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BARGAINING TOWARDS EQUALITY:
THE EFFECTS OF IMPLICIT BIAS TRAINING ON PLEA-
BARGAINING

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ABSTRACT

This comment focuses on the racial discrimination that currently exists in the process of plea-bargaining. The author suggests an approach aimed to mend the widespread racial discrimination. Particularly, the author details why mandatory implicit bias trainings for prosecutors would benefit defendants. Implicit bias trainings would benefit the criminal justice system as a whole because they would bring awareness to the issue and give prosecutors the knowledge they need to act justly in the plea-bargaining process.

INTRODUCTION

The system of plea-bargaining creates and perpetuates disparate outcomes for those of different racial backgrounds in Virginia. This comment addresses this shortcoming by exploring the impact of requiring implicit bias training for those with the most power and discretion to affect the outcomes of plea-bargains: prosecutors. In order to combat disparate treatment amongst defendants in plea-bargaining, the Virginia Bar Association (“VBA”) should require prosecutors to complete mandatory implicit bias training as a part of their Continuing Legal Education (“CLE”) requirements. By requiring prosecutors to complete implicit bias training, they likely will be more effective at reducing the widespread discrimination that exists within plea-bargaining.

This comment contains three parts. Part I highlights the pervasiveness of racial discrimination within the realm of plea-bargaining in Virginia. Part I also expands on implicit bias as a reason for such discrimination, and briefly discusses various proposals aimed at resolving such issues. Part II examines my proposal and explores the nature of implicit bias trainings on the plea-bargaining process. Part III evaluates sectors outside of state prosecution offices where implicit bias trainings have been implemented.

I. THE SIGNIFICANCE OF RACIAL DISCRIMINATION IN PLEA-BARGAINING

While racial inequalities affect nearly every aspect of the criminal justice system,¹ this paper is devoted to the racial inequalities that exist within

¹ Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39

plea-bargaining. Section A outlines the rampant nature of racial disparities within plea-bargaining. Section B discusses the science behind implicit biases as one possible reason for such racial disparities in plea-bargaining. Section C briefly evaluates the shortcomings of several proposals aimed at remedying such issues.

A. Widespread Racial Disparities in Plea-Bargaining

Racial disparities in plea-bargaining are readily apparent.² In Virginia, data from over 110,000 criminal status case reports in 2015 revealed African-Americans and other minorities consistently received less favorable treatment than similarly situated white defendants through plea-bargaining.³ In particular, white defendants who pled guilty when charged with malicious wounding or burglary were more than twice as likely to receive plea deals with reduced sentences than African-Americans.⁴ Additionally, white defendants were nearly twice as likely to receive plea offers to lesser offenses when charged with assault and battery of family members than African-Americans.⁵ However, in localities where fewer plea deals were made, these disparities were vastly diminished.⁶

B. Implicit Biases as a Reason for Disparities in Plea-Bargaining

While it is apparent racial disparities exist in the system of plea-bargaining, it is not entirely clear why such disparities exist. One reason suggested for such racial disparities in plea agreements is the implicit racial bias of prosecutors.⁷ Implicit racial bias refers to the cognitive processes by which people unconsciously classify information in racially biased man-

COLUM. HUM. RTS. L. REV. 202, 202 n.2 (2007).

² See generally Alan J. Gocha, *The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice*, 8 GEO. J. L. & MOD. CRITICAL RACE PERSP. 307 (2016) (discussing systematic inequality as seen in racial sentencing disparities); *id.* (discussing how prosecutors can make race neutral charging and plea-bargaining decisions that produce racial disparities).

³ See Dave Ress, *Blacks More Likely to Get Prison Time in Plea Deals, Hampton Roads Court Data Show*, DAILY PRESS (Mar. 17, 2016), <http://www.dailypress.com/news/dp-nws-sunshine-disparities-20160317-story.html>; Dave Ress, *Records Supreme Court is Withholding Point to Racial Disparities in Plea Deals*, DAILY PRESS (Feb. 1, 2015), <http://www.dailypress.com/news/dp-news-court-data-20150201-story.html> (accounting for differences in charges, criminal history, and severities of crimes).

