found with weapons or drugs.<sup>17</sup> A study of the Boston Police Department found that “43% of all vehicle searches were of [B]lack motorists even though they comprised only 33% of all the cars stopped by police.”<sup>18</sup>

### C. Use of Force

“Shooter bias” infects police departments.<sup>19</sup> Police officers are more willing to shoot Black men than White men.<sup>20</sup> In one

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12. Smith et al., *supra* note 5, at 877.

13. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 155 (Univ. Chi. Press ed., 2014).

14. Jeff D. May et al., *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 181 (2013) (citing Michael L. Birzer & Gwynne Harris Birzer, *Race Matters: A Critical Look at Racial Profiling, It's a Matter for the Courts*, 34 J. CRIM. JUST. 643, 643 (2006)).

15. *Id.*

16. *Id.*

17. *Id.* at 182 (citing IAN AYRES & JONATHAN BOROWSKY, *A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT* 6, 43 (2008)).

18. *Id.* at 181 (citing Birzer & Birzer, *supra* note 14, at 643).

19. John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 695–96 (2014).

20. *See id.* at 695.

study requiring participants to decide whether to shoot when confronted with images of Black and White suspects, the participants were significantly more willing to shoot Black suspects.<sup>21</sup> Police officers, despite their training, can fall prey to shooter bias just like untrained members of the public.<sup>22</sup>

#### *D. Arrest*

Studies show that Black males are two to three times more likely than White males to be arrested during their lifespans.<sup>23</sup> Additionally, Blacks and Latinos tend to have higher rates of rearrest.<sup>24</sup> For youth of color, Black youth are arrested at much higher rates than White youth for drug, property, and violent crimes.<sup>25</sup>

#### *E. Charging*

A study examining Black and White federal defendants found that Black defendants face significantly more severe charges.<sup>26</sup> The disparity is especially pronounced for mandatory minimum charges: Black defendants are nearly twice as likely as White defendants to be charged with crimes that carry mandatory minimum sentences.<sup>27</sup>

#### *F. Incarceration*

A study of Black and White federal defendants found that Black men were incarcerated at a rate over six times that of White

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21. *Id.*

22. *Id.* at 695–96.

23. Conn. Gen. Assembly Office of Program Review & Investigations, *Recidivism In Connecticut: Final Report*, CONN. GEN. ASSEMBLY (2001), <http://www.cga.ct.gov/pri/archives/2001ricreportchap2.htm>.

24. *Id.*

25. NAT'L CONFERENCE OF STATE LEGISLATURES, DISPROPORTIONATE MINORITY CONTACT: JUVENILE JUSTICE GUIDE BOOK FOR LEGISLATORS 4, <http://www.ncsl.org/documents/cj/jjguidebook-dmc.pdf> (last visited Feb. 1, 2016) [hereinafter DISPROPORTIONATE MINORITY CONTACT].

26. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 2 (Univ. of Mich. Law Sch. Program in Law & Econ. Working Paper Series, Working Paper No. 12-002, 2012), [http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/\\$file/NSPI201213.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/$file/NSPI201213.pdf).

27. *Id.*

men.<sup>28</sup> Also, “Black women are three times more likely to be incarcerated than [W]hite women and twice as likely as Hispanic women.”<sup>29</sup>

### *G. Bail*

Black defendants are subjected to higher rates of pretrial detention and higher bail amounts than White defendants.<sup>30</sup> This is true in state cases, federal cases, and juvenile delinquency proceedings.<sup>31</sup> Latino defendants are subjected to similar bail disparities.<sup>32</sup>

### *H. Diversion*

A study of California offenders found that Black males were diverted to drug treatment in 4.0% of all drug-related cases and 5.4% of nonviolent felony cases, whereas White males were diverted to drug treatment in 7.9% of all drug-related cases and 12.1% of nonviolent felony cases.<sup>33</sup> Even after implementing mandatory diversion for eligible drug offenders in 2001, unexplained racial disparities persisted.<sup>34</sup>

### *I. Sentencing*

Racial bias exists in sentencing.<sup>35</sup> A study of judges in Detroit found that they imposed harsher sentences on Black offenders.<sup>36</sup> A study of offenders in Georgia found that sentences for Blacks with “light” complexions were the same length as those for Whites, but sentences for Blacks with “medium” and “dark” complexions were 4.8% longer than for Whites and “light”

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28. *Id.*

29. Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 *FORDHAM L. REV.* 2999, 3016 (2015).

30. Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y* 919, 938–39 (2013).

31. *Id.*

32. *Id.* at 939.

33. John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 *J. LEGAL STUD.* 155, 179 (2014).

34. *Id.* at 183–84.

35. Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 *LAW & SOC’Y REV.* 1197, 1212 (1990).

36. *Id.* at 1212–13.

complexioned Blacks.<sup>37</sup> A study of race and gender in sentencing indicated that favoritism toward White women helped explain their lower sentences, whereas bias against Black men helped explain their higher sentences.<sup>38</sup> In the federal criminal justice system, the prison sentences of Black offenders are five months longer than similarly situated White offenders.<sup>39</sup>

### III. RACIAL DISADVANTAGE CUMULATES ACROSS MULTIPLE STAGES

Racial disparity at individual stages can cumulate across the stages.<sup>40</sup> Racial disparity is not isolated to any single stage of the criminal justice system, but accrues at each stage from arrest through parole.<sup>41</sup> A small amount of racial bias at each stage may cumulate to create a sizable racial bias.<sup>42</sup> Cumulative racial bias disadvantages defendants of color, including Blacks and Latinos, in the criminal justice system.

#### *A. Blacks Suffer from Cumulative Disadvantage*

A 2015 study found that Black defendants suffered from cumulative disadvantage in the criminal justice system when compared with White defendants.<sup>43</sup> The study considered five decision points: (1) bond amount, (2) pretrial detention, (3) charge reductions, (4) whether a defendant received a prison sentence, and (5) the length of the prison sentence if one was received.<sup>44</sup> The study indicated that Blacks suffered disproportionate cumulative disadvantage at two decision points: (1) pretrial detention and (2) sentencing resulting in incarceration.<sup>45</sup>

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37. AM. BAR FOUND., 2014 ANNUAL REPORT 14 (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/2014\\_annual\\_report.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/2014_annual_report.pdf).

38. Todd Sorensen et al., *Race and Gender Differences Under Federal Sentencing Guidelines*, 102 AM. ECON. REV. 256, 259 (2012).

39. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 75–76 (2015).

40. SENTENCING PROJECT, *supra* note 6, at 2.

41. *See id.*

42. Lisa Stolzenberg et al., *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275, 279 (2013).

43. Wooldredge et al., *supra* note 2, at 216–17.

44. *Id.* at 198–99.

45. *Id.* at 212.

First, at the pretrial detention stage, the study indicated that Blacks face greater cumulative disadvantage because they suffer disproportionately from the following three factors: history of imprisonment, an inability to hire private counsel, and higher bond amounts.<sup>46</sup> These three factors increase the odds of pretrial detention for Blacks relative to Whites by 75%.<sup>47</sup>

Second, at the prison sentence decision stage, Black defendants were 40% more likely than White defendants to be convicted and sent to prison because of cumulative disadvantage involving pretrial detention, prior prison sentences, and the absence of hired attorneys.<sup>48</sup> The cumulative disadvantages were greater for Black defendants, although White defendants also suffered from cumulative disadvantages.<sup>49</sup>

A 2013 study also found that Blacks suffered from cumulative disadvantage when compared with Whites.<sup>50</sup> The study examined eight decision points:

[1] whether release on bail was financial, [2] whether bail was denied, [3] the bail amount, [4] whether the defendant made bail, [5] whether the defendant was held pretrial, [6] whether the case was adjudicated as a felony, [7] whether the defendant received an incarcerative sentence, and [8] the length of the imposed incarcerative sentence.<sup>51</sup>

The last two decision points showed a statistically significant race bias.<sup>52</sup> Black defendants were more likely to receive an incarcerative sentence and a longer incarcerative sentence.<sup>53</sup> Being Black increased the odds of receiving a criminal sanction by approximately 42%.<sup>54</sup>

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46. *Id.* at 194.

