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## BOOK REVIEW

### IMPLICIT BIAS IN THE AGE OF TRUMP

BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO. By Jennifer L. Eberhardt. New York, N.Y.: Viking, 2019. Pp. 340. \$28.00.

*Reviewed by Charles R. Lawrence III\**

*We inhabit a nomos — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.*

*No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.*

— Robert Cover<sup>1</sup>

#### INTRODUCTION

I am watching a video of Donald Trump, the forty-fifth President of the United States. He stands before a sea of white people, many of them wearing red hats emblazoned with Trump’s campaign slogan, “Make America Great Again” (MAGA), or carrying signs that say “Keep America Great.”<sup>2</sup> I cannot find a Black or brown face in the crowd.<sup>3</sup> Just days earlier Mr. Trump had attacked four congresswomen of color — Alexandria Ocasio-Cortez, Ilhan Omar, Ayanna Pressley, and Rashida Tlaib — tweeting that they should “go back” to the countries they came from, countries whose governments he called “a complete and

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\* Professor of Law Emeritus, William S. Richardson School of Law; Centennial Professor Emeritus, University of Hawai‘i at Mānoa. B.A., Haverford College, 1965; J.D., Yale Law School, 1969. The author thanks Mari Matsuda and Jon Goldberg Hiller, who read early drafts of this Review and shared their insights with me. I am indebted to Terina Faagau for intrepid research assistance, and to the editors of the *Harvard Law Review* for rigorous editorial support.

<sup>1</sup> Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); see also JAMES B. WHITE, THE LEGAL IMAGINATION 303–04 (1973) (arguing that it is through legal language that we form communities and communitarian values).

<sup>2</sup> *Trump Rally Crowd Chants “Send Her Back” While He Continues Attack on Ilhan Omar*, CBS NEWS (July 17, 2019), <https://www.cbsnews.com/video/trump-rally-crowd-chants-send-her-back-while-he-attacks-ilhan-omar> [<https://perma.cc/DD5F-PRUT>] [hereinafter *Trump Rally*].

<sup>3</sup> See *id.* Trump has consistently called upon and used a few African Americans in order to refute claims that he is racist. See, e.g., Nikki Carvajal, *Trump Hosts African American Pastors and Faith Leaders at the White House*, CNN (July 29, 2019, 6:35 PM), <https://www.cnn.com/2019/07/29/politics/donald-trump-african-american-pastors-white-house/index.html> [<https://perma.cc/59LX-USWE>]; *Remarks by President Trump in Meeting with Kanye West and Jim Brown*, WHITE HOUSE (Oct. 11, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-kanye-west-jim-brown> [<https://perma.cc/RWW7-GVR9>].

total catastrophe, the worst, most corrupt and inept anywhere in the world.”<sup>4</sup> In his speech, he renews the attack begun in those tweets, this time singling out Congresswoman Omar.<sup>5</sup> Now, several people in the crowd begin to chant: “Send her back! Send her back!” The chant spreads until the whole crowd shouts: “*SEND HER BACK! SEND HER BACK! SEND HER BACK! SEND HER BACK!*” President Trump stops speaking and listens to the crowd, allowing the chant to continue<sup>6</sup> and basking in the exhilarating ritual of call and response that binds the members of the crowd to him and to each other.<sup>7</sup> I can feel him grinning, clearly pleased with himself. He orchestrated this collective affirmation of his racist and nativist theme.<sup>8</sup> President Trump’s racism is transparent. He hides nothing from us nor from his audience. He knows what they have come to hear, and he will not deny them. From the earliest moments of his campaign for President, he has positioned himself as the champion of an abandoned and unloved white nation under threat from a rising tide of Blacks, minorities, immigrants,

<sup>4</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 14, 2019, 8:27 AM), <https://twitter.com/realDonaldTrump/status/1150381394234941448> [<https://perma.cc/29QC-YN7J>]; see also Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to “Go Back” to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://nyti.ms/2LokWkq> [<https://perma.cc/3K27-SBPF>] (explaining that President Trump’s tweets appeared to be “meant for members of the so-called squad”). After attacking the four Democratic congresswomen (“the squad”), Trump again went to Twitter to assert that he is “NOT Racist.” Donald J. Trump (@realDonaldTrump), TWITTER (July 16, 2019, 9:59 AM), <https://twitter.com/realdonaldtrump/status/1151129281134768128> [<https://perma.cc/DGS7-P47R>] (“Those Tweets were NOT Racist. I don’t have a Racist bone in my body!”). For more information on “the squad,” see William Cummings, “*The Squad*”: *These Are the Four Congresswomen Trump Told to “Go Back” to Other Countries*, USA TODAY (July 15, 2019, 12:25 PM), <https://www.usatoday.com/story/news/politics/2019/07/15/who-is-the-squad-ocasio-cortez-omar-pressley-and-tlaib-make-mark/1732238001> [<https://perma.cc/MJ9D-L8X2>].

<sup>5</sup> *Trump Rally*, *supra* note 2, at 1:53.

<sup>6</sup> *Id.* at 6:30.

<sup>7</sup> President Trump uses the four congresswomen of color to remind his audience of their whiteness, or to remind them that their whiteness is all they have. Cf. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 283–89 (1980) (discussing the use of racism to undermine populist movements led by farmers of both races); Ryan Grim & Briahna Gray, *Podcast Special: Alexandria Ocasio-Cortez on Her First Weeks in Washington*, THE INTERCEPT (Jan. 28, 2019, 5:03 PM), <https://theintercept.com/2019/01/28/alexandria-ocasio-cortez-podcast> [<https://perma.cc/77PQ-L2ML>] (“And LBJ talked about this — like, if you can convince a poor white man that he’s superior to a black man, he’ll empty his pockets for you.”).

<sup>8</sup> See Amy Davidson Sorkin, *From “Lock Her Up” to “Send Her Back”: Trump in North Carolina*, NEW YORKER (July 18, 2019), <https://www.newyorker.com/news/daily-comment/from-lock-her-up-to-send-her-back-trump-in-north-carolina> [<https://perma.cc/XN3M-7B2D>] (noting that while President Trump claimed to disagree with the chant, his goal “seemed to be to make his supporters believe that they are the hated ones”). The chant recalls the “lock her up” chant used so effectively in his campaign against Hillary Clinton. *Id.* (“Lock Her Up, Send Her Back — the resentments begin to blur.”).

and other un-American outsiders living off government handouts and perpetrating crime.<sup>9</sup>

I find it difficult to watch this white bonding scene. I feel sickened, assaulted, anxious, afraid, powerless, and sad.<sup>10</sup> It is the familiarity of the scene, the *déjà vu*, that makes me sick. I hear my mother telling of sitting at her best friend's kitchen table in Vicksburg, Mississippi, when neighbors brought news of her friend's father taken from his place of business, hanged, and burned. I recall photographs: of lynch mobs where white mothers and fathers, with their small children in tow, gather to picnic with their neighbors under the charred bodies of Black

<sup>9</sup> See Briahna Joy Gray, *The Problem with Calling Trump a Racist*, ROLLING STONE (Jan. 23, 2018, 4:54 PM), <https://www.rollingstone.com/politics/politics-news/the-problem-with-calling-trump-a-racist-117010> [<https://perma.cc/G874-QP7C>] (“Trump glided into the 2016 presidential contest on the twin engines of a golden escalator and the Southern Strategy — signaling his antagonism toward non-white interests by flagging Mexican immigrants as an existential threat to American (read: white) purity.”); German Lopez, *Donald Trump’s Win Tells People of Color They Aren’t Welcome in America*, VOX (Nov. 9, 2016, 10:38 AM), <https://www.vox.com/identities/2016/11/9/13570922/trump-election-2016-racism> [<https://perma.cc/FVW6-YFR4>] (“From the very beginning, Donald Trump’s campaign for presidency was fueled by an undercurrent of racism and bigotry.”). President Trump’s racism predates his campaign for President of the United States. See, e.g., Michael Kranish & Robert O’Harrow Jr., *Inside the Government’s Racial Bias Case Against Donald Trump’s Company, and How He Fought It*, WASH. POST (Jan. 23, 2016), [http://wapo.st/1Uj18f9?tid=ss\\_tw](http://wapo.st/1Uj18f9?tid=ss_tw) [<https://perma.cc/N59G-CALJ>] (“White testers were encouraged to rent at certain Trump buildings, while the black testers were discouraged, denied or steered to apartment complexes that had more racial minorities, according to the testimony [in a 1973 civil rights case against future-President Trump’s business].”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 18, 2011, 10:54 AM), <https://twitter.com/realdonaldtrump/status/137559273394802690> [<https://perma.cc/2978-A6F5>] (“Made in America? @BarackObama called his ‘birthplace’ Hawaii ‘here in Asia.’”); Josh Voorhees, *All of Donald Trump’s Birther Tweets*, SLATE (Sept. 16, 2016, 10:15 AM), <https://slate.com/news-and-politics/2016/09/donald-trumps-birther-tweets-in-order.html> [<https://perma.cc/P5MB-X6LP>]. As President, Trump’s racism has continued unabated. See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfco725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfco725c-f711-11e7-91af-31ac729add94_story.html) [<https://perma.cc/B5MN-G22G>]; German Lopez, *Donald Trump’s Long History of Racism, from the 1970s to 2019*, VOX (July 15, 2019, 9:40 AM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> [<https://perma.cc/FT3H-VT22>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 27, 2019, 7:14 AM), <https://twitter.com/realdonaldtrump/status/1155073964634517505> [<https://perma.cc/TL8V-5FD8>].

<sup>10</sup> In recording my thoughts and feelings as I watch this video and when I read Professor Jennifer Eberhardt’s recent book, I am employing a methodology I use in my seminars in Critical Race Theory and Literature, Law, Race, and Culture. I ask students to do reflection pieces on each week’s readings. My suggestions for writing reflections include that they should convey both feelings and analysis. These suggestions may include a prompt such as: “Does the text capture or reflect your own life experience or do you experience a dissonance between your own experience and the text?” See, e.g., Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2247–48 (1992).

men hanging above them;<sup>11</sup> of the contorted faces of white women hurling epithets at Elizabeth Eckford as she walks the gauntlet of the mob to her first day at Little Rock Central High School.<sup>12</sup> This familiar feeling, the churning in my gut, comes not just from echoes of my family's and people's history, but also from contemporary scenes: of white nationalists marching with torches and Nazi regalia in Charlottesville, Virginia;<sup>13</sup> and of massacres at a Black church in Charleston, South Carolina;<sup>14</sup> at mosques in Christchurch, New Zealand;<sup>15</sup> at a synagogue in Pittsburgh, Pennsylvania;<sup>16</sup> and at a shopping center in El Paso, Texas,<sup>17</sup> the shooters in all these massacres urged on by racism, anti-Semitism, and xenophobia.<sup>18</sup>

<sup>11</sup> Cf. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 33–37 (3d ed. 2017), <https://ej.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> [<https://perma.cc/K7LN-F4WH>] (explaining that many lynchings “were carnival-like events, with vendors selling food, printers producing postcards featuring photographs of the lynching and corpse, and the victim’s body parts collected as souvenirs,” *id.* at 33); Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 546 (2000) (recalling discussions with Anita Hill about how “everybody has some lynching story in their family”); Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.*, N.Y. TIMES (Apr. 25, 2018), <https://nyti.ms/2vS6A55> [<https://perma.cc/B4YX-LWR6>].

<sup>12</sup> In this iconic image, fifteen-year-old Elizabeth Eckford walks alone while a white mob behind her hurls insults at her. See Aimee Lamoureux, *The True Story Behind the Most Iconic Image of the Civil Rights Movement*, ALL THAT’S INTERESTING (Apr. 11, 2018), <https://allthatsinteresting.com/elizabeth-eckford-hazel-bryan> [<https://perma.cc/X98T-98HY>]. Eckford was denied entrance to Little Rock Central High School that day but eventually integrated the school, along with eight other Black students, with the assistance of the United States Army. *Id.*

<sup>13</sup> See Paul P. Murphy, *White Nationalists Use Tiki Torches to Light up Charlottesville March*, CNN (Aug. 14, 2017, 11:37 AM), <https://www.cnn.com/2017/08/12/us/white-nationalists-tiki-torch-march-trnd/index.html> [<https://perma.cc/SH7X-KZB4>]; Ainara Tiefenthäler & Natalie Reneau, *Swastikas, Shields and Flags: Branding Hate in Charlottesville*, N.Y. TIMES (Aug. 15, 2017), <https://nyti.ms/2vAmOou> [<https://perma.cc/FSF7-LN27>].

<sup>14</sup> See Charles R. Lawrence III, *The Fire this Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 398–400 (2015) [hereinafter Lawrence, *The Fire this Time*] (describing the “Massacre in Charleston,” *id.* at 398); see also *id.* at 400 (“[Dylann] Roof’s act echoes the law’s clear and unambiguous rendering of black life in *Dred Scott v. Sandford* that blacks ‘had no rights which the white man was bound to respect.’” (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857))).

<sup>15</sup> See Helen Regan & Sandi Sidhu, *40 Killed in Mass Shooting at Two Mosques in Christchurch, New Zealand*, CNN (Mar. 15, 2019, 1:33 PM), <https://www.cnn.com/2019/03/14/asia/christchurch-mosque-shooting-intl/index.html> [<https://perma.cc/8LA9-PNWT>].

<sup>16</sup> See Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://nyti.ms/2JIIq5U> [<https://perma.cc/PE2C-646U>].

<sup>17</sup> See Simon Romero, Manny Fernandez & Mariel Padilla, *Massacre at a Crowded Walmart in Texas Leaves 20 Dead*, N.Y. TIMES (Aug. 3, 2019), <https://nyti.ms/2Yks8Fb> [<https://perma.cc/6R3W-HEKG>].

<sup>18</sup> For more on the rise of hate crimes and racial violence, see ANTI-DEFAMATION LEAGUE, *MURDER AND EXTREMISM IN THE UNITED STATES IN 2018*, at 9 (2019), <https://www.adl.org/media/12480/download> [<https://perma.cc/FCQ8-L5FB>]; Lawrence, *The Fire this Time*, *supra* note 14, at 398 n.76; Ayal Feinberg, Regina Branton & Valerie Martinez-Ebers,

My anxiety comes from knowing that violence follows a scene like this one,<sup>19</sup> but I think my sadness is a grief for my country, in the recognition that we still live with our country's original sin of choosing slavery over freedom, property over humanity.<sup>20</sup> I am saddened that Trump can so easily invoke white supremacy's tale.

I also feel anger, and I wish I felt more. There is something cathartic and clarifying about anger, something empowering and enabling, whereas anxiety, fear, and sadness disable and disempower, cause flight from, not fight against, what oppresses us. Although I loathe this President, my anger is not directed primarily toward him and the crowd, whom he seduces and manipulates. I am most angry at the commentators, pundits, and professors, who ask, with serious and sagacious intonation: "Is the President racist?"<sup>21</sup> I am angry at a Supreme Court that would look at this scene and say there is no evidence of constitutionally cognizable racism, nothing that violates the values enunciated in the Fourteenth Amendment,<sup>22</sup>

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*Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019, 7:45 AM), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes> [<https://perma.cc/WX9Z-4GNE>]; and Press Release, FBI, FBI Releases 2017 Hate Crime Statistics (Nov. 13, 2018), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2017-hate-crime-statistics> [<https://perma.cc/444W-N99K>].

<sup>19</sup> See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2329–31, 2365 & n.229 (1989) (discussing how hate speech is a precursor to violence and genocide).

<sup>20</sup> See TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 47 (1992) ("Deep within the word 'American' is its association with race. . . . American means white, and Africanist people struggle to make the term applicable to themselves with ethnicity and hyphen after hyphen after hyphen."); Nell Painter, Opinion, *Trump Revives the Idea of a "White Man's Country," America's Original Sin*, THE GUARDIAN (July 20, 2019, 2:00 PM), <https://www.theguardian.com/commentisfree/2019/jul/20/as-donald-trump-revives-racism-struggle-against-it-gathers-momentum> [<https://perma.cc/4ZES-AEQF>]; Nell Irvin Painter, Opinion, *What Whiteness Means in the Trump Era*, N.Y. TIMES, Nov. 13, 2016, at SR4; see also DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 26–50 (1987).

<sup>21</sup> See, e.g., Meredith Dost, Ryan D. Enos & Jennifer L. Hochschild, *Is President Trump's Rhetoric Racist? It Depends on Whom You Ask*, WASH. POST (Aug. 12, 2019, 7:00 AM), <https://www.washingtonpost.com/politics/2019/08/12/is-president-trumps-rhetoric-racist-it-depends-whom-you-ask> [<https://perma.cc/F5EU-WY3N>] (concluding that "[w]hen judging what is and is not racist, Republicans and Democrats, Trump supporters and opponents, are talking past one another"); *Is Donald Trump Racist?*, AL JAZEERA: INSIDE STORY (July 17, 2019, 6:24 PM), <https://www.aljazeera.com/programmes/insidestory/2019/07/donald-trump-racist-190717174455525.html> [<https://perma.cc/AG6E-5HCM>].

<sup>22</sup> See Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 691 (2019) (noting that the majority in *Trump v. Hawaii* "appeared to repudiate *Korematsu*'s validation of mass racial incarceration while replicating its 'logic' of unconditional deference to the President" (citing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018))); see also *id.* at 713 ("Given the paucity of evidence supporting the 'superficial claim of national security,' Justice Sotomayor characterized the *Trump* majority's 'rational basis' review as blindly deferential, paralleling the *Korematsu* majority's closed-eyed approach." (quoting *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting))). See generally Ian Haney-López, *Intentional Blindness*, 87 NYU L. REV. 1779 (2012) (arguing that the Court's racial jurisprudence seems intentionally blind to the persistence of racial discrimination against nonwhites).

nothing that corrupts the process of democracy.<sup>23</sup>

Professor Jennifer Eberhardt opens her book, *Biased*, with a story. She is walking into an auditorium filled with Oakland police officers. As the chair of a federal oversight team charged with investigating extensive civil rights violations by members of the Oakland Police Department, she has come to share the team's findings with the department's officers. This is a much smaller audience than the one that gathered to hear President Trump, and she knows that they have not come to cheer her. She knows she is facing a hostile crowd, and she writes: "I wanted to help the officers to understand the insidious ways in which implicit bias could act on human decision making" (p. 1).