⁴ Ress, *Records Supreme Court is Withholding Point to Racial Disparities in Plea Deals*, *supra* note 3.

⁵ *Id.*

⁶ *Id.* (explaining that in rural areas of Virginia, where less plea deals are made, the racial disparities of the outcomes of plea-bargaining disappear).

⁷ See Robert J. Smith & Dustin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012) (exploring how racial bias can operate in each stage of prosecutorial discretion).

ners.⁸ Implicit racial biases are unintentional, unplanned, and effortless.⁹ Such biases result from the repeated exposure to cultural stereotypes and attitudes that pervade our society.¹⁰ For example, various stereotypes, such as the dangerous black male, are well documented.¹¹ It is critical to understand that implicit biases exist, even in the absence of purposeful bigotry, simply because of exposure to cultural and societal stereotypes.¹² Ultimately, many Americans, including prosecutors, carry some form of implicit racial bias.¹³

Implicit biases affect plea-bargaining through prosecutorial discretion, as prosecutors are granted ample discretion when deciding whether to offer plea deals and the substance of such offers.¹⁴ Prosecutors' decision-making is strongly influenced by their own implicit racial biases against African-American defendants.¹⁵ As with all bias, implicit bias can distort one's view of the facts.¹⁶ In particular, implicit racial biases affect the evaluation of evidence, offering of plea deals, and the defendant's acceptance of punishments.¹⁷ Biased evaluation of evidence can lead one to unintentionally interpret evidence as more probative of guilt.¹⁸ For example, implicit racial biases can prevent prosecutors from offering plea deals due to expectations of the defendant's likelihood of recidivism.¹⁹ Ultimately, prosecutors with limited information, time, and resources may often subconsciously rely on race when making such plea-bargaining decisions.²⁰

⁸ *Id.* at 797.

⁹ L.S. Richardson & P.A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629 (2013) (quoting Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004)).

¹⁰ Florian Arendt & Temple Northup, *Effects of Long-Term Exposure to New Stereotypes on Implicit and Explicit Attitudes*, 9 INT'L J. COMMUNICATION 2370, 2371 (2015).

¹¹ See Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877 (2004).

¹² *Implicit Bias*, NAT'L INITIATIVE FOR BUILDING COMMUNITY. TR. & JUST., [hereinafter TR. & JUST.] <https://trustandjustice.org/resources/intervention/implicit-bias> (last visited Mar. 23, 2018).

¹³ See Joe Davidson, *Implicit Bias Training Seeks to Counter Hidden Prejudice in Law Enforcement*, WASH. POST (Aug. 16, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/08/16/implicit-bias-training-seeks-to-counter-hidden-prejudice-in-law-enforcement/?utm_term=.a8166d5aa834.

¹⁴ See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1656–57 (2010).

¹⁵ See Smith & Levinson, *supra* note 7, at 814.

¹⁶ See Richardson & Goff, *supra* note 9, at 2634–36.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1, 3–4 (forthcoming 2018).

²⁰ *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), <https://eji.org/news/research-finds-racial-disparities-in-plea-deals>.

C. Proposals to Remedy Such Racial Disparities

Scholars have sought solutions to reduce the impact of prosecutors' implicit biases on plea-bargaining. Such proposals have included: (1) limiting or banning plea bargains, (2) requiring racial background data on defendants to be unknown to prosecutors, and (3) conducting racial impact studies in prosecutors' offices.²¹ However, these proposals have significant shortcomings relating to time, resources, and practicality.

First, eliminating or reducing plea-bargaining could overrun the judicial system, as nearly 97 percent of federal cases and 94 percent of state cases result in plea agreements.²² Second, while requiring racial data to be unknown to prosecutors may be sound in theory, the practical effect of this is limited. Prosecutors would still have access to defendants' names, and the names themselves may connote certain racial and ethnic backgrounds.²³ Additionally, recidivism is a widespread issue in the criminal justice system.²⁴ Thus, prosecutors may know the racial background of a defendant through years of dealing with such defendant.