47. *Id.* at 215.

48. *Id.* at 216.

49. *Id.* at 216–17.

50. Stolzenberg et al., *supra* note 42, at 289.

51. *Id.* at 282.

52. *Id.* at 286.

53. *Id.*

54. *Id.* at 288.

*B. Young Black Males Suffer Even More from Cumulative Disadvantage*

Cumulative bias disadvantages young Black males more than other groups. According to the 2015 study mentioned above, there are “significant race effects on the odds of pretrial detention for Blacks in general and *even stronger effects for young Black men.*”<sup>55</sup> In comparison to Black defendants in general, who were 40% more likely than White defendants to be imprisoned, Black males ages eighteen to twenty-nine were 50% more likely than all other suspects to be imprisoned.<sup>56</sup>

*C. Latinos Suffer from Cumulative Disadvantage*

Cumulative disadvantage affects not only Blacks, but also Latinos. A 2014 study involving Black and Latino defendants found that pretrial detention, case retention or nondismissal, and incarceration formed the most disadvantaged combination of outcomes.<sup>57</sup> The prospect of this three-part combination was greatest for Black defendants at 33%, followed by Latino defendants at 30%.<sup>58</sup> The probability of receiving this three-part combination was 5% greater for Black defendants and approximately 2% greater for Latino defendants when compared with White defendants.<sup>59</sup>

A 2013 study involving Blacks and Latinos stated that “from the point where initial charges are filed, the average Blacks or Latino defendant has about a 19% chance of going to prison, while the rate for the average Anglo is about 15%.”<sup>60</sup> The study examined three decision points: pretrial detention, guilty pleas, and sentencing.<sup>61</sup> First, for pretrial detentions, the data showed “clear evidence” of racial bias with Black defendants detained at a “disproportionately high rate,” and Latinos “even more so.”<sup>62</sup> The

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55. Wooldredge et al., *supra* note 2, at 218 (emphasis added).

56. *Id.* at 216.

57. Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 535 (2014).

58. *Id.*

59. *Id.*

60. John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RES. 1207, 1217 (2013).

61. *Id.* at 1210.

62. *Id.* at 1214.

decision to detain had a cumulative effect on later decisions.<sup>63</sup> For guilty pleas, detention “indirectly raises the odds for [B]lack defendants by lowering the rate of plea bargains.”<sup>64</sup> For sentencing, detention “directly increases the odds of a prison sentence more than three times” for Blacks and Latinos.<sup>65</sup> According to the study, the cumulative effects of racial bias increases the probability that the average African American or Latino felon goes to prison compared with the average White felon by 26%.<sup>66</sup>

A 2007 study examining felony drug offenders found that Black and Latino offenders were more likely to be sentenced to incarceration and given longer sentences than similarly situated White offenders.<sup>67</sup> Black offenders were 34% more likely to be sentenced to incarceration and received sentences that were 17% longer than White offenders when sentenced to incarceration.<sup>68</sup> The statistic disparities were worse for Latino offenders.<sup>69</sup> They were 45% more likely to be sentenced to incarceration and received sentences that were 35% longer than White offenders when sentenced to incarceration.<sup>70</sup> Indeed, according to the study, comparison of disparities in treatment between Black and Latino defendants reveals that Latinos always receive harsher treatment.<sup>71</sup>

#### *D. Juveniles of Color Suffer from Cumulative Disadvantage*

Racial disparities exist in the juvenile criminal justice system.<sup>72</sup> Youth of color are overrepresented at every stage of the juvenile justice process.<sup>73</sup> Youth of color are “disproportionately

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63. *Id.* at 1218–19.

64. *Id.* at 1219.

65. *Id.*

66. *Id.* at 1217.

67. Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT’L STUD. 261, 270 (2007).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 275–76.

72. Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 928 (2010).