Eberhardt's purpose here is very different from the President's. Rather than seeking to arouse and exploit her audience's racism, she seeks to help them acknowledge their racism and to understand it. She wants to show them how the brain works — the way that it works outside of our consciousness — to cause racist thoughts and behavior "despite . . . noble intentions and deliberate efforts" (p. 1). But her usual academic consultant's repertoire is getting nowhere with this crowd.

Instead, she decides to tell a personal story. She and her five-year-old son are on an airplane, and her son sees a Black man and remarks, "Hey, that guy looks like Daddy" (p. 3). But the guy doesn't look like Daddy at all, no resemblance in height, skin color, or facial features. The man wore dreadlocks, and Eberhardt's son's father, her husband, was bald. Then, her son blurts out, "I hope that man doesn't rob the plane" (p. 3). "Why would you say that?" she asks him (p. 4). "You know Daddy wouldn't rob a plane" (p. 4). And finally her son replies, "I don't know why I said that. I don't know why I was *thinking* that" (p. 4).

Eberhardt continues, sharing her thoughts as she completes her story:

I took a deep breath, and when I looked back out at the crowd in the auditorium, I saw that the expressions had changed. We were parents, unable to protect our children from a world that is often bewildering and frightening, a world that influences them so profoundly, so insidiously, and so unconsciously that they — and we — don't know why we think the way we do. (p. 4)

This scene feels familiar to me as well, although this time the familiarity I experience does not come from the historical echoes of threat, violence, and disparagement of my personhood that the Trump rally evoked. The familiarity I feel here comes directly from the etymological root of the word "familiar." Jennifer Eberhardt feels like family to me. I feel as if I am standing in her shoes as she looks out at this audience. I have lived the story she tells here. I have been the Black professor from the prestigious academic institution invited to speak about my field

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<sup>23</sup> Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 168 (1980).

of professional and scholarly expertise and also to speak about race and racism. Because I am Black in a world that is not colorblind, I know that I also inevitably speak about myself. Jennifer Eberhardt knows this too. She knows that this is especially so when we are invited to talk about race and racism. I know from the family stories she tells in this book that she was raised by people, like my own parents and grandparents, who reminded her always, with explicit lessons and by the example of their own lives, that she “represented the race.” She needed to be nicer, be smarter, work harder, be more well-spoken than her white classmates and colleagues, because that’s what it took to succeed while Black, while America’s founding, and still vital, narrative of white supremacy told a story that imagined her as the opposite of all of those virtues. This was not just a story about her. Rather, it was a story about us. Each time she stands before an audience, she represents all of us, and she must tell a story that speaks back to and challenges white supremacy’s defamatory story of our inferiority.<sup>24</sup>

Eberhardt does not include these thoughts, or the feelings that accompany them, when she tells the story of her presentation to the Oakland police. Surely there is some resistance to the messenger, as in: “Who is this Black woman who thinks she can come and tell us we are racists?” Eberhardt will soon tell us that her research shows these officers have been conditioned by racial images to perceive the Black man on the street as a dangerous threat. She must also know that a different but related set of images has conditioned them to think of a Black woman as anything but a highly trained and authoritative scientist, much less one who is objective and unbiased on the subject of race.<sup>25</sup> Maybe she was not thinking consciously of how racialized and gendered implicit biases were evident in this scene, of how it might have influenced the way she told her story or whether her audience heard her. As I read the story, I thought: Is there something to be learned from asking why those of us whom white supremacy’s narrative deprives of personal authority as full human beings choose to tell stories that, like those from science and the law, have an authority of their own?<sup>26</sup>

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<sup>24</sup> See Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC’Y REV. 247, 252 (2012) [hereinafter Lawrence, *Listening for Stories*] (describing how when professional people of color speak, they engage in a political project of “racial reconstruction”); see also Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 10–12 (2015) [hereinafter Lawrence, *Passing and Trespassing*] (describing “racial performance” as political speech).

<sup>25</sup> She is also aware of the Black and Latino officers who have seen the department’s racism from the inside and are quietly rooting for her to prove herself both competent and persuasive, hoping their “sister” will represent them in challenging the narrative that makes their white fellow officers perceive them as no different from that frightening Black man on the street.

<sup>26</sup> Of course, the authority that these narratives possess is not inherent. They have been given authority by those with power, and, as Professor Robert Cover reminds us, that authority is always

I begin with these two scenes, of Trump and Eberhardt and their audiences, because each is a story, a narrative. Each scene provides a text that we may interpret, as evidence of who we are, of “our world,” our *nomos*.<sup>27</sup> We can also read each scene as an adversarial, creative text. The story is told to create meaning and community, to shape our *nomos*, to make a moral argument for whom we should be or an aspirational argument for whom we might be. Professor Robert Cover instructs us that we cannot understand law apart from the stories we tell one another about who we are and who we should or might be.<sup>28</sup> Ultimately our stories make the law.

When the *Harvard Law Review* asked me to write a review of a book whose title and subject is uncovering hidden prejudice, I was puzzled. Why choose a book about hidden bias when the active threat is self-proclaimed racists marching in the streets? It seemed a strange time to worry about hidden racism when the President of the country was holding rallies and building walls to proclaim himself the protector of a white nation.<sup>29</sup> As I contemplated what I might write, if I accepted this invitation, I realized that I could regard the puzzlement I was experiencing — “You must be kidding. You want me to talk about hidden bias when they’re burning a cross on my lawn?” — as my theme. I admit this was my first impulse. Alternatively, I could treat my question as a real question, posed without irony, as a serious challenge.

This Review chooses the latter of those two roads, although the reader will discover I am not completely cured of my initial, “are you kidding?” impulse. These two texts — Eberhardt’s book on the lived experience and science of implicit bias, and the ascendancy of overt racism — appear contemporaneously. I have argued often before that the interpretation of cultural texts is essential to making law and justice.<sup>30</sup>

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“essentially contested.” See Cover, *supra* note 1, at 17 (citing W. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* 157–91 (1964)).

<sup>27</sup> Cover argues that “[t]his *nomos* is as much ‘our world’ as is the physical universe.” *Id.* at 5.

<sup>28</sup> See *id.* at 4; see also *id.* at 11 n.30 (“The state becomes central [to the process of giving meaning to normative activity] only because . . . an act of commitment is a central aspect of legal meaning. And violence is one extremely powerful measure and test of commitment.”).

<sup>29</sup> See Toni Morrison, *Making America White Again*, *NEW YORKER* (Nov. 14, 2016), <https://www.newyorker.com/magazine/2016/11/21/making-america-white-again> [<https://perma.cc/2XDX-E5JW>] (“So scary are the consequences of a collapse of white privilege that many Americans have flocked to a political platform that supports and translates violence against the defenseless as strength. . . . On Election Day, how eagerly so many white voters — both the poorly educated and the well educated — embraced the shame and fear sowed by Donald Trump.”); see also Michael Crowley & David E. Sanger, *Trump Celebrates Nationalism in U.N. Speech and Plays Down Iran Crisis*, *N.Y. TIMES* (Sept. 24, 2019), <https://nyti.ms/2kTwuR6> [<https://perma.cc/2HTA-E3CX>] (noting Trump’s use of the language of “replacement” and its white nationalist origins); Nell Irvin Painter, *supra* note 20.

<sup>30</sup> See Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 *CONN. L. REV.* 931, 938–39, 964–66 (2008) [hereinafter Lawrence, *Revisited*]; Charles R. Lawrence III, *Forbidden Conversations: On Race,*



This Review takes seriously the questions of why these texts appear at the same time, how they relate to one another, and what work they do to both manifest and shape our *nomos*. Of course, as Cover reminds us, there is a third storyteller here, a third text — the law. And, I will add a fourth text that I will call the abolitionist or movement story.<sup>31</sup> I give this name to what Professor Mari Matsuda has called stories from the bottom.<sup>32</sup> Movement stories speak directly to our collective values. They ask us to confront our country's racism. They ask a descriptive and interpretive question: "Who are we?"<sup>33</sup> And they ask moral questions: "Who should we be? How should we constitute ourselves?"<sup>34</sup>

Eberhardt has written an insightful, thoughtful, and eminently readable book about racism and implicit bias. Eberhardt is a scientist, scholar, sought-after consultant, and, as she shows in this book, a master science teacher. With clear explanation, real-world examples, and complex context, the book introduces the vital and pioneering research she and her colleagues have done to explore the architecture and workings of the brain and the psychological mechanisms that cause racial bias, distort our perceptions, shape our behavior, and influence the decisions we make each day. But Eberhardt clearly intends that this book do more than serve as a primer for the uninitiated. She is drawn to this research by her desire to change the culture of racism she has experienced in her own life as a Black woman. She writes to engage in the project of racial justice, and she invites us to join her in that enterprise. To that end she surrounds her science lessons with stories from her life, stories in which she hopes we will see ourselves and recognize a shared humanity with her and enlist in her justice project.

Early in the book, she tells us how she believes her work as a scientist is essential to her justice project:

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*Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1370 n.28 (2005) [hereinafter Lawrence, *Forbidden Conversations*]; Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. HAW. L. REV. 457, 458–59 (2015) [hereinafter Lawrence, *Local Kine Implicit Bias*]; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–81 (1987) [hereinafter Lawrence, *Id, Ego & Equal Protection*].

<sup>31</sup> See, e.g., Charles R. Lawrence III, Foreword, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 823–25 (1995) [hereinafter Lawrence, *Jurisprudence of Transformation*]; Lawrence, *The Fire this Time*, *supra* note 14, at 387 ("Any law that claims racial justice or human justice as its purpose must transform the status quo. . . . A racial justice law must redistribute privilege.")

<sup>32</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

<sup>33</sup> Cover writes: "The normative universe is held together by the force of interpretive commitments — some small and private, others immense and public. These commitments — of officials and of others — do determine what law means and what law shall be." Cover, *supra* note 1, at 7.

<sup>34</sup> See *id.* at 9 ("A *nomos* is a present world constituted by a system of tension between reality and vision. Our visions hold our reality up to us as unredeemed."); see also Lawrence, *Forbidden Conversations*, *supra* note 30, at 1398.

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Confronting implicit bias requires us to look in the mirror. To understand the influence of implicit racial bias requires us to stare into our own eyes . . . to face how readily stereotypes and unconscious associations can shape our reality. By acknowledging the distorting lens of fear and bias, we move one step closer to clearly seeing each other. And we move one step closer to clearly seeing the social harms — the devastation — that bias can leave in its wake. (p. 7)

This Review takes up Eberhardt’s call for us to “look in the mirror.” Rather than ask the narrow question of whether the book helps us better understand how our brains work to hide our biases from view, I treat the book, and the larger narrative of science of which it is a part, as social text. I ask what stories are told in this book, and I ask how those stories, when read or heard in conversation with other stories, shape our collective beliefs about what is right and wrong, and ultimately our laws.

Part I of this Review introduces *Biased*. I ask why Eberhardt tells her story, what theory of social change informs that story, and why she believes this story will make a difference. The answers to those questions comprise what I call the “Science Story.” Part I also introduces the legal literature and the work done by legal scholars, lawyers, and a small group of judges to apply insights from the science of implicit bias to the law. I argue that the legal reform project that these lawyers have taken on adopts the same theory, vision, and approach to social change as does Eberhardt’s book, so I include this work in my discussion of the science story.

Part II describes the “Law’s Story.” I consider a series of cases from *Plessy v. Ferguson*<sup>35</sup> to *Washington v. Davis*<sup>36</sup> to demonstrate that Supreme Court jurisprudence tells a story that denies our collective embrace of racism and white supremacy. This story of denial plays a central role in our failure to achieve the purpose of the Fourteenth Amendment and to heal the sickness of a country and Constitution established and built on plunder and enslavement and on the ideology that justified both. This Part reprises an argument I have made before: that the Court should look to the cultural meaning of legal and social texts to recognize and redress the continuing presence of racism in our democracy.<sup>37</sup> The Court’s opinions do not turn on the failure of legal advocates to support their legal claims with scientific evidence. Rather, the Court makes a conscious choice to deny the clear presence of racism. A central premise in this story of denial is the law’s claim that racism

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<sup>35</sup> 163 U.S. 537 (1896).

<sup>36</sup> 426 U.S. 229 (1976).

<sup>37</sup> I have touched on the significance of cultural meaning as a guide in reading texts before. Lawrence, *Revisited*, *supra* note 30, at 943–44; Lawrence, *Local Kine Implicit Bias*, *supra* note 30, at 465 n.23, 492 n.107; Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 369–76. This Review continues an ongoing conversation among lawyers, jurists, legal scholars, psychologists, and social scientists.

causes no injury where there is no proof of individual fault and causation. This makes inevitable the story's concluding chapter, in which we learn that we have no collective responsibility for the injury racism does and that societal discrimination is something our Constitution will not see.

Part III introduces the "Abolitionist Story." I use stories from literature, popular culture, and social movements. I argue that these stories, in contrast to the stories told by the law and science, confront us with the truth of our racism. They speak to all of us rather than identifying blame-worthy perpetrators so that the rest of us may avoid culpability for the continued existence of racism's ideology, institutions, and structures. Movement stories demand that we take responsibility for our *nomos*. They speak directly to our constitutive and constitutional values, challenging us to commit to the values of antiracism and human liberty and to the affirmative disestablishment of our pre-Reconstruction constitutional premises of slavery and white supremacy. I argue that abolitionist stories are essential to the justice project, to healing the injury racism has inflicted upon my Black and brown sisters and brothers, upon my white sisters and brothers who share our history, and upon our democracy. These are the only stories that will save us.

#### I. THE BOOK: RACISM AS A SCIENCE STORY

In her introduction, Eberhardt tells us: "This book is an examination of implicit bias" (p. 6). She writes this sentence as a scientist, alerting the reader, as she would her students on the first day of class, that we are here to learn about a method of inquiry as well as some of the important findings of that inquiry. But Eberhardt closes her introduction with a different description of the book: "This book is a representation of the journey I have taken — the unexpected findings I have uncovered, the stories I have heard, the struggles I have encountered, and the triumphs I have been buttressed by. I invite you to join me" (p. 8). This portrayal does not sound at all like what one might hear in the first lecture of an entry-level science course. Her allusion to unexpected findings might suggest that we are about to embark on a scientific journey of discovery, and certainly that is part of her meaning. Still, our teacher is a Black woman, and the subject of her scientific research is racial bias. The stories she speaks of are the personal struggles and triumphs of a Black woman encountering racism in America. She sees her science lesson as part of the struggle against racial bias and racism. Her project is more than a quest for scientific discovery and knowledge. She intends a racial justice project, and she hopes that her stories will persuade the reader to join her in that project.

A. *Human Stories and What the “Research Shows”*

Because this Review sees the book through the analytic lens of narrative in conversation with other narratives, I believe the way the story is told and what that way of telling signifies are as important as the content of the individual stories.<sup>38</sup>

In the book’s opening story about her presentation to Oakland police officers, Eberhardt plans to teach a science lesson; then, when that does not go so well, she switches to a personal story. Eberhardt tells this story, as she does many times in the book, to let the reader know that at each step in her journey she is learning not just from the data she collects in her research but also from her experience as a teacher, trying to enlist others to join her in the journey. Each chapter of the book and each subsection begins with stories drawn from her own life. We hear the rich and textured details of setting, gesture, context, and feeling, the gifts of well-told narrative. But as each story comes to a close, almost before we’ve had a chance to experience how it makes us feel or to consider its meaning for ourselves, Eberhardt switches gears and launches into a description of a study or body of research that explains what is going on in the brains of the individuals who inhabit the story.

For example, at the beginning of Chapter Three, “A Bad Dude,” Eberhardt tells a story about sharing dinner with Tiffany Crutcher, the twin sister of a young Black man, Terence Crutcher, killed by a white woman police officer in Tulsa, Oklahoma.<sup>39</sup> Eberhardt first learns of this killing as she is about to lead a two-day train-the-trainer course on implicit bias; a video had just been released of the shooting in Tulsa and everyone at the training was talking about it (p. 48). Eberhardt dreads watching another police shooting video. She tells us that, in recent years, “[t]he steady stream of tragic scenes” — like the killings of Philando Castile and Tamir Rice — has led her “to question the value of what [she] was doing” (p. 49). When she gives talks to community groups, mothers stand up in tears and ask her: “What can we do to keep our sons safe?” (p. 51).<sup>40</sup> She tries to answer with facts and statistics, but explains that, ultimately, she must “answer as a mother, with three sons and fears of [her] own” (p. 51).

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<sup>38</sup> Cf. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 191–98 (1994); Lawrence, *Listening for Stories*, *supra* note 24, at 251 (describing the importance of narratives in Critical Race Theory).

<sup>39</sup> It is striking, given this Review’s theme of historical denial, that Eberhardt never mentions the infamous Tulsa Race Riots, also known as the “Black Wall Street Massacre” of 1921, when mobs of white residents attacked Black residents and businesses of the Greenwood District in Tulsa, Oklahoma. See Nicholas Bogel-Burroughs, *Tulsa Sites May Hold Mass Graves from “Black Wall Street” Massacre*, N.Y. TIMES (Feb. 5, 2020), <https://nyti.ms/35y2nAM> [<https://perma.cc/4MRM-MLJE>]; Walter F. White, *The Eruption of Tulsa*, THE NATION (Aug. 23, 2001), <https://www.thenation.com/article/archive/tulsa-1921> [<https://perma.cc/Z9QH-UB4X>].

<sup>40</sup> Emphasis has been omitted.