Additionally, one proposal is to study the effects of race on cases in individual prosecutors' offices.²⁵ However, conducting racial impact studies in prosecutors' offices would require substantial resources.²⁶ While no single proposal will end all discrimination in plea-bargaining, there is evidence that the problem can be reduced over time with appropriate trainings and education. However, most proposals fall short of remedying such disparate outcomes in plea-bargaining, which is why I have developed my own proposal aimed to reduce such disparities.

II. MANDATORY IMPLICIT RACIAL BIAS TRAINING AS A REMEDY

Section A describes my proposal to help reduce the impact of implicit biases on plea-bargaining. Section B explains the likely effects of mandating

²¹ Davis, *supra* note 1, at 219–31.

²² Eric Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html>.

²³ See Charisse L'Preé Corsbie-Massay, *Manipulating Race and Gender in Media Effects Research: A Methodological Review Using the Media FIT Taxonomy*, in RACE AND GENDER IN ELECTRONIC MEDIA: CONTENT, CONTEXT, CULTURE 125, 130 (Rebecca Ann Lind ed., 2017) (explaining how names contain information about race and gender).

²⁴ Christopher Zoukis, *Report Documents U.S. Recidivism Rates for Federal Prisoners*, HUFFINGTON POST. (Mar. 25, 2016), https://www.huffingtonpost.com/christopher-zoukis/report-documents-us-recid_b_9542312.html.

²⁵ Davis, *supra* note 1, at 228–29.

²⁶ See *id.* at 227.

that prosecutors complete implicit bias training. Section C discusses the reasoning behind requiring only prosecutors to complete such training.

A. The Proposal

My proposal to reduce the effect of prosecutors' implicit racial biases on plea-bargaining is rather simple. I propose that the VBA require prosecutors to complete mandatory implicit bias trainings as a part of their CLE requirements. Prosecutors will be required to complete such trainings within two years of official adoption of the proposal; for prosecutors hired after the enactment of the proposal, they will need to complete such trainings within two years of beginning employment as prosecutors. Such trainings should be completed periodically similar to other ethics and training programs because the trainings will be more effective the more frequent they occur.²⁷

There are two main types of implicit bias trainings: change-based and control-based intervention.²⁸ Change-based intervention focuses on changing implicit racial biases, while control-based intervention recognizes the challenge of eliminating or changing implicit biases and enables the agent to control the effects of such biases.²⁹ An example of a change-based intervention is reducing an individual's automatic association of "white" with "good."³⁰ However, change-based interventions demand more active participation and dedication to change such associations than control-based intervention.³¹ To avoid this, my proposal is geared toward control-based intervention.

Such trainings will consist of presentations and lectures akin to the typical presentations that qualify for CLE credits. It will be broken down into three segments, similar to other implicit bias training models, which I will address below.³² First, these trainings will examine the psychology behind such biases and how they impact our decisions. Second, the trainings will

²⁷ See, e.g., Michael McCabe, Jr., *ABA Recommends Mandatory Substance Abuse and Mental Health CLE*, MCCABE IP ETHICS L. (Feb. 9, 2017), <https://www.ipethicslaw.com/aba-recommends-mandatory-substance-abuse-and-mental-health-cle/>.

²⁸ Compare Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 J. PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1334 (2008) (discussing control-based intervention), with Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 J. PERSONALITY & SOC. PSYCHOL. BULL. 513–14 (2010) (discussing change-based intervention).

²⁹ *Id.*

³⁰ See Mendoza et al., *supra* note 28, at 514–15.

³¹ See generally *id.* at 512, 513–14 (discussing change-based intervention).