73. JUVENILE JUSTICE SUBCOMM. OF RACE AND CRIMINAL JUSTICE TASK FORCE, PRELIMINARY REPORT AND THE RECOMMENDATIONS TO THE SUPREME COURT TO ADDRESS THE DISPROPORTIONALITY IN WASHINGTON’S JUVENILE JUSTICE SYSTEM 1 (Mar. 28, 2012),

arrested, referred to juvenile court, prosecuted, detained and sentenced to secure confinement” compared to White youth.<sup>74</sup> A study of Washington State’s juvenile justice system found “clear evidence” of overrepresentation of youth of color at each stage of the process.<sup>75</sup> Compared to White youth, Black youth are approximately twice as likely to be arrested.<sup>76</sup> Black, Native American, and Native Alaskan youth are more than twice as likely to be referred to court.<sup>77</sup> Youth of color are less likely to receive a diversion<sup>78</sup> and overrepresented in transfers to adult court.<sup>79</sup> The cumulative effect of overrepresentation results in “big disparities” for youth of color.<sup>80</sup> For example, although Black youth constitute 6% of Washington State’s population, they constitute 21% of youth sentenced to juvenile facilities.<sup>81</sup>

Indeed, cumulative decision points exist that precede the juvenile justice system.<sup>82</sup> Law enforcement might initiate crime-control efforts that target people of color in low-income, urban neighborhoods.<sup>83</sup> Police departments might increase their presence in communities of color.<sup>84</sup> Its increased presence escalates the likelihood that youth of color will become entangled with law enforcement.<sup>85</sup> For example, Black youth are arrested at much higher rates than White youth for drug, property, and violent crimes.<sup>86</sup> The future dims for youth of color as their early entanglements with law enforcement carry over to subsequent stages in the juvenile justice process.<sup>87</sup>

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[http://www.law.washington.edu/about/racetaforce/Juvenile\\_Justice\\_and\\_Racial\\_Disproportionality\\_Report\\_WEB.pdf](http://www.law.washington.edu/about/racetaforce/Juvenile_Justice_and_Racial_Disproportionality_Report_WEB.pdf) [hereinafter JUVENILE JUSTICE SUBCOMM.].

74. *Id.*

75. *Id.* at 7.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 7–8.

80. *Id.* at 8.

81. *Id.*

82. DISPROPORTIONATE MINORITY CONTACT, *supra* note 25, at 4.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

#### IV. COMBATTING CUMULATIVE DISADVANTAGE

Researchers have begun to recognize the elusive problem of cumulative disadvantage. However, the next step beyond mere recognition of the problem is implementation of policies to remedy the problem. Three potential policies are: dismantling the school-to-prison pipeline, including cumulative disadvantage effects in racial impact statements, and abolishing the death penalty because it is tainted by cumulative disadvantage.

##### *A. Dismantling the School-to-Prison Pipeline*

One way of breaking the cumulative disadvantage process is to act on strategic “leverage points.”<sup>88</sup> One leverage point in a person’s lifespan is the period of youth.<sup>89</sup> This means preventing racial disadvantages from accumulating in the lives of people of color by acting during their early years. This entails dismantling the “school-to-prison” pipeline. The pipeline refers to a pathway from school to prison created by school disciplinary policies and practices that push students of color into the juvenile and criminal justice systems.<sup>90</sup> The school-to-prison pipeline makes children of color more likely to become enmeshed in the juvenile justice system.<sup>91</sup> Juvenile incarceration leads to adult incarceration.<sup>92</sup> The goal, therefore, is to prevent people of color from becoming trapped in the criminal justice system in the first place.

##### i. The School-to-Prison Pipeline Problem

Students of color receive harsher penalties than White students for the same offenses.<sup>93</sup> A study of schools nationwide found that Black students were three and a half times more likely

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88. Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOC. 17, 29 (2012).

89. *See id.* at 30.

90. Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt the School-to-Prison Pipeline*, 13 SEATTLE J. SOC. JUST. 751, 752–54 (2015).

91. ALICE P. GREEN, *THE DISPROPORTIONATE IMPACT OF THE JUVENILE JUSTICE SYSTEM ON CHILDREN OF COLOR IN THE CAPITAL DISTRICT 1* (Ctr. for Law & Justice ed., 2012), <http://www.cflj.org/report/juvenile-justice.pdf>.