When Eberhardt finally summons the nerve to watch the video, she writes her recollection of what she sees: Crutcher's hands are "stretched high in the air," then he is "placing his hands on the roof of his car" before "suddenly his body slumps toward the ground" (p. 52). As "[a] clutch of officers surrounds and comforts" the shooter, Officer Betty Shelby, "[t]he figure of Crutcher recedes, becoming part of the background" (p. 52). Crutcher lies "untended on the pavement, bleeding to death" (p. 52).

At Officer Shelby's trial for felony manslaughter, she testified that she fired her gun because she feared for her life; she was found not guilty. Eberhardt wanted to understand "why jury verdicts so often belie what we think we've seen" (p. 54). But she was also interested in the impact of these killings on the families and communities of the people killed. So, she arranged to have dinner with Tiffany Crutcher.

Tiffany tells Eberhardt that she and Terence were twins, born just three minutes apart. "They were inseparable as kids" (p. 54). In the summer of 2016, he'd "found a new sense of purpose" and enrolled in community college (p. 55). His first class, music appreciation, was to meet the day he was killed (p. 55). Tiffany tells Eberhardt that her father was hysterical when he called to tell her the news.

"They killed my son. They killed my son. He's gone!"

"Who killed him?" she asked.

"The police" (p. 55).

Through Eberhardt's story of this dinner, we hear Tiffany's voice and the voices of her brother and family. And as I read this story, I hear my family's voices, and I think Eberhardt hears her own voice as well, the mother of a Black son, asking, *what can we do to keep our sons and brothers and daughters and sisters safe?*<sup>41</sup> Tiffany Crutcher's story speaks back to and challenges a racist legal story that says Officer Shelby was reasonable in her fear of Terence, Tiffany's softhearted brother. It also challenges that part of the law's story that suggests that

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<sup>41</sup> As I write these words, there is breaking news of Atatiana Jefferson, a twenty-eight-year-old Black woman, shot to death through the bedroom window of her own house in Fort Worth, Texas. Marina Trahan Martinez, Nicholas Bogel-Burroughs & Sarah Mervosh, *Fort Worth Officer Charged with Murder for Shooting Woman in Her Home*, N.Y. TIMES (Oct. 15, 2019), <https://nyti.ms/2MK9TQT> [<https://perma.cc/7DC3-X3UT>]. I am listening to her father say: "[S]he was a giving person and she was a loving person. And she loves. Tay [Atatiana] was love. And that smile, Lord have mercy, can brighten up any room. . . . Her life was cut short. As a little girl, I always told her she could be anything she wants to be. Not just her — you, me, your children . . . Tay wanted me to be strong. I have to be strong. My mission is not over." CBSDFW, *Atatiana Jefferson's Father Holds News Conference After Ordering Stop to Daughter's Funeral, Burial* at 9:41, YOUTUBE (Oct. 18, 2019), <https://www.youtube.com/watch?v=PT6HgLyL6PI> [<https://perma.cc/NVY2-NQYM>]. In this same issue of the *Times* reporting this killing, there is another article reporting a separate police shooting of a Black person. Rick Rojas & Richard Fausset, *Former Georgia Officer Who Killed a Black Man Is Convicted, but Not of Murder*, N.Y. TIMES (Oct. 14, 2019), <https://nyti.ms/35zuhNb> [<https://perma.cc/8RYN-UQLX>].

convicting Officer Shelby would solve our problem. But now I am getting ahead of myself. I have related Eberhardt's story of dinner with Tiffany Crutcher to call attention to the story's intimacy and complexity, to its interpretive quality, to the way it asks and begins to answer the question of whether (clearly yes) and how our racism (our country, our society, our collectively constituted self) lives and acts in this scene — in the video, in the trial, in Terence's and Tiffany's and their family's lives. I tell this story here to contrast it with how Eberhardt reads, and would have us read, her story after this wonderful telling of it.

The section that follows immediately is titled "The Scientific Lens." And this is its first sentence: "Watching the video and listening to Tiffany's story, I felt the findings of years of research on implicit bias assume new clarity and gain new meaning" (p. 57). When we view the story of this encounter between a police officer and a Black citizen through Eberhardt's scientific lens, the questions that become important focus on what's happening in each individual's brain as the event unfolds. Eberhardt tells us there was "a study appropriate to each critical act" and that by using these studies we can measure "with precision and control" how race is relevant to each aspect of such situations, thereby gaining insight into the "larger forces at work" (pp. 57–58). This worldview sees the problem of racism as a problem of brains that are wired to create implicit bias. I'm not certain what "larger forces at work" means in this context, unless it means that the scientific studies show that a lot of us need our brains rewired. My own view is that the larger forces at work are the forces of structural and institutional racism and the narrative of white supremacy that justifies those structures and institutions. Only when we examine and understand those structures and narratives, only when we commit ourselves to the demolition and reconstruction of those structures and narratives, can we treat and heal the injuries of racism.

Eberhardt divides the book into three parts. A brief discussion of each part follows. Part I, "What Meets the Eye," introduces the science of implicit bias. I subtitle this part "The Brain as Categorizer." Part II, "Where We Find Ourselves," applies the science of implicit bias to the problem of racial bias and racism. I subtitle this part, "Imagining Blacks as Scary." Part III, "The Way Out," describes several prescriptive interventions. I call this part "Science as Solution."<sup>42</sup>

### B. "What Meets the Eye" (*The Brain as Categorizer*)

Part I of the book, titled "What Meets the Eye," teaches an introductory lesson about the brain as a processing tool. There are two im-

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<sup>42</sup> My subtitles imply critique and I mean them to be read as such. This critique is made more explicit in the final two sections of this Part of the Review. See *infra* sections I.E & I.F, pp. 2323–28.

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portant parts to this lesson: The first is that racial stereotypes and implicit bias are the result of a normal and universal phenomenon of recognition (pp. 17–19). Stereotype, racial recognition, and preference are functions of biology, of the brain’s need to function efficiently for children to survive (pp. 38–39). Our biases, the process of sorting into categories of us and them, result from the natural process of categorization and should be understood as no different from the way our brains process all information (p. 17).

The second lesson in this Part is that our brains are malleable (pp. 15–17). Recent advances in neuroscience “have allowed us to peek inside the brain and track its adaptation over time” (p. 16). This principle of neuroplasticity means that “the brain can be altered by experience” (p. 16). These twin lessons about the brain are necessary to our elementary understanding of the science of cognition, but, more importantly for purposes of this Review, they inform our understanding of how Eberhardt approaches her justice project.

If the brain functions as a normal biological processing mechanism and stereotype and bias are simply errors made by this otherwise efficient mechanical sorting device, then we should not be blamed for these errors and called racists. Moreover, we should not be surprised to discover that we all harbor stereotype and prejudice, that all of our brains make these errors. If the brain is malleable and adaptable, if it can learn to correct these sorting errors through experience, then we can unteach bias.<sup>43</sup> We can train people to recognize when their brains are making these errors and cure their racism.<sup>44</sup>

### C. “Where We Find Ourselves” (*Imagining Blacks as Scary*)

Part II of the book, titled “Where We Find Ourselves,” introduces the subject of racism in the criminal justice system. Michelle Alexander has given the name “The New Jim Crow” to state-sponsored violence that replaces the social subordination and economic subjugation of slav-

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<sup>43</sup> For discussion of debiasing training, see *infra* note 81.

<sup>44</sup> Eberhardt sees the work of the journalist Walter Lippmann on stereotype as foundational to the science of implicit bias. She notes that Lippmann worried “that Americans might make rash and illogical civic and political choices if stereotypes blinded them to information that didn’t conform to what they already believed” (p. 33). This idea of racism as illogical or irrational corresponds to cognitive scientists’ description of bias as caused by the brain’s processing error. But there is a clear logic to racism when seen as an ideology that justifies the oppression and exploitation of other human beings. The brain’s “processing error” is only illogical if we are convinced that the individual or society is fully committed to values that oppose racism or does not have a reason for holding on to her biased beliefs.

ery and formal segregation with the oppressive policing and mass incarceration of Black communities.<sup>45</sup> Racists' narratives portraying Blacks as savage, violent, criminal, and sexually predatory have played a central role in justifying the violence of slavery and its successors,<sup>46</sup> and we should not be surprised that the criminal justice system, where race, law, and our racial imaginings so often intersect, should provide fertile ground for research and reform efforts of cognitive scientists and collaborating colleagues in the law.<sup>47</sup>

Eberhardt introduces several by-now-familiar studies that have asked whether the associations between Black people and crime in the minds of Americans explain racial disparities in policing, prosecution, and incarceration that have been demonstrated in the data on everything from traffic stops, to stop-and-frisk arrests, to police shootings, to death penalty prosecutions and convictions. For example, officers subliminally primed to think of crime when simultaneously shown a Black face and a white face looked more at Black faces than white ones (pp. 59–60). Whites rate Black men as more capable of doing harm than white men of the same physical stature and size (p. 61). People seem to perceive Black body movements as more threatening than identical body movements made by whites (pp. 62–63). In the well-known “Shoot–Don’t Shoot” study, where figures appear on a screen holding a gun or a harmless object and participants are told to shoot if the figure has a gun, participants are faster to respond “shoot” if a Black person is holding a gun and also more likely to mistakenly “shoot” a Black person with no gun (pp. 66–68). Eberhardt explains these racially biased results

<sup>45</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2010) (criticizing U.S. mass incarceration as contemporary racial control). See generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (discussing the role of Black Americans in the punitive U.S. criminal justice system); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2015) (discussing the death penalty's origins in lynching); *13TH* (Netflix 2016) (examining the Thirteenth Amendment and the reinstitution of enslavement through mass incarceration); ANGELA DAVIS, *THE PRISON INDUSTRIAL COMPLEX* (AK Press Audio 1999) (criticizing the U.S. prison industrial complex and mass incarceration).

<sup>46</sup> See generally DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS* (3d ed. 1994); ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000) (examining media narratives); STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. & expanded ed. 1996) (criticizing biological narratives that seek to justify racial inequality).

<sup>47</sup> See generally, e.g., Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT BIAS ACROSS THE LAW* 9 (Justin D. Levinson & Robert J. Smith eds., 2012); Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT BIAS ACROSS THE LAW*, *supra*, at 45; Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in *IMPLICIT BIAS ACROSS THE LAW*, *supra*, at 229. But see JONATHAN KAHN, *RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE* 226–27 (2018) (cautioning against overreliance on studies of implicit bias).



as caused by the brain's reflexive reliance on its natural process of sorting and categorizing the data it receives from the world (p. 61). Since this biased processing error occurs in each individual, Eberhardt and other cognitivist reformers' response is to train the individual brain to recognize and correct these errors (pp. 184, 192–93).<sup>48</sup>

Eberhardt expresses her own misgivings about the efficacy of implicit bias training (pp. 50, 280–82), and she acknowledges that we need to consider “not only . . . how our minds are designed to work, but our history and our culture” and the “larger societal context” (pp. 74–75).<sup>49</sup> Ultimately, however, her own work as a trainer and consultant, and the book itself, proceeds from the premise that racism or racial bias resides within the individual brain and cognitive science can play an important role in the justice project. It can do this not only by helping us understand how the brain perceives race and by teaching us (or, in the case of litigation, proving to the courts) that specific discriminatory behavior like police shootings or traffic stops is caused by these racially biased beliefs, but also by providing scientifically grounded bases for mitigating implicit bias with “debiasing” interventions that alter the salience of racial categorization and thereby reduce, contain, or manage racial bias.<sup>50</sup>

#### D. “The Way Out” (*Science as Solution*)

Eberhardt closes Part II with words that convey her deep belief in the power of science to contribute to the cause of racial justice. Reflecting on what originally attracted her to this work, she says:

I could pick up the tools of neuroscience to demonstrate how humans are not static beings affixed to a predetermined hierarchy. Our brains, our minds, are molded and remolded by our experiences and our environments. We have the power to change our ways of thinking, to scrub away the residue of ancient demons. (p. 152)

These words also presage Part III of the book, titled “The Way Out.” As its title suggests, this part moves the book's narrative from diagnosis to prescription. Eberhardt tells us how she and her colleagues worked with Silicon Valley entrepreneurs to help them find ways to eliminate or discourage racial discrimination by the people using their websites (pp. 180–94).

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<sup>48</sup> See Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 312 (2015) (discussing the limitations but ultimate value of implicit bias training).

<sup>49</sup> Eberhardt tells us that “[i]n 2016, nearly a thousand people were killed in the United States by police officers” (p. 49). She cites a federal investigation of the Ferguson Police Department, done in the wake of the fatal police shooting of Michael Brown, which found that while Blacks made up 67% of Ferguson's population, they accounted for 85% of vehicle stops and 90% of citations from 2012 to 2014. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015). See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing how government policies sustained racial segregation).

<sup>50</sup> Cf. KAHN, *supra* note 47, at 38–39 (discussing the scholarship on “debiasing”).

Nextdoor, a platform of online bulletin boards that bills itself as a place “where neighbors work together to build stronger, safer, happier communities” (p. 182), found that its “crime and safety” category was eliciting many posts “with racist overtones, messages that labeled blacks and Latinos ‘suspicious’ for walking down a street, sitting in a car, talking on a cell phone, knocking on a door” (p. 183). After consulting with Eberhardt, Nextdoor developed a checklist of reminders that people had to click through before they could post a “suspicious person” warning to their neighbors, including: “Focus on behavior,” “[g]ive a full description,” and “[d]on’t assume criminality based on someone’s race or ethnicity. Racial profiling is expressly prohibited” (p. 185). Eberhardt notes that “[r]esearch supports the notion that raising the issue of race and discrimination explicitly can lead people to be more open-minded and act more fairly, particularly when they have time to reflect on their choices” (p. 185). After implementing the checklist, Nextdoor found that the incidence of racial profiling declined by more than seventy-five percent (p. 186). Eberhardt tells a similar story about interventions at the online booking service Airbnb (pp. 188–94).

Both examples show how the thoughtful use of the science of implicit bias can lessen problems of racial discrimination. But they are both also examples that leave in place, and do little to address, the structural racism that informs and is justified by the ideology of white supremacy we call racial bias. When the neighbor on Nextdoor sees a young Black man in a hoodie walking on her block and posts a “suspicious person” warning, her suspicion is triggered not just by stereotype but also by the fact that she likely lives in an all-white neighborhood where she does not often see young Black men. Recounting a conversation with a Nextdoor executive, Eberhardt writes:

When you have direct connections with people who are different from you, then you develop an ability to recognize [that they might be more similar to you than you assume].” So that scary black teenager in the hoodie in the dark turns out to be Jake from down the block, walking home from swim team practice. (p. 187)

Of course, this can happen only if Jake lives down the block from you, and the Nextdoor checklist won’t make that happen.

Paradoxically, this section of the book, which describes interventions that do not address the underlying structural foundations of racial bias, begins with a chapter that, more than any other in the book, directly addresses the historical and societal antecedents of implicit bias. In Chapter Seven, “The Comfort of Home,” the book briefly recounts how we have come to live in segregated spaces that Nextdoor’s debiasing checklist accepts as a given (pp. 157–62). This is one of the few times the book makes explicit reference to the law’s role in segregation and structural racism — racially restrictive zoning ordinances and covenants, the federal government’s deliberate subsidization of all-white suburbs, and the GI Bill’s discrimination against Black veterans (p.

157).<sup>51</sup> Eberhardt tells stories of her own grandfather's narrow escape from a threatened lynching and then, when members of the family migrated to Chicago, of their personal experience with the phenomenon of white flight from the neighborhood to which they had just moved (pp. 173–75, 178–79). She visits the National Memorial for Peace and Justice in Montgomery, Alabama, where civil rights lawyer Bryan Stevenson's Equal Justice Initiative created a memorial to the 340 Black people lynched in Alabama between 1877 and 1943; Eberhardt calls it “a powerful symbol of how we — as individuals and as a nation — can reckon with the legacy of racism” (p. 176).

At the close of the chapter describing her interventions at Nextdoor and Airbnb, Eberhardt compares these efforts to *The Negro Motorist Green Book*, the travel guide that mapped out safe places for Black travelers to stay and shop when most businesses barred their entry and their very lives were at risk if they were found in certain towns after sundown<sup>52</sup>:

In some respects, the *Green Book* served as a mid-twentieth-century version of Airbnb for blacks who were shut out of conventional commercial lodging. It was a cultural response to a structural problem. Yet the problem of the twenty-first century involves managing integration, not segregation. Now that the laws have changed and spaces are being transformed, how do we all find, accommodate, and see one another? (p. 194)

In this paragraph, we hear the power of the law's story. Yes, the laws have changed, and the law tells us that its formal declaration of the end of segregation means our spaces have been transformed and that now, in the twenty-first century, we are “managing integration, not segregation.” The law would have us believe that the structural and transformational work of abolishing racism has been done and that now all that is left to do is to manage the lingering residue of implicit bias.<sup>53</sup>

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<sup>51</sup> Eberhardt cites historian Richard Rothstein's book, *The Color of Law*, for its account of how “private and government forces conspired to block integration and protect the reigning social order” (p. 179) (citing ROTHSTEIN, *supra* note 49).

<sup>52</sup> In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Supreme Court cited the existence of such a guidebook among congressional findings supporting Congress's Commerce Clause power to pass the public accommodations provisions of the 1964 Civil Rights Act. *See id.* at 252–53.

<sup>53</sup> As recently as August 2017, the NAACP issued a travel advisory for the state of Missouri, warning “African American travelers, visitors and Missourians to pay special attention and exercise extreme caution when traveling throughout the state given the series of questionable, race-based incidents occurring statewide.” *Travel Advisory for the State of Missouri*, NAACP (Aug. 2, 2017), <https://www.naacp.org/latest/travel-advisory-state-missouri/> [<https://perma.cc/86Y6-CE7P>]; *see also* Lawrence, *Jurisprudence of Transformation*, *supra* note 31, at 824 (describing the difference between a substantive or transformative view of equal protection and the individualist nonsubstantive view espoused by process theorists). *See generally* Lawrence, *Forbidden Conversations*, *supra* note 30.