³² Memorandum from U.S. Dep't of Justice Deputy Attorney General Sally Q. Yates to All Department Law Enforcement Agents and Prosecutors on "Implicit Bias Training" (June 27, 2016) [hereinafter Yates Memo], <https://www.justice.gov/opa/file/871116/download>.

emphasize the risks and outline the statistics about the effects of implicit biases on plea-bargaining. Third, the trainings will provide insight on ways to recognize one's own implicit biases. It is vital for such trainings to emphasize that while it is within human nature to create such implicit biases, there are methods to overcome such biases.³³

Notably, the VBA requires practitioners fulfill a specified amount of CLE courses in the areas of ethics or professionalism.³⁴ The goal for this proposal is to count implicit bias trainings towards such requirements.³⁵ Also, these seminars would be available and encouraged, but optional for criminal defense attorneys, as their implicit biases also contribute to disparate treatment among defendants in plea-bargaining.³⁶

This proposal has numerous advantages when compared to the previously mentioned proposals. Specifically, the main advantage of this proposal is that there is little to no additional cost of resources. Prosecutors are already required to satisfy annual CLE courses on ethics or professionalism, and these courses often cost money to attend.³⁷ Prosecutors would simply divert the cost to attend one CLE course on ethics to the implicit bias trainings. Thus, these trainings would be at little or no additional cost than what prosecutors already spend on CLE courses. Further, prosecutors would not be spending additional time receiving the trainings, as it would qualify for a CLE course credit.³⁸

Moreover, there are numerous possible sponsors to choose from to host such a CLE training, ranging from law schools to local bar associations.³⁹ While the guests invited to speak at such trainings will vary, the purpose of the trainings is to have individuals with knowledge of the science behind implicit biases speak at the trainings. Ultimately, this will include individuals with a background in psychology. It is also important to have local legal

³³ *Id.*

³⁴ See VA. SUP. CT. R. pt. 6 § IV, 17(F) (requiring attorneys to complete two hours of legal ethics credits per year).

³⁵ See generally *id.* at § IV, 17(H) (explaining that, in order to qualify as a legal education credit, consideration will be given to whether the course “tends to increase the professional’s competence as a lawyer”).

³⁶ Richardson & Goff, *supra* note 9, at 2633 (explaining that defense attorneys’ biased evaluations of cases due to the defendant’s race can result in accepting plea offers that they may otherwise not have taken).

³⁷ See VA. SUP. CT. R. pt. 6 § IV, 17(F) (requiring attorneys to complete two hours of legal ethics credits per year).

³⁸ See *id.*

³⁹ See, e.g., Symposium, *Immigration: Exploring Today’s Legal Landscape*, 21 RICH. PUB. INT. L. REV. (2018); *Free Ethics CLE: Lawyer Impairment and Three Strikes and You’re...Legal Ethics for the Busy Practitioner*, FAIRFAX B. ASS’N, <http://www.fairfaxbar.org/events/EventDetails.aspx?id=1023991&group=>.

professionals speak and share their experiences of common implicit biases they recognize and try to manage. Of course, these legal professionals will have needed to complete the training prior to speaking at such trainings. Having legal professionals objectively speak and discuss the data regarding implicit biases will be critical to generating positive change in the legal community.

B. The Results

Motivation is key to addressing the habitual prejudice in plea-bargaining, and motivation stems from awareness of biases and concern for their effects.⁴⁰ The main function of such trainings is to make prosecutors aware of the impact of their collective actions. Cognitive awareness of one's own biases is the first step to reducing its impact.⁴¹ Learning about unconscious biases and their consequences can help lawyers identify their own social prejudices and biases and change these behaviors.⁴² The majority of people can counter these effects if they are aware of the biases they possess and are trained to recognize how such biases affect their decision-making.⁴³

By informing prosecutors of the widespread discrimination within the system of plea-bargaining and how their implicit biases perpetuate such discrimination, prosecutors can become increasingly sensitive to such racial disparities. Once prosecutors become aware of such issues, they likely seek to reduce their role in perpetuating such discrimination for two reasons.

First, prosecutors will likely seek to reduce the impact of their implicit biases in order to fulfill their obligations to seek a fair and just result.⁴⁴ Prosecutors have the duty to seek the administration of justice and equal justice for all.⁴⁵ As the National District Attorneys Association states, “[t]he primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.”⁴⁶ Thus, prose-

⁴⁰ Patrick G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268 (2012).

⁴¹ See Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 374 (2005).

⁴² *Id.*

⁴³ Yates Memo, *supra* note 32.