92. *Id.*

93. Tamar Lewin, *Black Students Punished More, Data Suggests*, N.Y. TIMES, Mar. 6, 2012, at A11.

to be suspended or expelled than White students.<sup>94</sup> Although Black students constituted only 18% of the student body at sampled schools, they constituted 46% of those students who were suspended more than once and 39% of those expelled.<sup>95</sup>

Harsher penalties push students of color into the juvenile justice system.<sup>96</sup> Once they are within the juvenile justice system they face disproportionate consequences. A Florida study found that “31% of non-[W]hite youths were incarcerated or transferred at judicial disposition, compared to only 18% of White youths.”<sup>97</sup> The incarceration statistics are increasing. In 2001, youth of color constituted 60.3% of youth in confinement nationwide; in 2010, they constituted 67.6% of youth in confinement.<sup>98</sup> In short, “youth of color continue to be disproportionately arrested, referred to juvenile court, prosecuted, detained and sentenced to secure confinement compared to their [W]hite peers.”<sup>99</sup>

## ii. The Juvenile System Leads to the Adult Criminal Justice System

Youth entanglement with the juvenile justice system likely leads to adult entanglement with the adult criminal justice system.<sup>100</sup> Youth of color are overrepresented at all stages of the juvenile justice system.<sup>101</sup> The cumulative effects of multi-stage overrepresentation contribute to the continual involvement of youth of color in the adult criminal system.<sup>102</sup> The juvenile justice system acts as a feeder system into the adult criminal justice system for youth of color.<sup>103</sup>

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94. TOM RUDD, RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED 1 (Kirwan Inst. ed., 2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf>.

95. *Id.*

96. *Id.* at 4.

97. Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1271 (2014).

98. *Id.*

99. JUVENILE JUSTICE SUBCOMM., *supra* note 73, at 1.

100. GREEN, *supra* note 92, at 12.

101. JUVENILE JUSTICE SUBCOMM., *supra* note 73, at 11.

102. *Id.*

103. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 37, <http://www.protectcivilrights.org/pdf/reports/justice.pdf> (last visited Jan. 28, 2016).

One study examined youth released from a state facility and found that on their twenty-eighth birthday, 89% of the boys and 81% of the girls had been rearrested.<sup>104</sup> Further, 71% of the boys and 32% of the girls had been confined in an adult jail or prison.<sup>105</sup> The incarceration trend is worrisome. In 1988, about 10% of Black high school dropouts between the ages of twenty to thirty-four were incarcerated.<sup>106</sup> Twenty years later, in 2008, 38% of Black high school dropouts between the ages of twenty to thirty-four were in prison.<sup>107</sup>

Excessive disciplinary policies create a school-to-prison pipeline that pushes students away from schools and toward the juvenile and criminal justice systems.<sup>108</sup> Thus, helping youth of color requires disrupting the school-to-prison pipeline and shielding them from early embroilment with the juvenile or criminal justice system.

### iii. Aiding Youth of Color

Dismantling the school-to-prison pipeline requires a holistic approach incorporating varied elements.<sup>109</sup> School districts could (1) collect school discipline data to illuminate the extent of the school-to-prison pipeline problem, (2) include parents when crafting discipline policies, (3) adopt a rehabilitative approach to school discipline, (4) train school administrators and staff on this rehabilitative approach, (5) limit penalties for nonviolent offenses, and (6) refer disciplinary cases to law enforcement only as a last resort.<sup>110</sup>

School districts could also establish youth courts as alternative disciplinary systems.<sup>111</sup> In these courts, students fill the

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104. GREEN, *supra* note 91, at 12.

105. *Id.*

106. Sean Darling-Hammond, *Expanding the Scholastic Circle of Belonging to Realize the Citizenship Promise of the Nation*, 16 BERKELEY J. AFR. AM. L. & POL'Y 112, 144 (2014).

107. *Id.*

108. Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut it Down*, NEATODAY (Jan. 5, 2015), <http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut> (discussing the school-to-prison pipeline).

109. See Katherine Dunn, *Fred Gray Civil Rights Symposium: School-to-Prison Pipeline*, 5 FAULKNER L. REV. 115, 127 (2013).

110. *Id.* at 128–29.