*E. When Lawyers Tell the Science Story*

I should hesitate to judge a scientist for doing an exemplary job at what she was trained to do. However, the task I have set for this Review is to consider how the narrative advanced by cognitivists' findings and interventions is read together with other narratives, particularly the law's narrative, and to ask whether and in what ways those narratives, when heard in conversation, advance or hinder the racial justice project.

Beginning in the 1990s, legal scholars and lawyers concerned with persistent social inequality looked to the insights and findings of cognitive scientists to make new arguments calling for the legal recognition of subtle but pervasive forms of discrimination.<sup>54</sup> These arguments apply to a wide range of substantive legal subjects but especially to the fields of employment discrimination law, criminal law, police practices, and equal educational opportunity.<sup>55</sup> Professors Linda Krieger and Jerry Kang, in several influential articles, argued that the law's concepts of motive, intent, and causation were based on outmoded and unscientific theories of human behavior.<sup>56</sup> Cognitive science had shown that much discriminatory behavior is based on stereotypes that operate at a cognitive level outside of our conscious awareness. These stereotypes cause discrimination by biasing how we process information about other people. This discrimination is automatic. It is not caused by bad people with bad motives. Rather it is caused by a brain-processing error and operates independently of motive and intent. Not surprisingly, given the origin of this legal argument in cognitive science, these scholars describe the source or cause of racial bias or racism exactly as Eberhardt describes it.

Professor Jonathan Kahn, in his book *Race on the Brain*, refers to the legal theories that have engaged the science of cognitive psychology

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<sup>54</sup> I bear some responsibility for this turn in legal scholarship, as I first called for the need for the law to take heed of unconscious racism in 1987. See Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 432 (2000) (listing *Id, Ego & Equal Protection*, *supra* note 30, as the most-cited law review article, adjusted for age, at that time); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 769 (1996) (listing *Id, Ego & Equal Protection*, *supra* note 30, as the sixty-first most-cited law review article of all time).

<sup>55</sup> See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1496 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1216–17 (1995); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 406–07 (2017); Ogletree et al., *supra* note 47, at 50–52.

<sup>56</sup> See, e.g., Krieger, *supra* note 55, at 1216–17. Kang and Professor Mahzarin Banaji have argued that behavioral realism “identifies naïve theories of human behavior latent in the law and legal institutions. It then juxtaposes these theories against the best scientific knowledge available to expose gaps between assumptions embedded in law and reality described by science.” Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1065 (2006).

and implicit bias as “behavioral realism.”<sup>57</sup> Behavioral realists believe that law, particularly antidiscrimination law, should remain *au courant* with progress in psychological science and that “judges should take reasonable steps . . . to make sure they have the science right.”<sup>58</sup> Moreover, the legal behavioral realists share Eberhardt’s belief that the malleability of cognitive bias makes it a good candidate for efficacious legal, policy, and educational intervention. Krieger writes that cognitive biases “can be controlled, sometimes even eliminated, through careful process re-engineering. . . . [They] can be recognized and prevented by a decisionmaker who is motivated not to discriminate and who is provided with the tools required to translate that motivation into action.”<sup>59</sup>

There is a critical qualifying clause in the last sentence that should not be overlooked. The behavioralist will provide the tools of cognitive science to the decisionmaker “who is motivated not to discriminate.” But where will we find the well-motivated antiracist decisionmaker?<sup>60</sup> This presumption seems especially problematic in a world where the scene of racist chants at a packed Trump rally that opens this Review can hardly be explained as an anomaly, or where, as I will argue later in this Review, the Supreme Court of the United States does backflips to ignore evidence of racism even when that evidence is the product of the most rigorous and *au courant* science.

The behavioralist strategy of intervention proceeds from the premise that we have already won the values fight. We are committed to anti-racism as a value, and once we discover that our racially biased reflexive actions are caused by the erroneous processing of our brains, we will commit ourselves to correcting the error. This is circular. If it is the biased (racist) input or data that causes the categorization error, then the problem is not solved by fixing the processing machine but by changing the input; changing the structurally embedded cultural content of the categories rather than fixing a glitch in the processing machine.

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<sup>57</sup> KAHN, *supra* note 47, at 10. Kahn does not claim to have invented the term, and it has been in use previously. See generally, e.g., *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006).

<sup>58</sup> KAHN, *supra* note 47, at 45 (quoting Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1002 (2006)).

<sup>59</sup> Krieger, *supra* note 55, at 1216–17.

<sup>60</sup> The presumed well-motivated nonracist decisionmaker derives from the cognitivists’ view that, if the decisionmaker’s racist behavior is “unintentional and largely unconscious,” KAHN, *supra* note 47, at 42, the decisionmaker must intend something that is the opposite of the result of the categorizing error the brain has made. A primary source of this presumption is the law’s story that we are already committed to the value of antiracism. Contrast this with the Freudian view of the unconscious as repressed beliefs that we do not want to acknowledge.

*F. Charles Lawrence's Story: A Brief Reprise of Earlier Conversations*

I should reveal that I have a dog in this fight. Or, to remain within the analytic frame I have adopted here, I should acknowledge that I am an active participant in the conversation among narratives that I consider in this Review.<sup>61</sup> A brief reprise will serve the purpose of fully disclosing my own potential bias and will also serve as necessary background to the arguments I make in this Review.

In 1987, I wrote *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,<sup>62</sup> an article that began as a critique of *Washington v. Davis* and of the doctrine of discriminatory purpose established in that decision.<sup>63</sup> The article argues that requiring proof of animus — as *Davis* did — ignored the continued vitality and ubiquity of racist beliefs within our society.<sup>64</sup> A significant part of the article is devoted to introducing the theories and research from psychology and social science that offered support for my contention that unconscious racism was commonplace rather than exceptional.<sup>65</sup> It followed that the Court and those constitutional theorists who had argued that the primary harm of race discrimination derived from bad motive<sup>66</sup> should not

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<sup>61</sup> Readers who are familiar with my work will not need this disclosure. I assume that the editors of the *Law Review* chose me precisely because they knew I was a longtime, and sometimes thoughtful, participant in this conversation.

<sup>62</sup> Lawrence, *Id, Ego & Equal Protection*, *supra* note 30.

<sup>63</sup> I join many other critics of *Davis* who condemn the decision for placing a heavy and often impossible burden on plaintiffs seeking constitutional protection from racially discriminatory practices and conditions. See, e.g., Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 966–69 (1993); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054–57, 1055 n.21 (1978); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1105–08 (1989); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1133–34 (1997); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 763–64 (2011).

<sup>64</sup> In the most often quoted passage of the article, I wrote: “Americans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.” Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 327. Justice Brennan quotes this passage in full in the body of his dissent in *McCleskey v. Kemp*, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting), and Justice Blackmun cited the article in his dissent, *id.* at 360 n.13 (Blackmun, J., dissenting) (citing Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 79–80).

<sup>65</sup> Part I of *The Id, the Ego, and Equal Protection* was subtitled, “A Primer on the Unconscious and Race.” Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 328.

<sup>66</sup> The article examines two leading constitutional theories that justified the application of heightened scrutiny to governmental decisions based on race (the “process defect theory” and the “stigma theory”) and argues that the distinct harm that each theory posits is more completely revealed and addressed if the theory incorporates a recognition of unconscious as well as conscious motives for racist acts. See *id.* at 344–55. Process defect theory takes the position that judicial review of legislative action is legitimate insofar as it seeks to reinforce democratic values by correcting defects in the political process. See *id.* at 345; JOHN HART ELY, DEMOCRACY AND

ignore what science had taught us about the influence of the *unconscious* on human motivation. This foregrounding of unconscious racism is often cited as a significant influence on the legal behavioralist's turn to cognitive psychology to combat subtle but pervasive forms of discrimination. However, the article makes the more fundamental argument that *Davis* was wrong not only because the intent doctrine ignored sources of motivation residing in a defendant's unconscious, but also "because the injury of racial inequality exists irrespective of the motives of the defendants in a particular case."<sup>67</sup> In an article revisiting *The Id, the Ego, and Equal Protection*,<sup>68</sup> I sought to clarify the argument I made there, reiterating what I had intended as the article's central thesis: that the Court, by requiring a showing of intentional discrimination in *Davis*, had done much more than hold the defendants in that case faultless. *Davis* "held that, because the defendants were not intentional racists, *no* constitutional violation had occurred" despite the indisputable evidence of continuing dramatic racial inequality.<sup>69</sup> As a result, "[t]he rest of us were held guiltless as well, all of us exculpated from any responsibility for society's institutional and structural racism."<sup>70</sup> If the defendants in *Davis* had not acted intentionally, the racist structures and ideology that were evident in the case and in the world were, for constitutional purposes, simply no longer there. *Davis* placed the Court firmly within a jurisprudence that "holds that the goal of [the Fourteenth Amendment's Equal Protection Clause and] anti-discrimination law is to root out individual instances of discrimination in a world otherwise free from discrimination."<sup>71</sup> The Court in *Davis*, by requiring a showing of individual racial motivation, ignores continuing societal racism, and at the same time asserts an interpretation of the Fourteenth Amendment's purpose and of the moral value it expresses and embodies. Critical race

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DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980). Stigma theory posits that "racial classifications should be strictly scrutinized when they operate to shame and degrade a class of persons by labeling it as inferior." Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 350. This theory was "at the core of the Supreme Court's unanimous declaration in *Brown v. Board of Education* that segregated public schools are inherently unequal." *Id.* at 350 (footnote omitted). The injury inflicted by stigmatization flows from the meaning society attaches to an action or classification.

<sup>67</sup> Lawrence, *Revisited*, *supra* note 30, at 944.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 946.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 947 n.46. Professor Alan Freeman has named this jurisprudence the "perpetrator perspective," a view that he argues "denies historical reality — in particular, the fact that we would never have fashioned antidiscrimination law had it not been for the specific historical oppression of particular races." Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW* 285, 288 (David Kairys ed., 3d ed. 1998). In contrast, the "victim perspective" focuses on the social and economic conditions associated with our specific history of discrimination and measures the success of antidiscrimination law against the actual equality it produces. *Id.* at 285–311; *accord* Freeman, *supra* note 63, at 1053.

theorists and other advocates of antisubordination interpretations of the Equal Protection Clause have argued for a substantive interpretation of that Amendment that differs from the Court's in its application to specific cases and, perhaps more importantly in the context of my analysis in this Review, in its understanding of the *values* the Amendment embodies.<sup>72</sup> In *Unconscious Racism Revisited*, I reiterated the importance of these differences.<sup>73</sup>

If equal protection requires the affirmative disestablishment of racist structures and ideologies, then the Court must determine in each case whether the law, decision, or behavior in question evidences the continued existence or vitality of those racist structures and ideologies. *The Id, the Ego, and Equal Protection* proposes that the Court employ a "cultural meaning" test to determine whether actions with discriminatory impact require strict scrutiny.<sup>74</sup> The method I urged upon the Court is the one I adopt in this Review: a focus on reading and interpretation of cultural texts.<sup>75</sup>

Kahn distinguishes my purpose and method from the approach taken by legal behavioralists, contrasting their focus on the psychological state of particular biased individuals with the broader focus on the dynamics in the production and circulation of cultural meaning.<sup>76</sup> Kahn notes that the "cultural meaning" test I proposed "was primarily interpretive in nature and looked to broad cultural and historical phenomena to evaluate whether a particular act conveys a shameful or stigmatizing message."<sup>77</sup> Kahn observes that "reference to 'collective unconscious' contrasts strikingly with [the behavioralist] focus on specific individual cognition."<sup>78</sup>

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<sup>72</sup> See Freeman, *supra* note 63, at 1056 ("Operating along with fault, the causation requirement serves to distinguish [those conditions that the law will address] from the totality of conditions that a victim perceives to be associated with discrimination . . ."); Matsuda, *supra* note 32, at 374–80 (1987) (explaining how narrow notions of fault and causation are an impediment to public acceptance of reparations for historical injustice); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1447–48 (1991) (arguing that the criminal justice system's punitive approach to drug use prevents the system from addressing the real causes of drug addiction in newborns). Professor Robin West calls the substantive understanding of equal protection "progressive constitutional faith." Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 793 (1992).

<sup>73</sup> See Lawrence, *Revisited*, *supra* note 30, at 950–51 (citing Lawrence, *Forbidden Conversations*, *supra* note 30, at 1382–83).

<sup>74</sup> See Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 324.

<sup>75</sup> *Id.* at 358 ("Indeed, construction of text is the most basic of judicial tasks. And while most judicial interpretation involves determining the meaning of written text, legal theorists have recognized that meaningful human behavior can be treated as 'text analogue.'" (quoting Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 (1984))).

<sup>76</sup> KAHN, *supra* note 47, at 41–45.

<sup>77</sup> *Id.* at 43.

<sup>78</sup> *Id.* (quoting Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 324).



These differences between approaches are far from trivial. The cognitivists see the law's failure as misunderstanding the psychological process that produces bias, and they seek to correct that misunderstanding by explaining that the origin of discriminatory bias is primarily cognitive — the product of the process of categorization. This analysis shifts the psychological paradigm from conscious motivation to flawed cognition, but the legal question remains within the paradigm of individual fault and causation. As Kahn astutely observes, “[t]he cultural meaning test does not depend on evaluating the motivational state of the individual or entity that commits a particular act; rather, the test interprets the functioning of that act as it plays out in social and historical context.”<sup>79</sup> Legal scholars who apply theories of implicit bias to the law move away from the broad interpretive approach that examines societal racism toward a narrower technical focus on individual causation and the measurement of individual attitudes. As I explained, the behavioralist approach “accepts the central premise of the *Davis* intent requirement — that the harm of race discrimination lies in individual acts infected by bias” — while the cultural meaning test “rejects that premise and finds the harm of racism in the pervasive effects of shared racist ideology.”<sup>80</sup>

This Review focuses on another critical difference between these two projects. The behavioralists look to cognitive science to prove to the Court, or to teach the individuals and organizations with whom they do debiasing training, that the brain has made a processing error that causes us to engage in biased or discriminatory behavior. Thus, the behavioralist project presumes we have already embraced the antiracist value required by the Equal Protection Clause. In this way the behavioralist story not only shares the law's view of individual fault and causation, but also joins the narrative that assumes our collective consensus in the norm of antiracism and accepts the Court's ahistoric view of the value the Fourteenth Amendment embodies.<sup>81</sup>

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<sup>79</sup> *Id.* at 44.

<sup>80</sup> Lawrence, *Revisited*, *supra* note 30, at 964.

<sup>81</sup> As should be clear from my discussion of Eberhardt's work, I do not intend to accuse the authors of this research and scholarship of lack of concern with racism and other forms of group subordination. I know these empiricists seek to advance the cause of antidiscrimination. Instead, I am concerned with the way this research is read together with the law's narrative to allow us to avoid our own implication in and responsibility for righting America's racism.

Some behavioralist scholars have acknowledged that their theory and project fall within the Court's paradigm and narrative of individual causation and consent. Kang makes clear that he knows the difference between our approaches. *See* Kang, *supra* note 55, at 1496. He chooses his empirical project of “measur[ing]” the fact of racism over my interpretive approach that merely “divines cultural meaning,” *id.* at 1496 n.28, not because the substantive structural arguments are wrong but for the pragmatic reason that they have not been successful — “[r]ace talk in legal literature feels like it is at a dead end,” *id.* at 1495. Similarly, and directly relevant to my thesis here, Kang and Professor Kristin Lane write: “Once upon a time, the central civil rights questions were

## II. THE LAW'S STORY: DENYING WHAT "EVERY ONE KNOWS"

Thus far in this Review, I have considered the story told by scientists and lawyers who have applied the science of implicit bias to the project of antidiscrimination law and racial equality, concluding that, despite the good motives of these advocates and the positive pragmatic interventions their work has occasioned, the narrative of implicit bias reinforces and amplifies a denialist story told by the law and ultimately harms the cause of racial justice and equality. This Part turns to the story the law tells. The unconscious racism that most harms our democracy is not each individual's lack of awareness of one's racial bias. Rather, the impediment to the achievement of racial equality is our *collective* national and societal denial of our racism. The law plays a principal role in this collective denial. Almost without exception,<sup>82</sup> when cases involving claims of racial discrimination have come before the Supreme Court, the Court has told the story that we are not racists.

All of these stories claim there is no evidence of a structural racism that we are collectively responsible for. The Court uses different plotlines and identifies different heroes and villains in each story, but the stories share a common fairytale ending: "We are not racists." As a people and as a nation we are fully committed to the value of racial equality and have already achieved the disestablishment of the white supremacy that was once a central part of our Constitution and national identity.<sup>83</sup> If there is something that looks or feels like we are racists, not to worry. There are two possible explanations, both of which preclude *our* racism: The first is that you are wrong. You think you have seen and felt racism when it's simply not there. This may be because you have misperceived the presence of racism when what you see can be explained by some other nonracist rationale, or by your imagination. It's all in your head. The second explanation is that what you see and feel is in fact racism, but it's not *our* racism. It's the racism of some individual or institution who hasn't got with the program. It's a

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*indisputably normative*. . . . Today, the central civil rights questions of our time turn also on the underlying empirics." Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010) (emphasis added).

<sup>82</sup> Two cases might be considered exceptions to this rule. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." (emphasis added)).

<sup>83</sup> Freeman refers to this approach as the "era of rationalization." Freeman, *supra* note 63, at 1102. This approach "declare[s] the war is over" and "make[s] the problem of racial discrimination go away by announcing that it has been solved." *Id.*

bad-guy outlier who is violating our shared value of racial equality. If there are bad-guy racist individuals still among us, we will catch them and make them stop. All you need do is point them out to us and prove to us that they know they are violating our shared value of racial equality and that the racism you are experiencing is caused by them.<sup>84</sup>

In discussing the stories these cases tell, this Part will also show why I am skeptical of the behavioralists' project to use science to counter the law's story of denial. This project assumes that the law's denial story is based on the Court's misreading of the facts. We can use science to demonstrate the Court has the facts wrong. We can use empirical evidence to prove bias. Then the Court will change its tune and stop denying.<sup>85</sup> But the denial stories discussed in this Part reveal that the Court will either find scientific evidence useful and probative or reject it as inconclusive or irrelevant depending on whether it suits its larger story of denial.