⁴⁴ See generally Steven M. Dettelbach, Commentary, *Brady from the Prosecutor's Perspective*, 57 CASE W. RES. L. REV. 615, 615-17 (2007) (explaining that the *Brady* requirements make attorneys fearful of ethical dilemmas).

⁴⁵ See Am. Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, 3-1.2(b), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html (last visited Mar. 23, 2018) (explaining that it is the duty of the prosecutor not to discriminate based on race).

⁴⁶ NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS 2 (3d ed.),

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cutors who are aware of their own biases understand their duty is to counteract such biases in order to ensure that all defendants receive a fair and just outcome.

Second, prosecutors will likely try to reduce such biases in order to avoid claims of ethical violations.⁴⁷ Even if the idea of racial injustice does not persuade some prosecutors to curb their behaviors, the threat of ethical violation claims is ubiquitous and unsettling for all attorneys.⁴⁸ Possibilities of disbarment or overturned cases naturally deter attorneys from engaging in culpable conduct that could lead to such punishments.⁴⁹ This threat can become more realistic and apparent the when the notions of implicit biases become a more well-known concept within the legal community and the public in general. Thus, prosecutors have multiple incentives to reduce the impact of their implicit biases on plea-bargaining.

In sum, ethics trainings help remind and educate attorneys on their professional responsibilities. Ethics trainings enable attorneys to understand what professional conduct is allowed and what is not allowed. While there is no explicit rule against racial discrimination in plea-bargaining, there are several authorities that demand prosecutors not act in racially motivated manners.⁵⁰ Ultimately, these trainings will help remind attorneys of their professional responsibilities and that non-adherence to such duties is morally and ethically problematic.

C. Mandatory Training Only for Prosecutors

My proposal calls for requiring prosecutors to complete such implicit bias training, and gives defense counsel the option to complete such training. Prosecutors are in a unique position of power unlike criminal defense attorneys. As such, prosecutors are granted ample power to decide whether to charge, what to charge, what sentence to recommend, and so forth.⁵¹ Prosecutors can charge in a way that weakens a defendant's procedural entitlements, thereby making it more difficult for a defendant to present an ade-

<http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> (last visited Mar. 23, 2018).

⁴⁷ See generally Dettelbach, *supra* note 44, at 615–16 (explaining that the *Brady* requirements make attorneys fearful of ethical dilemmas).

⁴⁸ See Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 n. 1 (2003).

⁴⁹ *Id.*

⁵⁰ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that jurors cannot be excluded based solely on race); Am. Bar Ass'n, *supra* note 45, at 3-3.1(b) (explaining that it is the duty of the prosecutor not to discriminate based on race).

⁵¹ See generally Bowers, *supra* note 14 (explaining the significant discretion prosecutors possess).

quate defense.⁵² Because of these extraordinary powers and the duty of prosecutors to administer justice, prosecutors are required to adhere to higher standards of ethical conduct than defense attorneys.⁵³ For instance, the American Bar Association (“ABA”) has implemented rules outlining the special responsibilities of prosecutors.⁵⁴ The ABA sets a higher standard of ethics for prosecutors than the U.S. Constitution.⁵⁵ Thus, by requiring prosecutors to complete implicit bias trainings, they are being held to the higher standard of ethical conduct that their position demands.

III. THE MOVEMENT TOWARD IMPLICIT BIAS TRAININGS

This Part demonstrates how implicit bias trainings have already gained traction throughout the country. Section A examines the early stages of such implicit bias trainings and the primary goals behind them. Section B discusses implicit bias trainings at the Department of Justice (“DOJ”) and further evaluates various implicit bias trainings that police departments have established throughout the United States. Section C examines the contemporary research on implicit bias trainings.