111. Edward Preston & Kimberly Tague, *How Allegheny County Can Benefit from Youth Courts*, 14 LAW J. 8, 8 (2012) (explaining youth court program requirements and how they are beneficial to youth of color).

positions of judge, juror, advocate, and defense attorney.<sup>112</sup> Student defendants volunteer to appear in youth court and promise to abide by youth court dispositions, which may include community service, tutoring, or a written apology.<sup>113</sup> These early-intervention efforts to disentangle youth of color from the criminal justice system permit youth of color to avoid the problem of cumulative racial disadvantage in the criminal justice system at the outset.

*B. Requiring Racial Impact Statements to Consider  
Cumulative Disadvantage*

Another solution is requiring racial impact statements to assess whether government policies are tainted by racial cumulative disadvantage. Racial impact statements are similar to fiscal or environmental impact statements.<sup>114</sup> They require government actors to assess possible harm prior to policy implementation.<sup>115</sup> The objective is to anticipate unintended consequences before new initiatives are undertaken.<sup>116</sup>

Increasingly, states are requiring racial impact statements.<sup>117</sup> In April 2008, Iowa became the first state to require racial impact statements for proposed legislation affecting sentencing, probation, or parole policies.<sup>118</sup> Later, other states passed similar legislation.<sup>119</sup> Iowa's statute requires bills on criminal law matters to include an impact statement that considers "the impact of the legislation on minorities."<sup>120</sup> Connecticut's statute requires a racial and ethnic impact statement to be prepared for bills that potentially increase or decrease the state's pretrial or sentenced population in correctional facilities.<sup>121</sup> Oregon's statute allows lawmakers to request racial impact statements for proposed legislation that potentially affects the

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112. *Id.*

113. *Id.*

114. Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17 (2009).

115. *Id.*

116. *Id.*

117. *Id.* at 19.

118. *Id.* at 17.

119. *Id.*

120. IOWA CODE § 2.56(1) (2015).

121. CONN. GEN. STAT. § 2-24b(a) (2015).

racial composition of adults in the criminal justice system and juveniles in the juvenile justice system.<sup>122</sup>

Racial impact statements can make a positive difference. Iowa's racial impact law appears to be having a modest effect in reducing racial disparities.<sup>123</sup> It obstructed the passage of purported racially-biased bills and promoted the passage of purported racially-neutral or racially-beneficial bills.<sup>124</sup> The Associated Press's review of sixty-one Iowa impact statements since 2009 revealed only six out of twenty-six bills regarded as racially biased became law (a 23% passage rate), whereas fourteen out of thirty-five bills regarded as racially neutral or racially positive became law (a 40% passage rate).<sup>125</sup>

These preliminary racial impact statements are a needed first step, but the next step is to have future racial impact laws specifically assess for cumulative disadvantage. Future racial impact statements can serve as a type of "race audit" that seeks out potential cumulative disadvantage problems in proposed legislation.<sup>126</sup> For example, requiring such a racial impact statement prior to passage of previous crack-cocaine legislation could have helped policymakers foresee inequalities for communities of color.<sup>127</sup> The effort to eliminate crack-cocaine created racial disparities stemming from complex dynamics that included unequal sentencing provisions and law enforcement's focus on low-income, minority communities.<sup>128</sup> In hindsight, requiring a racial impact statement to consider potential racial cumulative disadvantage prior to passage of crack-cocaine legislation might have encouraged lawmakers to explore other ways of combatting the overall cocaine problem.<sup>129</sup> Thus, the next wave of racial impact laws should require government actors to consider whether any proposed policy will produce cumulative

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122. OR. REV. STAT. § 137.656(3)(e) (2015).

123. Ryan J. Foley, *Racial-Impact Law Has Modest Effect in Iowa*, DES MOINES REG., (Jan. 21, 2015, 7:47 PM), <http://www.desmoinesregister.com/story/news/politics/2015/01/21/racial-impact-law-effect-iowa-legislature/22138465>.

124. *Id.*

125. *Id.*

126. See R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1575 (2011).

127. Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 31 (2007).

128. *Id.* at 39–40.