#### A. *Dred Scott v. Sandford*: Chief Justice Taney's Truth

The law's story begins in 1857 with *Dred Scott v. Sandford*.<sup>86</sup> Chief Justice Taney's account of the status of Blacks and the nation's commitment to white supremacy stands as the Court's ultimate truth-telling.<sup>87</sup> Dred Scott, a Negro, brought an action in federal court asserting his right to freedom under federal and state law.<sup>88</sup> Chief Justice Taney states the question before the Court as follows: "[W]hether the class of persons in the plea in abatement *compose a portion of this people*,<sup>89</sup> and

<sup>84</sup> See *id.* at 1054 ("The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors." (footnote omitted)).

<sup>85</sup> See Kang & Banaji, *supra* note 56, at 1065 (arguing that behavioral realism "expose[s] gaps between assumptions embedded in law and reality described by science"); Krieger & Fiske, *supra* note 58, at 1013.

<sup>86</sup> 60 U.S. (19 How.) 393 (1857). Of course, the law's story begins long before this in the text of the Constitution itself and in the laws and court decisions of the several colonies who joined to create the nation. Chief Justice Taney documents this earlier story at length in his opinion in the *Dred Scott* case. See *id.* at 407–22. For a comprehensive coverage of pre-Reconstruction Amendment race law, see generally A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978); and F. MICHAEL HIGGINBOTHAM, *RACE LAW* 67–177 (4th ed. 2015).

<sup>87</sup> I use "ultimate" here to convey that word's meaning as in "utmost" or "best" as well as to mean "final" or "last."

<sup>88</sup> *Dred Scott*, 60 U.S. (19 How.) at 400 ("[Scott] brought this action . . . to assert the title of himself and his family to freedom.").

<sup>89</sup> This emphasis is mine. I have highlighted "compose a portion of this people" because the question of whether a law treats a class of persons as "belonging to the people" or operates to exclude them should be the central question in an equal protection case. See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (asking who belongs in America and who qualifies for equality under American law). This question is particularly important in race cases as the purpose and meaning of white supremacy is to treat

are constituent members of this sovereignty?”<sup>90</sup> His answer: “We think they are not . . . .”<sup>91</sup>

Chief Justice Taney’s most well-known line from this opinion summarizes the reasons for the Court’s conclusion: Blacks “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .”<sup>92</sup> When one reads the entirety of Chief Justice Taney’s opinion, one sees an exemplar of what it means to discover this truth through the reading and interpretation of legal, historical, and cultural texts.<sup>93</sup> Chief Justice Taney notes that the exclusion of Blacks from “[the] people” was based on race rather than any individual’s enslaved status, and he draws most of his examples from the laws, beliefs, and practices of the states in which slavery had been abolished.<sup>94</sup> As he enumerates each law and practice, he describes the law less by indicating its effect on the Negro race’s physical liberties, or economic and legal rights, than by noting the way it speaks to or symbolizes how Negroes were regarded by white people. Thus, he speaks of “various laws, marking the condition of this race,” and legislation that “shows, in a manner not to be mistaken, the inferior and subject condition of that race” and “a class of beings whom [the states] had thus stigmatized; whom, as we are bound . . . to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation.”<sup>95</sup>

### B. Plessy’s *Transparent Lie*

If *Dred Scott v. Sandford* is an exemplar of the law speaking truth about America’s white supremacy, *Plessy v. Ferguson* represents the advent of the law’s story of denial. The Thirteenth Amendment had abolished slavery and the Fourteenth and Fifteenth Amendments had announced the nation’s commitment to the inclusion among “[the] people”

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nonwhites as not a “portion of [the] people” where “[the] people” refers not only to the nation but to humanity.

<sup>90</sup> *Dred Scott*, 60 U.S. (19 How.) at 404.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 407.

<sup>93</sup> One hundred thirty years before *The Id, the Ego, and Equal Protection* suggested that the Court use a “cultural meaning” test to determine whether facially neutral laws with racially discriminatory impact should be treated as laws with racial meaning, Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 324, Chief Justice Taney’s opinion engaged in an interpretive exercise that does precisely what that test called for. The word used in the jurisdictional provision of the Constitution considered in the case, “citizen,” is racially neutral on its face, and Chief Justice Taney says the “duty of the court is, to interpret the instrument . . . with the best lights we can obtain on the subject.” *Dred Scott*, 60 U.S. (19 How.) at 405.

<sup>94</sup> See *Dred Scott*, 60 U.S. (19 How.) at 413–16.

<sup>95</sup> *Id.* at 416.

of those formerly “regarded as beings of an inferior order, and altogether unfit to associate with the white race.”<sup>96</sup> Of course, the achievement of that commitment proved more troublesome than a declaration in the Constitution’s text.<sup>97</sup> The promise of Reconstruction was eclipsed by what was still called the South’s “Redemption” when I was taught this history in the fifth grade.<sup>98</sup> The Court could no longer speak the truth about America’s racism unless it was prepared to hold unconstitutional the still existing conditions of white supremacy and the many “deep and enduring marks of inferiority and degradation”<sup>99</sup> that white supremacy “deemed . . . just and necessary thus to stigmatize”<sup>100</sup> Negroes. After the nation abandoned Reconstruction, the Court could not enforce Reconstruction’s command of equality.

Instead, the Court, in *Plessy*, told the most transparent of lies. Homer Plessy argued that the 1890 Louisiana law that required separate accommodations for white and colored passengers “stamp[ed] the colored race with a badge of inferiority.”<sup>101</sup> This replication of Chief Justice Taney’s account of the pre-Reconstruction Amendments Constitution’s commitment to the value of white supremacy surely violated Plessy’s right to be included as one among and belonging to the people. The Court upheld the statute, finding that it was a reasonable exercise of the police power enacted “in good faith for the promotion of the public good.”<sup>102</sup> Racial separation was a “custom[] and tradition[] of the people,” and it helped to ensure “their comfort.”<sup>103</sup>

The words the *Plessy* Court speaks in denial are striking in the way they parallel Chief Justice Taney’s truthful admission in *Dred Scott*. In Chief Justice Taney’s account, the law obviously marks the inferior condition of the Black race in a manner not to be mistaken. He finds the meaning of this marking so evident that the Court is “bound . . . to assume” the legislature passed inegalitarian laws because it “deemed it just

<sup>96</sup> *Id.* at 407.

<sup>97</sup> See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 443 (1988); HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 29–35 (2019); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8 (1955); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8–9 (2019) (“[W]hite supremacist terror, laws, and policies had effectively nullified the Amendments and replaced abolition with Jim Crow . . .”).

<sup>98</sup> See generally NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

<sup>99</sup> *Dred Scott*, 60 U.S. (19 How.) at 416.

<sup>100</sup> *Id.*

<sup>101</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1747 (1993) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

<sup>102</sup> *Plessy*, 163 U.S. at 550.

<sup>103</sup> *Id.* The Court stated that in determining the question of reasonableness the legislature “is at liberty to act with reference to the usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace.” *Id.*

and necessary thus to stigmatize” Blacks.<sup>104</sup> The *Plessy* Court considers the same type of evidence that Chief Justice Taney held “bound” or required the Court’s assumption of a legislative purpose to mark as inferior and calls that assumption “fallac[ious].”<sup>105</sup> The meaning of the marks of inferiority that Chief Justice Taney says cannot be mistaken, the *Plessy* court claims, “do not necessarily imply the inferiority of either race to the other.”<sup>106</sup>

Chief Justice Taney supports his reading of the text’s meaning with extensive evidence from the texts of the law, of history, and of what both legislators and ordinary people understood the law to mean. In contrast, the *Plessy* Court asserts the lack of racist purpose and meaning by presuming their absence and placing the burden on the plaintiff to prove their presence. If segregation “do[es] not necessarily imply”<sup>107</sup> racism, then, absent *Plessy* proving otherwise, the Court will find no harm. In this shifting of the burden of proof, *Plessy* foreshadows the *Davis* Court’s use of the intent requirement as a denial story.

Justice Harlan’s dissent in *Plessy* demonstrates that his brothers in the majority were hardly victims of implicit bias. They could not feign mistake or unconscious error with their brother Justice there to tell them what everyone knew, that the law “had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches [assigned] to white persons.”<sup>108</sup> Justice Harlan’s dissent not only speaks clearly of white Americans’ continuing commitment to white supremacy, but also finds the central injury of the segregation statute not just in its purpose but in its stigmatizing *meaning*. These enactments “proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”<sup>109</sup>

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<sup>104</sup> *Dred Scott*, 60 U.S. (19 How.) at 416.

<sup>105</sup> *Plessy*, 163 U.S. at 551.

<sup>106</sup> *Id.* at 544.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 557 (Harlan, J., dissenting).

<sup>109</sup> *Id.* at 560. The most famous and most often cited language from Justice Harlan’s dissent is the phrase “[o]ur Constitution is color-blind.” *Id.* at 559. There is considerable irony in how the import of Justice Harlan’s truth-telling is ignored and this phrase is employed in contemporary jurisprudence to tell yet another lie. See, e.g., *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 332 (2014) (Scalia, J., concurring in the judgment). Justice Scalia, in his *Schuette* concurrence, used Justice Harlan’s words to argue that Michigan’s anti-affirmative action provision in its state constitution was constitutional: “As Justice Harlan observed over a century ago, ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.” *Id.* (alteration in original) (citation omitted) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

The *Plessy* Court's chief harm is not its misinterpretation of what the Equal Protection Clause required;<sup>110</sup> rather it is its denial of our continuing racism. The Court knows that the Constitution has changed since Chief Justice Taney's opinion in *Dred Scott v. Sandford*. It professes adherence to the new Amendment's value of equality.<sup>111</sup> Instead the Court asserts that we have changed. We were racists then, but we are no longer racists, just people seeking comfort by this custom that has no racial meaning.

C. *Brown v. Board of Education: The Half-Truth of Science in the Law's Denial Story*

The Court in *Brown v. Board of Education*<sup>112</sup> asked this question: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"<sup>113</sup> Its answer: "We believe that it does."<sup>114</sup> So far so good, but this answer, for which *Brown* is rightly praised and celebrated, is the half-truth I speak of in the title of this section. We discover the denial story on the road it takes to arrive there.

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<sup>110</sup> Often *Plessy*'s adoption of what became known as the "separate but equal" doctrine is read to mean that the Court's error lay in its interpretation of the underlying value or norm expressed in the Amendment. But the Court reached this doctrinal result by its interpretation of the facts of segregation's purpose and meaning rather than by an interpretation of the Framers' intent or a normative interpretation of what equality means in the Constitution. In other words, the Court finds "separate but equal" constitutional not by finding separate is inherently equal or definitionally equal, but by finding that separate (in the case of segregation) was not intended to, nor was it read by the people, to signify inequality. Even the Court's argument referencing the Framers' intent, *Plessy*, 163 U.S. at 544–45, cited the existence of segregated schools in the North as evidence that segregation was not about racial inequality. This is also a denial story.

<sup>111</sup> *Plessy*, 163 U.S. at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law . . ."). This sentence goes on to qualify this statement of the Amendment's clear purpose: "[B]ut in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality . . . . Laws [requiring] [the races'] separation . . . do not necessarily imply the inferiority of either race to the other . . ." *Id.*

<sup>112</sup> 347 U.S. 483 (1954).

<sup>113</sup> *Id.* at 493.

<sup>114</sup> *Id.* Earlier in the opinion, the Court addressed the question of the Framers' intent, finding the historical record "inconclusive" and that the status of public education had changed so dramatically that the intent of the Framers might be irrelevant. *Id.* at 489; *see id.* at 489–90. Some historians have argued that the Court purposefully avoided answering the originalist question because a candid answer would reveal that Northern proponents as well as Southern opponents of the Fourteenth Amendment believed in segregation. *See, e.g.,* RICHARD KLUGER, *SIMPLE JUSTICE* 683 (1975) (describing Chief Justice Warren's need to craft an opinion that would secure a unanimous decision and not unduly offend Southerners).

The Court began its discussion of the holding by citing two graduate school precedents in which it claimed to rely on “intangible considerations.”<sup>115</sup> In *Sweatt v. Painter*,<sup>116</sup> the Court held that a newly established law school for Negroes was clearly not the equal of the white school in facilities, books, faculty, and alumni,<sup>117</sup> all things that were easily measured.<sup>118</sup> In *McLaurin v. Oklahoma State Regents for Higher Education*,<sup>119</sup> the Court pointed to George McLaurin’s inability to come together with other students — he was required to sit at a desk in a separate anteroom outside the classroom and segregated from white students in the library and lunchroom — when it held that these restrictions would have a detrimental effect on his education and the prospects of his professional future.<sup>120</sup>

Segregation achieves its racially subordinating purpose in two ways. First, it excludes and denies access to material goods and property and to places where powerful people gather to do business and politics. Second, it stigmatizes or marks the excluded group as inferior and underserving, signaling who is excluded and justifying the exclusion. By calling the injury of segregation in *Sweatt* and *McLaurin* “intangible,” the Court denies both of these injuries. The structural injury of racism is denied by pretending it does not exist. Structural exclusion from access to a profession can be measured.<sup>121</sup> To call it intangible is to say it is not there. At the same time, the Court, in naming the structural and measurable exclusion “intangible,” says nothing about the purpose or the meaning of segregation’s stigmatizing mark, of the signal it sends

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<sup>115</sup> *Brown*, 347 U.S. at 493.

<sup>116</sup> 339 U.S. 629 (1950).

<sup>117</sup> *Id.* at 633.

<sup>118</sup> While the Court went on to say that “the University of Texas Law School [also] possess[ed] to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school,” *id.* at 634, there is an important difference between describing something as “incapable of objective measurement” and describing it as an “intangible consideration.” The qualities the *Sweatt* Court referred to, like the “reputation of the faculty, experience of the administration, position and influence of the alumni, [and] standing in the community,” *id.*, confer tangible benefits on those who enjoy them and work a tangible harm on those who are denied them. For example, in *United States v. Virginia*, 518 U.S. 515 (1996), Justice Ginsburg cites VMI’s more “impressively credentialed” and higher paid faculty as an example of a tangible and measurable advantage that women excluded from the all-male school were denied, comparable to the books and faculty in *Sweatt*. *Id.* at 557; see also Harris, *supra* note 101, at 1729 (“[T]hose expectations in tangible or intangible things that are valued and protected by the law are property.”). Professor Cheryl Harris goes on to explain that “[w]hen the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.” *Id.* at 1731.

<sup>119</sup> 339 U.S. 637 (1950).

<sup>120</sup> See *id.* at 640–41.

<sup>121</sup> See DARIA ROITHMAYR, *REPRODUCING RACISM* 89–91 (2014) (arguing that segregated social networks “can explain quite a bit about persistent racial differences in wages and other aspects of employment status,” *id.* at 90).



and the badge it imposes so all will know whom to keep out and that the exclusion from “[the] people” is just.

Having offered these two stories of dual denial as precedent, the Court in *Brown* went on to say the intangible injury of segregation should be of particular concern when children are involved.<sup>122</sup> I have always been struck by the passive structure of the Court’s language in this section. It explains that “[t]o separate [children] from others . . . generates a feeling of inferiority.”<sup>123</sup> The Court writes as if it does not know, or it does not matter, who has done the separating and why.<sup>124</sup> In a lengthy quotation from “a finding” by the Kansas district court,<sup>125</sup> the Court shows it does know that the state has done the separating and notes that the identity of the separator is significant: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law . . .”<sup>126</sup> But even here, the Court speaks of the state’s decision as if it just happened spontaneously, and the Court has newly discovered its detrimental effect. Likewise, the words “generates a feeling of inferiority” give no hint of the source or cause of that generation.<sup>127</sup>

In the next clause of the passage quoted from the district court, “for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group,” the Court does reference the cultural meaning of the law, but even here the use of the word “usually” tells a half-truth that serves as denial.<sup>128</sup> This sentence does the same work as the sentence in *Plessy* that claimed that laws requiring the separation of the races “do not necessarily imply the inferiority of either race to the other.”<sup>129</sup> Both sentences are true in the abstract, but they also deny, as Justice Harlan’s dissent in *Plessy* put it, what “[e]very one knows.”<sup>130</sup> The suggestion that some significant part of the population in 1954

<sup>122</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>123</sup> *Id.*

<sup>124</sup> When I teach *Brown*, I often pose this hypothetical. Suppose you are John W. Davis, the lawyer who represented the Topeka School Board in the Supreme Court, and one of the Justices asks you this question: “Mr. Davis, can you tell me why the school board decided to put all of the white children in one school and all of the black children in another? Why in the world would they do that?”

<sup>125</sup> *Brown*, 347 U.S. at 494. Even the fact that the Court couches these observations as “find-  
ing[s]” serves to deny societal responsibility for the harms of segregation. *Id.* It suggests that the harm of segregation was not evident to all, that it required the factfinding power of a federal district court to reveal it and make it actionable.

<sup>126</sup> *Id.* (quoting the lower court in the Kansas case).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (quoting the lower court in the Kansas case).

<sup>129</sup> *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

<sup>130</sup> *Id.* at 557 (Harlan, J., dissenting).

might understand segregation as about something other than white supremacy implies that we were no longer the racists that we were in 1896.

This denial of the law's clear and irrefutable meaning enables the further denial of segregation's invidious purpose. Recall that the *Plessy* Court's denial of segregation's racist meaning allowed it to posit the rationality of a nonracist purpose for the segregated railway car, by referring to "the established usages, customs and traditions of the people."<sup>131</sup> But those customs and traditions could comport with the Equal Protection Clause only after the Court denied that they were customs and traditions whose sole meaning signified racial superiority and inferiority.<sup>132</sup>

The final three sentences in this paragraph are central to the Court's analysis in *Brown*, for it is here that the Court finds causality between the feelings of inferiority generated in Black children by segregation and their access to equal educational opportunity. This is also the juncture in the opinion where the Court turns to science for a half-truth that enables the denial of the full truth of segregation's injury.