A. Early Stages of Modern Implicit Bias Training: Fair & Impartial Policing Project

The Fair & Impartial Policing Project (“FIP”) is a training project that originated in the Criminology Department of the University of South Florida.⁵⁶ Beginning in 2008, with a grant of \$1 million from the DOJ, the project was established to study the effects of implicit bias on policing and to develop possible solutions to reduce such impacts.⁵⁷ The program studied the science behind implicit bias and developed training programs to help officers reduce and manage their biases.⁵⁸

FIP aims to address contemporary types of implicit biases through three modules: Module 1: Understanding Human Bias; Module 2: The Impact of Biased Policing on Community Members and the Department; and Module

⁵² See Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 775–76 (2016).

⁵³ Am. Bar Ass’n, *supra* note 45, at 3-1.2(c).

⁵⁴ MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2017).

⁵⁵ See *Cone v. Bell*, 556 U.S. 449, 477–78 (2009).

⁵⁶ Barbara Melendez, *A Possible End to Racial Profiling?*, U.S. FLA. NEWS (Sept. 12, 2013), <http://news.usf.edu/article/templates/?a=5668>.

⁵⁷ *Id.*

⁵⁸ See generally *FAQ’s on Implicit Biases*, U.S. DEP’T OF JUST., <https://www.justice.gov/opa/file/871121/download> (last visited Mar. 23, 2018) (explaining the research behind implicit bias).

3: Skills for Fair, Impartial, and Effective Policing.⁵⁹ The leaders for FIP reported that, while most personnel walked into the trainings hostile and defensive, many walked out with a new way of assessing their own implicit biases.⁶⁰ Ultimately, FIP laid the ground work for a new way to address the effects of implicit biases on policing.⁶¹

B. Implicit Bias Trainings Throughout the Nation

After realizing the success of the FIP, various state and local police departments across the nation implemented similar implicit bias trainings.⁶² Numerous police departments were found to have institutionalized patterns of racial bias by implementing strategies that result in severe and unjustified disparities in the rates of stops, searches, and arrests of African Americans.⁶³ On the same note, “studies suggest that implicit bias contributes to ‘shooter bias’—the tendency for police to shoot unarmed black suspects more often than white [suspects]”.⁶⁴ Implicit biases have consistently been blamed as the reason for these disparities.⁶⁵

Because of these pervasive issues, numerous police departments implemented implicit bias trainings specifically geared to address these problems. For example, police departments used life-like simulations to combat implicit bias.⁶⁶ The police officers are armed with a pistol that is modified to shoot a laser.⁶⁷ The simulator puts the police officers in real life situations, including domestic disputes, armed robberies, and traffic stops involving white, black, and Hispanic actors.⁶⁸ The purpose of the simulations is to demonstrate how police officers' implicit biases affect them in real life situations and to train officers to act on danger cues, rather than perceptions

⁵⁹ FAIR & IMPARTIAL POLICING, FAIR & IMPARTIAL POLICING: TRAINER RESOURCE SECTION 3 (2017), https://static1.squarespace.com/static/54722818e4b0b3ef26cdc085/t/58759865e3df289e72236b94/1484101734777/Extended_About+FIP_2017%24.pdf.

⁶⁰ Melendez, *supra* note 56.

⁶¹ FAIR & IMPARTIAL POLICING, *supra* note 59, at 2–3.

⁶² See, e.g., Betsy Hodges, *In Minneapolis, a Time for Change on Policing and Race*, STAR TRIB. (Feb. 16, 2016), <http://www.startribune.com/in-minneapolis-a-time-for-change-on-policing-and-race/369038681/>; Bob Hardt, *In NY1 Interview, Mayor Defends New ‘Implicit Bias’ Training for NYPD*, NY1 (Feb. 9, 2016), <http://www.ny1.com/nyc/all-boroughs/politics/2016/02/8/mayor-sits-down-for-ny1-interview-with-errol-louis.html>; Yates Memo, *supra* note 32.

⁶³ Davidson, *supra* note 13.

⁶⁴ TR. & JUST., *supra* note 12.

⁶⁵ See *id.*; see also Hardt, *supra* note 62.

⁶⁶ Tom Banse, *Battling the Bias: WSU Researchers Develop New Police Simulator Training*, NW NEWS NETWORK (Dec. 12, 2016), <http://nwnewsnetwork.org/post/battling-bias-wsu-researchers-develop-new-police-simulator-training>.