129. *Id.* at 41–42.

racial disadvantage. Racial impact statements will not remedy all disparities, but they are helpful tools for lawmakers to determine the racial ramifications of proposed legislation.<sup>130</sup>

### *C. Abolishing Capital Punishment*

The reality of cumulative disadvantage argues for abolishing the death penalty. Researchers have made a robust case that racial factors taint all stages of the capital trial process—from prosecutors' charging decisions to juries' death penalty verdicts.<sup>131</sup> Miniscule amounts of racial bias at individual decision points could aggregate to create a death penalty outcome.<sup>132</sup> The death penalty system has many interconnected parts.<sup>133</sup> The multiple problems at multiple parts can cumulate.<sup>134</sup> The death penalty system is a multi-decision-making process involving prosecutors, jurors, and others.<sup>135</sup> Deliberate or unconscious bias can seep in at any of these decision points.<sup>136</sup>

An American Bar Association examination of Pennsylvania's death penalty system found flaws at multiple points in the system.<sup>137</sup> The flaws included: (1) inadequate procedures, such as requiring audio or video recordings of all interrogations in potential capital cases; (2) insufficient compensation for capital defense attorneys; (3) lack of state funding for capital indigent defense services; (4) inadequate access to experts and investigators; (5) lack of data on death-eligible cases that hamper efforts to determine the existence or extent of racial bias in the

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130. Maggie Clark, *Should More States Require Racial Impact Statements for New Laws?*, PEW CHARITABLE TR. (July 30, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/07/30/should-more-states-require-racial-impact-statements-for-new-laws>.

131. Lynch & Haney, *supra* note 8, at 575.

132. *Id.* at 594.

133. DEBORAH FLEISCHAKER ET AL., EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT iii (Am. Bar Ass'n ed., Oct. 2007).

134. *Id.*

135. Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 19–20 (1997).

136. Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830 (1990).

137. FLEISCHAKER ET AL., *supra* note 133, at iii.

capital punishment system; and (6) significant capital juror confusion regarding capital jury instructions.<sup>138</sup>

Another study by the Pennsylvania Supreme Court Committee on Racial and Gender Bias concluded that “there are strong indications that Pennsylvania’s capital justice system does not operate in an evenhanded manner.”<sup>139</sup> Researchers in one county near Philadelphia found that Black defendants were sentenced to death at a “significantly” higher rate than non-Black defendants, that one-third of Black defendants on death row would have received life sentences if they were not Black, and that prosecutors removed Blacks from capital juries twice as often as non-Blacks.<sup>140</sup>

Prosecutors may also be biased when deciding which cases to try as capital cases—especially when the defendant is Black.<sup>141</sup> Research indicates cases involving Black defendants accused and later convicted of killing White victims are the cases most likely to proceed as capital cases and to produce death sentences.<sup>142</sup> One study of capital punishment in Maryland examined multiple decision-making stages and found that “Blacks charged with killing Whites were the most disadvantaged at *each stage of the process*, resulting in a *cumulative biasing effect*.”<sup>143</sup>

Racial bias may also exist at the jury decision stage. A study of Philadelphia’s death penalty system found that Black defendants were “significantly more likely to receive a death sentence” from capital juries.<sup>144</sup> Capital defendants of color suffer from cumulative disadvantage throughout their life histories.<sup>145</sup> The death penalty imposed on capital defendants of color represents the final stage to a lifetime of cumulative disadvantage.<sup>146</sup>

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138. *Id.* at iii–v.

139. JAMES DAVIDSON ET AL., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 201 (2003).

140. *Id.*

141. Lynch & Haney, *supra* note 8, at 586.

142. *Id.* at 577.

143. *Id.* (emphasis added).

144. *Id.* at 578.

145. *Id.* at 594.

146. *Id.*

## V. CONCLUSION

Racial cumulative disadvantage allows modern racism to be entrenched within the criminal justice system. Miniscule racial disadvantage at individual decision points cumulate to create significant negative outcomes for defendants of color. Racial cumulative disadvantage is less visible and thus more insidious because a problem not seen is a problem not addressed. The problem of cumulative bias, however, needs to be addressed for the sake of defendants of color in the criminal justice system who suffer injustice because of racial cumulative disadvantage.