First, it writes that "[a] sense of inferiority affects the motivation of a child to learn."<sup>133</sup> The Court describes this injury to the individual child without any description of the cultural context that causes the child's sense of inferiority. The Court tells us that state-sanctioned segregation "has a *tendency* to [retard] the educational and mental development of negro children,"<sup>134</sup> but the Court never says that what the state is sanctioning, or giving its imprimatur to, is the marking of these children, and all Black people, as inferior. This omission is crucial. Without a clear acknowledgment that the state is sanctioning racism, we do not know that the state and the collectively constituted "we" are responsible for Black children's sense of inferiority. As the Court's opinion reads, the state-sanctioned segregation, rather than the mark of inferiority, harms Black children, as if the separation of Black children from white children were a social practice with a neutral purpose and meaning, and the Court has discovered it happens to have this effect on the child's feeling about herself.<sup>135</sup> The words "has a tendency" further

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<sup>131</sup> *Id.* at 550 (majority opinion).

<sup>132</sup> Compare *id.*, with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1857) ("The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of [the negro] race . . .").

<sup>133</sup> *Brown*, 347 U.S. at 494 (quoting the lower court in the Kansas case); see also *id.* at 494 n.11 (citing numerous social science studies on the psychological effects of segregation on children).

<sup>134</sup> *Id.* at 494 (alteration in original) (emphasis added) (quoting the lower court in the Kansas case).

<sup>135</sup> Contrast this language with Chief Justice Taney's language in *Dred Scott*, where he says the purpose of the texts he is interpreting is to mark "the negro race as a separate class of persons," 60 U.S. (19 How.) at 411, and as "a subordinate and inferior class of beings," *id.* at 404–05. He determines that purpose in part by noting that because everyone will read or interpret those texts as having that meaning, we must assume this was the Framers' purpose. See *id.* at 409–11. In footnote 11, the *Brown* Court implies that the tendency of segregation to generate feelings of inferiority

remove segregation's effect on the child from its origin in the state's invidious purpose to mark her as inferior and from our collective belief in her inferiority. This "tendency" has an effect only on Negro children. The Court does not say, as it did in *Plessy*,<sup>136</sup> that this defamatory construction of segregation's meaning is only in Black children's heads, but the Court's language in this paragraph never places it elsewhere. There is nothing in the law's story that tells us this feeling of inferiority comes from the outside, that segregation tells the rest of the world these children are inferior. The Court, like the Court in *Plessy*, pretends it does

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is not obvious, that it is something to be discovered by science, and that society (and the Court) can be excused for not noticing its effects earlier. See *Brown*, 347 U.S. at 494 n.11; *infra* p. 2339. We also see here a precursor to *Davis*'s intent requirement, its refusal to see society's complacency with and complicity in structural racism. See *Washington v. Davis*, 426 U.S. 229, 242 (1976); *infra* section II.D, pp. 2340-42.

This language, which makes the state's sanction central to the finding of injury, foretells yet another theme and chapter in the law's denial story. Here state sanction is rightly offered as evidence that Black children have special reason to experience feelings of inferiority when the state has given its authority to that meaning of the law, but this finding is a precursor of the de facto/de jure distinction that finds segregation violative of equal protection only when it results from purposeful discrimination by the state. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of *state-imposed* segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution." (emphasis added)); *id.* at 23 ("We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation . . ."). Thus, when Black and white children attend separate schools because white parents have fled to all white neighborhoods, that segregation is attributed to private choice and held de facto and constitutional because it is not state sanctioned. See *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (striking down a court's public school integration program because there was no evidence of de jure segregation in Detroit's white suburbs). Nor may the government choose to remedy de facto segregation by considering the race of children in school assignment. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742-43 (2007) (plurality opinion) ("Again, this approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause 'protect[s] *persons*, not *groups*.' This fundamental principle goes back, in this context, to *Brown* itself." (citations omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))). Of course, the state sanction of segregation in *Brown* heightened feelings of inferiority in Black children only because the state represents and reflects our collective values and motivations. The de facto/de jure distinction turns this on its head by holding that the injury that arises out of our collective expression of our racism is constitutionally cognizable only when we formally delegate that expression to the state and the state achieves that collective desire in obvious ways. See Lawrence, *Forbidden Conversations*, *supra* note 30, at 1358 ("We have come to think of de facto segregation not simply as the absence of judicially cognizable constitutional injury, but as the absence of any injury at all."); *id.* at 1389-90, 1399-400.

<sup>136</sup> *Plessy*, 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

not know that the signification of inferiority is one of the primary purposes and functions of segregation, and that it sends this defamatory message to a community who believes in and acts on its assertion.<sup>137</sup>

Here the *Brown* Court invokes the science story to make it a co-conspirator in the denial story embedded in the law. “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”<sup>138</sup> The Court footnotes Dr. Kenneth Clark’s psychological study along with several others.<sup>139</sup> In this turn to science, the Court characterized Black children’s injury as the product of what scientists say goes on inside their heads when the state separates them from white children. Thus, *Brown* finds *Plessy*’s error neither in the Court’s intentional denial of segregation’s clear purpose nor in its failure to acknowledge the nation’s continuing commitment to racism. Rather, it explains the decision as a case of judges who did not have access to modern science that would have helped them understand what processes in the brain create the causal link between segregation and feelings of inferiority in the Negro child.<sup>140</sup>

The *Brown* Court’s reliance on social science evidence invited heavy criticism at the time of the decision and has garnered considerable commentary in subsequent years.<sup>141</sup> I find many of these criticisms and explanations for the Court’s turn to science persuasive, but my purpose here is not to support or criticize the soundness of Clark’s science or the

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<sup>137</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) (arguing that the meanings of segregation “are matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world”). As Professor Charles Black notes, there is a disconnect between his justification for the Court’s decision in *Brown* and the Court’s own reasoning: “It seems to me that the venial fault of the opinion consists in its not spelling out that segregation, for reasons of the kind I have brought forward in this Article, is perceptibly a means of ghettoizing the imputedly inferior race.” *Id.* at 430 n.25.

<sup>138</sup> *Brown*, 347 U.S. at 494.

<sup>139</sup> *Id.* at 494 n.11.

<sup>140</sup> The Court has taken, as Professors Krieger and Susan Fiske recommend judges should, “reasonable steps . . . to make sure they have the science right.” Krieger & Fiske, *supra* note 58, at 1002; see also *id.* at 1001–02.

<sup>141</sup> See, e.g., Michael Heise, Lead Article, *Brown v. Board of Education*, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 295 (2005) (discussing historical and present-day criticisms); Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 794 (2002) (arguing the Court did not rely on the social science evidence for its decision, but rather used it to “lend authority” to the decision). For discussion on *Brown*’s use of behavioral realism, see Krieger & Fiske, *supra* note 58, at 1014–15. Others argue that the Court should have based its decisions on more traditional constitutional values and principles rather than science. Black, *supra* note 137, at 430 n.25; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (“For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . . .” *Id.* at 34.).

Court's jurisprudence.<sup>142</sup> Nor do I intend to join the debate about whether the Court's decision really turned on science or was guided by world politics and its fear of public reaction to a highly controversial decision.<sup>143</sup> Rather, I want to show how the truth and authority of the science deny our societal racism.

Eberhardt and other behavioralists offer their research on implicit bias as more reliable than Clark's relatively rudimentary and primitive science, providing the Court with the most up-to-date "modern authority"<sup>144</sup> and "mak[ing] sure they have the science right."<sup>145</sup> They answer the critics of *Brown* who claim the Court's finding of causation between segregation and psychological injury to Black children was based on shoddy science. But they also give credence to the law's denial story. The science story joins the law's story in telling us this is not a fight to change our values and our *nomos*.

D. *Washington v. Davis: Wherein the Court Claims  
It Cannot Know Racism when It Sees It*

I close this discussion of the law's denial story with a brief reprise of that story's most recent iteration. This chapter in the story begins with *Washington v. Davis*, where the doctrine of discriminatory intent is used to turn our gaze toward the self-professed bigot as the proper target of the Equal Protection Clause's prohibition against discrimination and away from our continuing collective racism as the cause of our democracy's malaise.<sup>146</sup>

In *Davis*, the Court rejected the plaintiff's claim that a test required for employment as a police officer discriminated against Blacks because it had a failure rate that was four times as high for Blacks as for whites.<sup>147</sup> The Court held that, absent direct or inferential proof that

<sup>142</sup> I think Clark's finding of causality seems clearly right despite the primitiveness of his methodology.

<sup>143</sup> See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 99–107 (2000) (explaining that the Justice Department's brief in the school segregation cases emphasized the negative foreign policy consequences of racial segregation, and arguing that "the Justices were well aware of [the] issue," *id.* at 104); KLUGER, *supra* note 114, at 706 ("The Court was clearly taking pains not to level a finger at the South."); *id.* at 709–10 ("It was this very need not to offend, though, that seemed to make the inclusion of footnote #11 forceless and therefore gratuitously obnoxious.").

<sup>144</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>145</sup> Krieger & Fiske, *supra* note 58, at 1002.

<sup>146</sup> I have written elsewhere on this chapter. See sources cited *supra* notes 30–31; see also Freeman, *supra* note 63, at 1054–55.

<sup>147</sup> *Washington v. Davis*, 426 U.S. 229, 237–38 (1976).

the test was adopted with a design to exclude Blacks, the disproportionate impact of the test was not enough to require the application of strict scrutiny.<sup>148</sup> I have noted my considerable criticism of *Davis* elsewhere.<sup>149</sup>

Justice White's majority opinion in *Davis* arguing that the Court must require proof of intentional racism rests on his assertion that requiring justification for the discriminatory effect of laws would prove unworkable. An impact test would be "far reaching"<sup>150</sup> and might require the Court to "perhaps invalidate[] a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent white."<sup>151</sup> One might read this sentence to acknowledge the still-existing structural legacy of slavery and segregation and to say quite honestly, even if this structural legacy demonstrates our failure to achieve the disestablishment of slavery called for by the Reconstruction Amendments, an impact test would be too "far reaching." It would require the redistribution of property and privilege acquired when the Constitution accorded property rights to whiteness and treated Blacks as property.<sup>152</sup> This reading of "far reaching" would be an admission of our continuing racism and of our continuing commitment to property over humanity, followed by the declaration that equal protection could not possibly require that kind of redistribution. That would be too "far reaching," too much equality.<sup>153</sup>

Another reading of Justice White's understanding of an impact test as too "far reaching" denies our racism. It argues that the Court cannot subject every governmental action with disproportionate racial impact to strict scrutiny, because many of these actions may not be the product of racism. In this claim, we hear echoes of the *Plessy* Court's claim that segregation "do[es] not necessarily imply the inferiority of either race to the other"<sup>154</sup> and *Brown*'s equivocation that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."<sup>155</sup> The *Plessy* Court uses uncertainty, the possibility of no racism ("not necessarily") to deny what is certainly racism. The *Brown* Court uses uncertainty ("usually interpreted") to find racism without acknowledging the certainty that something was racism. The *Davis* Court

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<sup>148</sup> *Id.* at 246–48 (declining to apply the heightened standard of review applicable to analogous public employment cases).

<sup>149</sup> See generally Lawrence, *Revisited*, *supra* note 30; Lawrence, *Local Kine Implicit Bias*, *supra* note 30; Lawrence, *Id, Ego & Equal Protection*, *supra* note 30.

<sup>150</sup> *Davis*, 426 U.S. at 248.

<sup>151</sup> *Id.*

<sup>152</sup> See Harris, *supra* note 101, at 1715–18.

<sup>153</sup> I call this the "too much justice" reading of *Davis*. See my discussion of *McCleskey v. Kemp*, 481 U.S. 481 (1987), which appears *infra* pp. 2342–49.

<sup>154</sup> *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

<sup>155</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

uses uncertainty to say we will not even ask, we will not look. Thus, *Davis* achieves much more than its predecessors to establish the narrative that we are no longer racists. In *Plessy* and *Brown*, the Court was required to say it could not see our certain racism in the case at hand. *Davis* establishes a rule that prohibits the Court from looking, lest it might see.<sup>156</sup> It tells a story that gives us permission to look away as well.

Both in cases involving racially discriminatory impact and in cases that classify by race on the face of the law, the Court declines to ask the question: “Does the government action reinforce the structures and ideology of white supremacy?”<sup>157</sup> *Davis*’s denial story, its claim that we cannot know white supremacy when we see it and therefore must not look for it or ask if it still lives with us, “establish[es] as doctrine the incoherent, unprincipled, Orwellian notion that the Fourteenth Amendment mandates equality but prohibits consideration of the presence or absence of white supremacy.”<sup>158</sup>

### III. THE ABOLITIONISTS’ STORY<sup>159</sup>: NARRATIVES TO MAKE A WOUNDED NATION WHOLE

#### A. When They See Us and *McCleskey v. Kemp*: *Two Stories About Race, Crime and Justice*

*[T]hey were coming downtown from a world of crack, welfare, guns, knives, indifference and ignorance. They were coming from a land with no fathers. . . . They were coming from the anarchic province of the poor. And driven by a collective fury, brimming with the rippling energies of youth, their minds teeming with the violent images of the streets and the movies, they had only one goal: to smash, hurt, rob, stomp, rape. The enemies were rich, the enemies were white.*

— Pete Hamill<sup>160</sup>

As Episode 2 of *When They See Us*, Ava DuVernay’s powerful retelling of a true story of American racism and the American legal system, opens, we watch first just the feet and then the backs of a group of young Black men move in slow motion through Central Park toward a

<sup>156</sup> See *Davis*, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

<sup>157</sup> Lawrence, *Revisited*, *supra* note 30, at 953.

<sup>158</sup> *Id.* Elsewhere I have explained how this doctrine is applied in the affirmative action cases to prohibit the remedy of societal racism. See *id.* at 953–54.

<sup>159</sup> The title for this Part is inspired by Professor Dorothy Roberts’s stunningly brilliant Foreword in this *Law Review*. Roberts, *supra* note 97.

<sup>160</sup> Pete Hamill, *A Savage Disease*, N.Y. POST, Apr. 23, 1989, at 4.

cityscape of downtown skyscrapers on the horizon.<sup>161</sup> DuVernay accompanies this scene with a voice-over — a montage of quotes from the press describing the incidents leading to the prosecution of five young Black and brown men, aged fourteen to sixteen, who will soon be tried and convicted in a New York courtroom for raping and beating Trisha Meili, a young white woman, while she jogged in the park. The scene ends as we hear the passage in the epigraph that begins this section.<sup>162</sup> DuVernay cuts from the young Black bodies moving toward the downtown skyline to a newspaper office where a white man sits typing.<sup>163</sup> The words, once disembodied, without an author's face, become those of the journalist, as if we are hearing his thoughts as he composes the column. He reads the final words of the passage to a colleague, and we know that he is its author. But we know as well that these words are not his alone. This is DuVernay's Greek chorus, standing stage right, asking and answering the question implicit in her title: "What do they see when they see us?"

DuVernay's miniseries tells the story of the Central Park Jogger case, and of the state's wanton and unjustifiable destruction of the lives of five teenage boys.<sup>164</sup> But the Greek chorus reminds us that this is more than a tale of renegade cops, racist prosecutors, and a criminal justice system gone awry. Although the words in the voice-over are quoted verbatim from an opinion piece by a well-known New York journalist, they do more than indict the individual who penned them or even the press as a whole.<sup>165</sup>

DuVernay opens the series with quick cuts, between scenes of the afternoon preceding the night of the rape and beating, that introduce us to each of the five boys. A bright-faced boy talks baseball with his father over takeout hamburger and fries.<sup>166</sup> A young woman walks down the street with her younger brother, smiling at him with pride as he tells her he will be promoted to first-chair trumpet in his school orchestra.<sup>167</sup> She turns at the next corner, on her way to work, reminding

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<sup>161</sup> *When They See Us: Part Two* at 0:07 (Netflix May 31, 2019).

<sup>162</sup> *Id.* at 0:43.

<sup>163</sup> *Id.* at 1:18.

<sup>164</sup> For background on the Central Park Jogger case, see generally SARAH BURNS, *THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING* (2011); Patricia J. Williams, *Lessons from the Central Park Five*, *THE NATION* (Apr. 17, 2013), <https://www.thenation.com/article/lessons-central-park-five> [<https://perma.cc/W358-66DR>]; Patricia J. Williams, *Reasons for Doubt*, *THE NATION*, Dec. 30, 2002, at 10.

<sup>165</sup> Cf. Lynnell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, *COLUM. JOURNALISM REV.*, Jan./Feb. 2003, at 38 (explaining why "the press [should] consider its part in the drama" surrounding the Central Park Jogger case); Julia Dahl, *We Were the Wolf Pack: How New York City Tabloid Media Misjudged the Central Park Jogger Case*, *POYNTER* (June 16, 2011), <https://www.poynter.org/newsletters/2011/we-were-the-wolf-pack-how-new-york-city-tabloid-media-mangled-the-central-park-jogger-case> [<https://perma.cc/YNgM-SD6T>].

<sup>166</sup> *When They See Us: Part One* at 0:30 (Netflix May 31, 2019).