⁶⁷ *Id.*

⁶⁸ *Id.*

based on race.⁶⁹ Police departments have dedicated significant financial sources for such trainings, as some trainings cost \$250 per session per officer.⁷⁰

Additionally, in June 2016, DOJ implemented a plan that mandated implicit bias training for all of its prosecutors, law enforcement officers, and other personnel.⁷¹ Such trainings consists of three distinct curricula for DOJ's law enforcement agencies similar to FIP: one tailored for their executive leadership; one for mid-level supervisors and supervisors; and one for line agents and academy recruits.⁷² DOJ implemented three additional curricula more geared toward its attorneys.⁷³ "All three curricula include a review of the latest science on implicit bias, an examination of how implicit bias can affect policing decisions and interactive sessions that encourage participants to explore their own potential biases," according to the trainer's guide.⁷⁴ The cost for such trainings is unclear, but if it is anything like the FIP training, the DOJ trainings are also expensive.⁷⁵

C. Contemporary Research on Implicit Bias Trainings

Implicit bias training is not without its skeptics. Implicit bias trainings are a relatively new concept, thus the research is not entirely clear whether such trainings are effective.⁷⁶

Skeptics point to diversity and racial training in the workplace as a reason for hesitating to suggest that implicit bias training will generate positive change. Literature on racial and diversity training in the workplace is equivocal as to whether such trainings are effective or could serve as an effective substitute for implicit bias training.⁷⁷

Even if it is unclear whether such workplace trainings are effective, prosecutors and police departments should try such trainings until more conclu-

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Yates Memo, *supra* note 32.

⁷² *FAQ's on Implicit Biases*, *supra* note 59.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ FAIR & IMPARTIAL POLICING, *supra* note 59, at 8 (explaining that it costs \$17,000 to train two trainers for the implicit bias trainings).

⁷⁶ Jaweed Kaleem, *Why the Department of Justice Wants to Force its 28,000 Employees to Confront Unconscious Racial Biases*, L.A. TIMES (June 27, 2016), <http://www.latimes.com/nation/la-na-doj-implicit-bias-20160627-snap-story.html>.

⁷⁷ Destiny Peery, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST (Mar. 14, 2016), https://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html; Shankar Vedantam, *Most Diversity Training Ineffective*, WASH. POST (Jan. 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011901899.html?sid=ST2008011901990>.

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sive evidence shows that such trainings are ineffective. The proposed implicit bias training herein will have a relatively low cost and the possibility of benefits is readily apparent. Given the addressing the significance of the problem, it is obvious that doing nothing is not an option. Prosecutors and officers must at least try such trainings until more effective solutions are found.

Moreover, the implementation of such trainings in police departments and at DOJ further supports this proposal as a method to reduce the discriminatory results of plea-bargaining. The very fact that DOJ and state police departments are willing to spend substantial resources on such training demonstrates why my proposal is feasible. This proposal seeks to implement curricula that is similarly to that produced by DOJ without the substantial associated costs. While implicit bias training is a new movement, there is a general consensus for the need to address and resolve the racial disparities that permeate the plea-bargaining process through the implementations of implicit bias training.⁷⁸

CONCLUSION

Ultimately, mandatory training on the effects on implicit racial bias in plea-bargaining will help prosecutors to be more aware of how their implicit biases affect their attitudes during such negotiations. These trainings will help influence prosecutors to try to overcome these biases and not let such biases influence their professional judgment. While mandatory implicit bias training on plea-bargaining is a step in the right direction, it is not the ultimate solution that will completely resolve all discrimination within the plea-bargaining context. Nonetheless, it is still a reasonable and necessary approach that can help mitigate the impact of implicit racial biases on plea-bargaining.⁷⁹

⁷⁸ Yates Memo, *supra* note 32.

⁷⁹ While this comment focuses on plea-bargaining, this proposal may have relevance in other areas of the criminal prosecution process, such as the charging and sentencing stages. If there is success from such trainings on the plea-bargaining process, it is possible that such trainings could effectuate change in other stages of the criminal process as well.

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