<sup>167</sup> *Id.* at 1:02.



him to go straight home. A young man argues with his girlfriend who worries about how much school he has missed.<sup>168</sup> Each of these scenes is shot amidst crowded sidewalks, honking cabs, high-rise projects, the sights and sounds of late afternoon in Harlem. A Public Enemy soundtrack pulses beneath the street sounds, *Fight the Power*. DuVernay lets us see each boy, still a child, moving with fits and starts in the liminal space of adolescence. In these scenes of intimacy with family and friends, she captures their humanity as well as their vulnerability to the everyday injuries that the structures of racism do to them. All of the bodies in these street scenes are Black. Reminding us that Harlem feels safe and familiar to these boys. Reminding us as well of the text of America's hypersegregation,<sup>169</sup> still marking these boys "in a manner not to be mistaken."<sup>170</sup> Now, a rapidly growing crowd of boys moves through the streets toward the park, running, pushing, talking, and laughing, and we see each of the boys first watch and then join them as if drawn by a magnet.<sup>171</sup> As each of them joins this exuberant throng of black male adolescence, I become the worried parent. I know this story will end badly because DuVernay's series reenacts real events that I remember, but I would be the fearful parent even if I did not know this story's ending. DuVernay's series makes these boys my own children, and, before the words that call them "savages" have been written and read with nodding heads, I know how my children will be seen.

*When They See Us* tells a story about race and the law. DuVernay's telling has the narrative arc of a Hollywood crime story: the crime scene discovered; the arrest, interrogation, and confession; the trials; the guilty verdicts; the time in prison; the confession by the actual perpetrator of the crime and DNA confirmation of his guilt; the boys exonerated; the lingering injuries to the exonerated boys (now men) and their families in the aftermath.<sup>172</sup> We read the law's story in this text as well. DuVernay portrays the overzealous prosecutor, pressured by the press and the public to quickly solve this crime; the inconsistencies in timelines and locations of the crime and suspects; the boys' coerced confessions<sup>173</sup> preceded by hours of nonstop questioning without a lawyer or

<sup>168</sup> *Id.* at 1:39.

<sup>169</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 10-12* (1993) (describing how Black ghettos were created during the first half of the twentieth century and how segregation is perpetuated today through an interlocking set of individual actions, institutional practices, and governmental policies). Professors Douglas Massey and Nancy Denton argue that in many urban areas the degree of Black segregation is "so intense and occurred on so many dimensions simultaneously" that it amounts to "hypersegregation." *Id.* at 10.

<sup>170</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1857).

<sup>171</sup> *When They See Us: Part One*, *supra* note 166, at 4:49.

<sup>172</sup> See Williams, *Lessons From the Central Park Five*, *supra* note 164.

<sup>173</sup> Convictions based on false confessions are common. See, e.g., *Speaking While Black: False Confessions, Chicago Police, and Torture*, PRISON CULTURE (Nov. 20, 2011), <http://>

parents present; the inadequate and incompetent defense counsel; the confessions themselves filled with inconsistencies and obvious factual errors. But DuVernay's story does not direct its indictment only to evil and racist prosecutors and police, although this is how many of us want to hear it. Instead, her Greek chorus calls us all to account for the injuries we inflict on fellow human beings. She forces us to ask ourselves, how did this horror come to pass while we stood witness? How did we allow a state that takes our name, "the people," in this prosecution, conviction, and imprisonment, to inflict these horrors? What stories have we told each other, what stories have we heard, that allowed us to think this was okay? What made us believe, even if just for a moment, that maybe these boys had gang-raped and beaten this young white woman out for exercise in the park? How did we hear them called "savage" and not know that this name meant and means all of our Black and brown brothers and sisters?

DuVernay's story names the five boys, now men: Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Korey Wise.<sup>174</sup> She forces us to know them and their families in their full, human, complicated selves. And her Greek chorus calls out the names of all of the children murdered, beaten, imprisoned by the "racial capitalist state."<sup>175</sup> In this, DuVernay inherits and unites with the movement practice of calling out Black victims' names so that we will know and remember them as full and loved human beings, and also to make human all of those whose names have been erased by narratives denying the brutal history that they lived and justifying the ways their lives were taken from them.<sup>176</sup> This abolitionist storytelling names as well the origins, impulses, and continuing structure and ideology of white supremacy that the law's story denies.

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[www.usprisonculture.com/blog/2011/11/20/speaking-while-black-false-confessions-chicago-police-and-torture](http://www.usprisonculture.com/blog/2011/11/20/speaking-while-black-false-confessions-chicago-police-and-torture) [<https://perma.cc/V583-Z9XA>]. When DuVernay tells the story of these coerced and false confessions, she speaks not just of this case but of all these cases.

<sup>174</sup> See Jamil Smith, "I Felt I Had to Make It": Ava DuVernay on Why the Central Park Five Story Still Matters, *ROLLING STONE* (May 29, 2019, 1:12 PM), <https://www.rollingstone.com/tv/tv-features/when-they-see-us-netflix-central-park-five-ava-duvernay-interview-841081>

[<https://perma.cc/42V2-DC87>] ("[W]hen I decided to firmly root the story in the men's voices and their stories as boys and their families, all of the rest of that fell away. . . . The pain of having your child ripped from you, of being the child ripped out of his youth, of the taunts as you're walking into the courtroom, of the threats to the family — all of that.")

<sup>175</sup> Roberts, *supra* note 97, at 24 ("Police also serve as an arm of the racial capitalist state by controlling black and other marginalized communities through everyday physical intimidation and by funneling those they arrest into jails, prisons, and detention centers.")

<sup>176</sup> See #SayHerName x #InHerHonor, BLACK LIVES MATTER, <http://sayhername.blacklivesmatter.com/> [<https://perma.cc/C7P2-TPTJ>]; #SayHerName: Resisting Police Brutality Against Black Women, *AFR. AM. POL'Y F.* (July 16, 2015), <http://aapf.org/sayhernamereport> [<https://perma.cc/ZFM5-WNJS>]; Aisha Harris, *Janelle Monáe Brings a Powerful New Protest Song to the Black Lives Matter Movement*, *SLATE* (Aug. 14, 2015, 2:41 PM), [http://www.slate.com/blogs/browbeat/2015/08/14/janelle\\_mon\\_e\\_s\\_hell\\_you\\_talmbout\\_is\\_a\\_rallying\\_cry\\_against\\_police\\_](http://www.slate.com/blogs/browbeat/2015/08/14/janelle_mon_e_s_hell_you_talmbout_is_a_rallying_cry_against_police_)

DuVernay's scenes depict a world simultaneously shocking and quotidian: the police roundups and arrests, the violence of the interrogation, the prosecutors and public pressuring the police to find a suspect, demanding that a Black body be found, any Black body, to answer for this crime, the prison filled with Black and brown men, reminding us of the roots of modern criminal punishment in chattel slavery and the post-Reconstruction Black Codes.<sup>177</sup> These scenes feel normal rather than exceptional because we continue to assign police the role of "keep[ing] black people in their place for the benefit of white citizens."<sup>178</sup>

*When They See Us* speaks in unison with the street protests of the Black Lives Matter movement and other contemporary abolitionists, whose chants of "Black lives matter" name not just the violence of the state's criminal punishment system and the private vigilantes who are its posse, but also the everyday violence of segregation and structural racism that the law's story will not name.<sup>179</sup>

A significant part of *Biased* is dedicated to exploring the manifestations and ameliorating the effects of implicit racial bias on the policing and incarceration of Black communities. In Chapter Five, titled "How Free People Think," Eberhardt opens with her own "driving while Black" story. She is a graduate student at Harvard (p. 97). On the day before commencement, when she will receive her Ph.D. in psychology, she is driving with a female friend to pick up supplies for her side job, catering a faculty brunch, when they are pulled over by the police (p. 98). She has violated no traffic laws, but the car she is driving has Ohio plates and is registered in her mother's name (p. 99). When she cannot prove to the officer that she owns the car he calls a tow truck and asks her to exit (p. 99). When she refuses, he reaches into the car, lifts her out, and "body slam[s] [her], hard, on top of the roof of [her] car" (p. 100). When she pleadingly asks another officer if he saw what happened, he responds, "I didn't see a thing" and shoves her into a patrol car (p. 101). From jail, Eberhardt calls a Harvard dean who asks to

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brutality.html [https://perma.cc/4WGC-4MPW]. For literary accounts touching on the same theme, see generally JESMYN WARD, *SING UNBURIED*, SING (2017), a novel portraying the Mississippi prison system and its perpetuation of the conditions of slavery, and COLSON WHITEHEAD, *THE NICKEL BOYS* (2019), which fictionalizes the real-life stories of abuse, rape, and murder at the Dozier School for Boys.

<sup>177</sup> See Roberts, *supra* note 97, at 26–27, 27 nn.148–56 (discussing the origin and logic of today's policing of Black communities in slavery and the Black Codes).

<sup>178</sup> *Id.* at 27. Roberts writes: "Law enforcement continues to enforce the logic of slave patrols, to view black people as a threat to the security of propertied whites, and to contain the possibility of black rebellion." *Id.*

<sup>179</sup> I have written before of how this political practice of organizing, resistance, and protest articulates and narrates the multiple injuries of white supremacy. See Lawrence, *Passing and Trespassing*, *supra* note 24, at 28–29.

speak to someone in authority, and at the completion of the dean's phone conversation she and her friend are released (p. 106).<sup>180</sup>

Eberhardt follows this story with findings from several studies and an interview with John Burris, an attorney who has been both a prosecutor and defense counsel, that demonstrate her experience was not exceptional, save perhaps in its "John Harvard to the rescue" ending (pp. 101–06). She highlights the extensive and methodologically sophisticated research that has documented the racially disproportionate impacts of policing and incarceration (pp. 107–10, 112–18), concluding with a story of how she and her colleagues lent their expertise to a successful legal intervention aimed at addressing racial disparities in the carceral state (p. 119). In 2012, they had conducted a study concluding that "[t]he blacker the prisons, the more punitive the public was willing to be" in sentencing laws (p. 119). Thus, when supporters of an initiative to reform California's three-strikes sentencing law put it on the ballot, "the policy change was framed in terms of saving taxpayers money and being smart on crime" (p. 119).<sup>181</sup>

At the close of the Chapter, in a section titled "The Deathworthy," Eberhardt makes her first, and I believe only, direct reference to a U.S. Supreme Court decision, *McCleskey v. Kemp*<sup>182</sup> (p. 131). Warren McCleskey argued that his death sentence violated the Eighth and Fourteenth Amendments because Georgia's capital punishment was administered in a racially discriminatory manner.<sup>183</sup> In support of his claim he presented a sophisticated statistical study done by three social scientists, the "Baldus Study."<sup>184</sup> The study's analysis of more than 2000 murder cases found that defendants convicted of killing whites were more than four times as likely to receive the death penalty as defendants convicted of killing Blacks, and that Black defendants accused of killing whites had the highest risk of receiving the death penalty.<sup>185</sup>

Eberhardt describes her own study, one that builds on and further validates the Baldus Study. Using photographs from Professor David Baldus's database of black men convicted of crime, she assembled groups of people and asked them to rate each photograph on how "stereotypically black" the face appeared (p. 129). Then she applied their

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<sup>180</sup> This story will be easily recognized by Black professionals who have been granted access to white institutions that possess privilege and power — the initial startling recognition that despite your Ph.D. you are still perceived and treated as Black, the reconnection with your community, the understanding that your only protection is your connection to white power.

<sup>181</sup> This intervention, like the one in the story about the neighbors' app, seeks to manage the bias rather than confronting or changing it. Rather than change the voters' racial bias, the initiative campaign manipulates the cognitive categorization processing machine so that it does not see the Black faces who are in prison, thereby producing a nonracist outcome despite the voters' racism.

<sup>182</sup> 481 U.S. 279 (1987).

<sup>183</sup> *Id.* at 286.

<sup>184</sup> *Id.* The Court noted that the "study" was actually two studies, but it went on to read their findings as a single study. *See id.*

<sup>185</sup> *Id.* at 286–87.

ratings to the photographs and examined the sentences those defendants received (p. 129). She found that, where the victim was white, “looking ‘more black’ more than doubled [a defendant’s] chances of being sentenced to death, even though [she] controlled for factors like the severity of the crime, aggravating circumstances, mitigating circumstances, the defendant’s socioeconomic class, and the defendant’s perceived attractiveness” (p. 130).

It is more than ironic that Eberhardt introduces *McCleskey* to suggest that the science of implicit bias can inform the law and advance the project of racial justice when *McCleskey* stands as perhaps the foremost example of the Court’s refusal to see and acknowledge evidence of racism, even when that evidence is buttressed by the most advanced, rigorous, and definitive science. The Court rejected McCleskey’s equal protection challenge and held that absent proof of discriminatory purpose statistical evidence was irrelevant to the constitutionality of McCleskey’s sentence.<sup>186</sup> Although Justice Powell, writing for the majority, assumed the validity of the plaintiff’s regression analysis demonstrating the statistical disparity could be explained by no other factor than racial bias,<sup>187</sup> the Court nonetheless denied that it could see racism at work. “[W]e decline to assume that what is unexplained is invidious,” said Justice Powell.<sup>188</sup> In *Davis*, Justice White argued that the Court must require intent because it *cannot* tell when discriminatory impact is caused by racial bias.<sup>189</sup> In *McCleskey* the Court simply “*decline[d]*” to do so.<sup>190</sup> “There is . . . some risk of racial prejudice influencing a jury’s decision in a criminal case,” said the Court; “[t]he question ‘is at what point that risk becomes constitutionally unacceptable.’”<sup>191</sup>

Justice Powell makes clear why the Court strikes the balance of risk where it does. He writes, “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”<sup>192</sup> Professor Dorothy Roberts echoes Justice Brennan’s dissent, calling this reasoning “Fear of Too Much Justice.”<sup>193</sup> The Court knows that the continued presence of structural racism in the criminal justice system and throughout society have created such stark racial disparities that, if proof of disparate racial impact sufficed to prove a constitutional violation, nearly all aspects of criminal

<sup>186</sup> See *id.* at 294–97.

<sup>187</sup> *Id.* at 291 n.7.

<sup>188</sup> *Id.* at 313.

<sup>189</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>190</sup> *McCleskey*, 481 U.S. at 313 (emphasis added).

<sup>191</sup> *Id.* at 308–09 (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)).

<sup>192</sup> *Id.* at 314–15.

<sup>193</sup> Roberts, *supra* note 97, at 90, see also *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

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punishment, public education, and social welfare law might be challenged as unconstitutional.

Eberhardt accounts for Justice Powell's holding in *McCleskey* by quoting Justice Powell's claim that "disparities in sentencing are an inevitable part of our criminal justice system" (p. 131).<sup>194</sup> She notes that his ruling "came under heavy criticism from legal scholars and civil rights activists; it was even called 'the Dred Scott decision of our time'" (p. 131).<sup>195</sup> She closes the chapter by reporting that, after he retired, Justice Powell would call his decision in this case "the only Court ruling that he ever regretted" (p. 131).

The implication here that perhaps Justice Powell might have changed his mind, might have recognized the racism present in *McCleskey*'s death sentence, if only he knew and understood what the research from implicit bias could teach, comports with the science story's belief or hope that the enlightenment and authority of science can help us change our *nomos*. But the implicit bias story also concurs with and affirms the *McCleskey* Court's denial story. By offering new evidence of what happens in each prosecutor's or juror's brain, it accepts the Court's assertion that the harm that denies equality happens only when individual motivation and causation are proved. We do not all produce the harm and therefore are not all responsible for its remedy. The offer to prove implicit bias also confirms the lie that says we cannot already see what is clearly there. In *McCleskey*, the Court's lie, its claim it cannot see racism, is intentional. It is quite aware of the presence of racism in the administration of Georgia's death penalty statute. Although the Baldus Study and the dissent made this racism clear, the Justices in the majority have chosen not to act on it because this would require "too much justice."

Most importantly, the science story assents to the law's story's premise that the substantive meaning of the Fourteenth Amendment requires no disestablishment of slavery, that the Constitution does not require collective disestablishing of the structure and ideology of white supremacy and embracing of humanity over property. The science story participates in denying the facts of our racism, assuming we have already embraced the value of human equality. These two lies are twins that

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<sup>194</sup> The author quotes *McCleskey*, 481 U.S. at 312 (majority opinion).

<sup>195</sup> The author quotes Anthony G. Amsterdam, Address at Columbia University (2007). I had not heard of *McCleskey* being called "the Dred Scott of our time" before this. If anything, it might be considered the polar opposite of *Scott*. Where *Scott* told the truth about our Constitution's commitment to white supremacy and made evident the clash of values that resulted in the abolition amendments, *McCleskey* denies our continuing racism to disguise the need for us to continue this battle for those abolitionist values.

depend on and cannot be separated from one another. They live together at the core of the anti-abolitionist narrative.<sup>196</sup>

B. “A Girl Like Me”: A Black Girl Revisits Dr. Clark’s Doll Test to Tell a Different Story

When I teach *Brown v. Board of Education*, I introduce the case with a clip from a video titled “A Girl Like Me.”<sup>197</sup> The film is a short documentary made in 2005 by Kiri Davis, a young teenage Black girl from the Bronx. In the clip I show from the film, the filmmaker introduces Clark with a slide depicting a well-known photograph of Clark and a young Black child taken as he was conducting the doll experiment cited by the court in *Brown*.<sup>198</sup> The filmmaker says, “In *Brown v. Board of Education*, the famous case that desegregated schools in the 1950s, Dr. Kenneth Clark conducted a doll test with Black children. . . . I decided to re-conduct this test, as Dr. Clark did, to see how we’ve progressed since then.”<sup>199</sup>

In the minute that follows, we watch several very young Black girls and boys (perhaps four or five years old) sitting behind a desk with a white doll and a Black doll on it.<sup>200</sup> The scene is framed so we see the desk, and the dolls and the child behind the desk. We have a clear and intimate view of each child’s body language, facial expressions, and how the child handles, holds, and looks at the doll. The filmmaker is off camera and we just hear her voice as she asks them questions. We watch as eleven different well-dressed, carefully coiffed and groomed children answer the filmmaker’s questions. The filmmaker edits the film with quick clips of each child so that we see only the first nine children responding to her first question.

Q: “Can you show me the doll that you like best or that you like to play with?”

Each of the children listens carefully and looks at both of the dolls as if giving the question serious consideration, but all of them respond quite quickly and with great assurance, by either pointing to the doll of her or his choice or picking the doll up. All but one of the children choose the white doll.

The penultimate child who appears is a little boy. The filmmaker asks him:

Q: “And can you show me the doll that is the nice doll?”

<sup>196</sup> See Roberts, *supra* note 97, at 70–71 (defending an abolitionist reading of the Reconstruction Amendments); *id.* at 80 (criticizing the “delusion of baseline racial equality”).

<sup>197</sup> Mediathatmatters, *A Girl Like Me*, YOUTUBE (May 4, 2007), <https://www.youtube.com/watch?v=YWyI7YhIGg> [https://perma.cc/9DC8-ULMR].

<sup>198</sup> *Id.* at 3:22.

<sup>199</sup> *Id.* Clark’s wife, Dr. Mamie Clark, also participated in conducting the experiment. Kenneth B. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341 (1950).

<sup>200</sup> Mediathatmatters, *supra* note 197 at 3:50.

The boy picks up the white doll.

Q: "And why is that the nice doll?"

He turns the doll around to look at its face and then says, "She's white." He's smiling as he says this.

The last child who appears on screen is a little girl. She is very pretty in a pink sweatshirt with her hair in tight braids pulled up to the top of her head. She has a very serious demeanor, as if she knows what she is doing is important. As she is asked each question, she looks at the two dolls on the desk, considering her answer, and then reaches out and picks up one of the dolls to indicate her answer to the question.

Q: "Can you show me the doll that you like best or that you like to play with?"

The little girl picks up the white doll and holds it up in front of her facing the camera.

Q: "And, can you show me the doll that looks bad?"

The little girl puts the white doll down on the desk and picks up the Black doll and holds it in front of her facing the camera. She holds it there for a couple of seconds and slowly puts it back on the desk as the filmmaker asks the next question.

Q: "And can you give . . . And why does that look bad?"

A: "Because it's Black."

Q: "And why do you think that's a nice doll?"

A: "Because she's white."

The little girl answers the last two questions looking straight into the camera. She answers with a firm definitive voice as if she is stating a fact rather than giving her opinion.

Q: "And, can you give me the doll that looks like you?"

The little girl, still staring straight ahead, almost as if she is lost in her thoughts, first momentarily looks at the Black doll, then reaches out with her left hand and picks up the white doll. She looks the white doll in the face and then stops, as if she suddenly realizes that this "nice" doll that she likes does not look like her. She slowly puts the white doll down and slowly pushes the Black doll forward on the desk toward the camera without ever picking it up.

Each time I watch this scene I experience the pain that a parent feels when he watches his child suffer hurt or humiliation. I know I am re-experiencing my own childhood injury, my own humiliation as my kindergarten classmates laughed at Little Black Sambo and at me.<sup>201</sup> Each

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<sup>201</sup> The prologue to *The Id, the Ego, and Equal Protection* begins with the following description of my experience as a kindergartener at a predominantly white private school in New York:

It is circle time in the five-year[-]old group, and the teacher is reading us a book. As she reads, she passes the book around the circle so that each of us can see the illustrations. The book's title is *Little Black Sambo*. Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a



time I show the film to a new class I can see in their faces that they too see the hurt in this little girl's eyes as she realizes she must choose the Black doll, the bad doll, because this is the doll who truly looks like her.

When we have finished watching this two-minute clip of film and before we turn to the Court's opinion in *Brown*, I ask the class to describe the injury that they have just witnessed in their own words. How would we tell someone else or a court what is right or wrong about what is happening to this child? As in, "It's just wrong that this little girl . . . (complete the sentence)."<sup>202</sup> What value expressed in the Constitution does this wrong violate? Where does the injury come from? Or, what has done the injury, and who should be responsible for making it right, for its remedy?<sup>203</sup> Only when we have tried our best to articulate our own answers to these questions do we turn to the Court's opinion in *Brown* to ask how the Justices have answered each one of them. And then I have a final question. If the Court's answers in *Brown* were satisfactory, why is this little girl in the Bronx, over fifty years after *Brown* declared segregation unconstitutional, suffering from the same injury as the children that Clark identified in 1950?<sup>204</sup>

I show this film and ask these questions because the scene that reenacts Clark's experiment is a cultural text that we can read and interpret to ask whether these children have been injured and whether our Constitution holds us collectively responsible for the cure or remediation of that injury. This scene tells a story about the world we live in.<sup>205</sup> It describes our *nomos*, even as Chief Justice Taney's opinion in *Scott* described our country's *nomos* in 1857. The discomfort we feel when we watch this scene reminds us of our aspirational *nomos*, of whom we would like to be. The story told by this scene confronts us with the truth of our continuing racism and alerts us to the tension or contradiction between the still vital structural

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tiger chasing him. He is very black and has a minstrel's white mouth. His hair is tied up in many pigtailed, each pigtail tied with a different color ribbon. I have seen the picture before the book reaches my place in the circle. I have heard the teacher read the "comical" text describing Sambo's plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. I do not have the words to articulate my feelings — words like "stereotype" and "stigma" that might help cathart the shame and place it outside of me where it began. But I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story — that my classmates are laughing at me as well as at him. I wish I could laugh along with my friends. I wish I could disappear.

Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 317.

<sup>202</sup> Cf. Peter Gabel, *Founding Father Knows Best: A Response to Tushnet*, 36 BUFF. L. REV. 227, 228 (1987) (describing the deconstructionist view that "a legal argument is simply an opinion about right and wrong dressed up in an elite, technical discourse").

<sup>203</sup> My own best effort to answer these questions is found in *Forbidden Conversations*. See Lawrence, *Forbidden Conversations*, *supra* note 30, at 1377-78.

<sup>204</sup> See Clark & Clark, *supra* note 199, at 349-50.

<sup>205</sup> Only a story about the world these children live in, a story that is still the dominant, authoritative, and most widely told narrative, could produce this injury.

and ideological conditions of racism and the antiracist values that the Constitution, as amended by the Thirteenth, Fourteenth, and Fifteenth Amendments, calls upon us to achieve.<sup>206</sup>

The young filmmaker who reenacts Clark's science experiment tells us she is reconducting Clark's experiment to see "how we've progressed" since *Brown*. But what we see and hear, as we watch this reenactment, is not the science story. What we learn is not the behavioralists' lesson that explains the process of cognition that takes place inside each child's brain or in the brains of individuals who may have intentionally or unintentionally hurt them. This scene's story does not find the cause of segregation's injury in an error of faulty cognitive categorization that leads this little girl to value the Black doll, and thus herself, less than the white. Rather it answers the young filmmaker's question "How have we progressed?" with an emphatic "*We* are still racists." Her film answers a question about our nation, about the world, about *us*. Her story challenges and talks back<sup>207</sup> to the law's story and the science story that conspire to deny our collective racism and proclaim our innocence.

DuVernay and the young filmmaker, Davis, join the abolitionist narrative, a freedom song sung from before the nation and the Constitution were conceived, in the self-liberating defiance of slavery by Blacks who ran away by the thousands,<sup>208</sup> in the autobiographies of Frederick Douglass and the larger body of literature of the Black slave writing that gave "testimony of [the] defilement" of slavery and of their own membership in the human community,<sup>209</sup> in the voices of the newly emancipated Black community during Reconstruction,<sup>210</sup> in the sit-ins, voter registration, and community organizing of the young people whom historian Howard Zinn called "The New Abolitionists,"<sup>211</sup> in the Black

<sup>206</sup> Cover advances a related proposition. Cover, *supra* note 1, at 9–10 ("A *nomos* is a present world constituted by a system of tension between reality and vision. Our visions hold our reality up to us as unredeemed. . . . And law is that which holds our reality apart from our visions. . . . It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'").

<sup>207</sup> See generally BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989).

<sup>208</sup> Professor Vincent Harding calls this defiance "the measure of the mainstream of black struggle." VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 115 (1981).

<sup>209</sup> See Lawrence, *Passing and Trespassing*, *supra* note 24, at 10 (quoting HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* 128 (1988)).

<sup>210</sup> See Lawrence, *The Fire this Time*, *supra* note 14, at 389–90. See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Free Press 1998) (1935); FONER, *supra* note 97.

<sup>211</sup> See Lawrence, *The Fire this Time*, *supra* note 14, at 390–92 (citing HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* (1964)); see also MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1982*, at 1 (1984); Clayborne Carson, Jr., *Toward Freedom and Community: The Evolution of Ideas in the Student Nonviolent Coordinating Committee, 1960–1966*, at 22 (1975) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with the Harvard Law School Library).

power movement and urban rebellions of the 1960s and '70s,<sup>212</sup> and in today's young people's justice movement that has taken the name Black Lives Matter.<sup>213</sup> The stories these people's movements tell with their voices, their bodies, and their lives challenge and disrupt racist structures and institutions and contest the narratives of racial subordination. They call for transformative law that redistributes privilege, that says there is no such thing as "too much justice." They tell a normative story that calls us to be our best selves, that requires us to choose between right and wrong, and that makes us all responsible for healing this nation's sickness. The abolitionist story links *Brown* with *McCleskey*. The Exonerated Five were denied justice long before they joined that fateful exuberant parade in the park, long before their arrest, prosecution, and incarceration in a criminal system designed to reproduce slavery.

*C. Mirrors as Metaphor: Uncovering or Covering Our Racism*

In her introduction, Eberhardt employs the metaphor of looking in a mirror to capture how understanding the influence of implicit racial bias can help us in the project of achieving racial justice: "Confronting implicit bias requires us to look in the mirror[,] . . . requires us to stare into our own eyes . . ." (p. 7). When I first read that sentence, I assumed she was alluding to James Baldwin, who so eloquently used this metaphor to capture how the sickness of America's white supremacy is prolonged and propagated by denial:

[A] vast amount of the energy that goes into what we call the Negro problem is produced by the white man's profound desire not to be judged by those who are not white, not to be seen as he is, and at the same time a vast amount of the white anguish is rooted in the white man's equally profound need to be seen as he is, to be released from the tyranny of his mirror. All of us know, whether or not we are able to admit it, that mirrors can only lie, that death by drowning is all that awaits one there. It is for this reason that love is so desperately sought and so cunningly avoided. Love takes off the masks that we fear we cannot live without and know we cannot live within.<sup>214</sup>

When I returned to Eberhardt's words, however, I discovered what seemed to me a somewhat different meaning. Eberhardt's mirror is a mirror that forces the individual to see one's own hidden, unconscious bias, "to stare into our own eyes" (p. 7). Here the mirror reveals our bias. It uncovers the hidden racism in each of us, and as each one of us uncovers our racism, we will see that this is not the nonracist person we intend to be, that our cognitive processing machine has distorted the way we see others. This metaphor of the mirror that allows us to see how our brains work to distort perception falls clearly within what I have called the science story.

<sup>212</sup> See Lawrence, *The Fire this Time*, *supra* note 14, at 393–96.

<sup>213</sup> See *id.* at 386 n.15.

<sup>214</sup> JAMES BALDWIN, *THE FIRE NEXT TIME* 128 (1963).

Baldwin's mirror suggests a very different meaning and understanding of America's sickness and the project of justice. His mirror hides rather than reveals. The mirror imposes a "tyranny." The white man looks in the mirror because of his "desire not to be judged by those who are not white, not to be seen as he is."<sup>215</sup> And Baldwin's mirror reflects the collective white America: the mirror is metaphor for white America's collective denial of its history and that history's still-vital legacy.

The law is the helpmate of the mirror's tyranny. Again and again the law repeats the story of our innocence. In this way the law stands as the chief co-conspirator in the crime. The abolitionist's story shouts out to us to turn away from the mirror. It calls on "the people" to take off the mask, to see clearly, and to know our continuing complicity in the destruction of human lives.

### CONCLUSION

I close this Review where I began, at President Trump's rally watching his ecstatic ritual of call-and-response with the crowd: "SEND HER BACK! SEND HER BACK!"<sup>216</sup> What I see in this cultural text is a country made sick by the disease of racism. What I hear in the crowd's response to President Trump's call to make America great again by sending a Black woman back to the uncivilized place and people she came from is that American freedom requires the unfreedom of Black people. Their call for the expulsion of a Black woman from the country is not primarily about punishing her, or even punishing all Black people or all immigrants. Rather, they require her expulsion to make them more American, more human, more free. Our country's establishment and Constitution committed the nation to slavery as its economic means of freedom from British rule. American freedom, meaning white freedom, relied on the unfreedom of Blacks.<sup>217</sup> This meaning of American freedom is the legacy, the material, and the psychological residue of a

<sup>215</sup> *Id.*

<sup>216</sup> *Trump Rally*, *supra* note 2, at 6:24.

<sup>217</sup> This was the central lesson of *Dred Scott v. Sandford*: property ownership, including the ownership of Black human beings, was essential to the liberty of white human beings. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451–52 (1857). Chief Justice Taney's truthful account of how Blacks were not citizens, not part of "this people," *id.* at 404, described the story that white America told itself to justify the property ownership of other human beings that they believed was required for their liberty. See ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 19–20 (2d ed. 1994); Sven Beckert & Seth Rockman, *Introduction* to *SLAVERY'S CAPITALISM* 1, 1 (Sven Beckert & Seth Rockman eds., 2016); Lawrence, *The Fire this Time*, *supra* note 14, at 388; Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://nyti.ms/2H59Iow> [<https://perma.cc/UUA7-MQDA>]; Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://nyti.ms/2H63ygp> [<https://perma.cc/97DW-XUM6>].

history that shaped this country's character and identity.<sup>218</sup> This race-baiting rally is evidence of a country's illness, of a mass psychosis that causes people to believe that their freedom requires dehumanization of others, that makes them vulnerable to President Trump's specious promise that their personhood and prosperity will come from locking children in cages<sup>219</sup> and building walls to keep brown people out.<sup>220</sup>

When I first wrote of unconscious racism and called for the law to think of racism as both a disease and a crime,<sup>221</sup> I was referring to this mass psychosis, to a disease that infects and lives within the nation. This is not a disease that is understood by examining the way that each of our brains functions to sort data into categories that make sense. It is an illness that arises out of the injury and trauma of the Middle Passage, the slave plantation, the Black Codes, lynching, and segregation. It is a malignancy expressed in the genocide of indigenous Americans, the incarceration of Japanese Americans, in President Trump's Muslim ban<sup>222</sup> and border wall. Collective trauma manifests intergenerationally when human beings do horrible things to one another. America's racism is an illness of the mind and spirit that afflicts all who have been party to these horrors and trauma, although the persons whom the law would call perpetrator and victim are injured in distinct and different ways. When the horror is a horror of massive proportions participated in and witnessed by an entire nation, the illness is collective.

What drew me to Freud's theory of the unconscious when I first considered law's role in the propagation of the disease of racism was Freud's insight that one cannot heal traumatic psychological injury that is hidden by repression and denial until one uncovers the origins in trauma, until one admits the injury has happened. This is the lesson that guided the work of the Truth and Reconciliation Commission in

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<sup>218</sup> See MORRISON, *supra* note 20, at 48 ("What was distinctive in the New [World] was, first of all, its claim to freedom and, second, the presence of the unfree within the heart of the democratic experiment — the critical absence of democracy, its echo, shadow, and silent force in the political and intellectual activity of some not-Americans. The distinguishing features of the not-Americans were their slave status, their social status — and their color.")

<sup>219</sup> See Caitlin Dickerson, "There Is a Stench": Soiled Clothes and No Baths for Migrant Children at a Texas Center, N.Y. TIMES (June 21, 2019), <https://nyti.ms/2Iw1fEH> [<https://perma.cc/T5U3-MQD8>].

<sup>220</sup> See Manny Fernandez & Mitchell Ferman, *Under Construction in Texas: The First New Section of Border Wall*, N.Y. TIMES (Nov. 8, 2019), <https://nyti.ms/33xrP8m> [<https://perma.cc/BYY2-ZPAT>].

<sup>221</sup> See Lawrence, *Id, Ego & Equal Protection*, *supra* note 30, at 321 ("Much of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease.")

<sup>222</sup> See generally NAT'L IMMIGRATION LAW CTR., ONE YEAR AFTER THE SCOTUS RULING: UNDERSTANDING THE MUSLIM BAN AND HOW WE'LL KEEP FIGHTING IT (2019), <https://www.nilc.org/wp-content/uploads/2019/06/Impacts-of-the-Muslim-Ban-2019.pdf> [<https://perma.cc/ZH9Z-JQ8A>].

South Africa and all reparations movements.<sup>223</sup> We must know and confront our collective history because that history shapes our present circumstances. Our history shapes the material and structural racism of separate and unequal schools, of segregated ghettos, of employment discrimination, of mass incarceration, police killings, border walls, and brown children held in cages. Our history also shapes our continued infection with the ideology of white supremacy. It shapes the Trump crowd's belief that their freedom requires the nonfreedom of nonwhite Americans. This is the snake oil that President Trump sells.

The law tells a story that erases this history, that denies its legacy, that hides the trauma of the horrors we have done and still do to our fellow human beings. The law, like Baldwin's mirror, reflects only the mask that hides us from judgment, declares our innocence, and tells us that our history of horrors lives no longer. The behavioralists have done well to uncover the mechanics of how the brain processes the truths of our culture's racism. It is the content of those racist truths that causes the injury, not the miscalculations of our brains. When we hear and know the truth of the abolition story, we will know that our freedom does not require the nonfreedom of another. When we know that none will heal until all are healed, and that there is no such thing as "too much justice," we will heal our nation and make this wounded world whole.<sup>224</sup>

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<sup>223</sup> See CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 231-44 (1997); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 52-90 (1998); Eric K. Yamamoto, *Friend or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 227 (1992).

<sup>224</sup> Near the end of her brief and brilliant essay *On Causation*, Matsuda writes, "I dream of a world in which every advantage I have . . . is not tied to the disadvantage of someone else. That world will come only if we stand up against inequality and harm in the world as it is now, knowing every wound upon a human heart or body as both caused by us and happening to us." Mari Matsuda, Essay, *On Causation*, 100 COLUM. L. REV. 2195, 2219-20 (2000).