THE 911 COVENANT: POLICING BLACK BODIES IN WHITE SPACES AND THE LIMITS OF IMPLICIT BIAS AS A TOOL OF RACIAL JUSTICE

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INTRODUCTION

We tell ourselves many stories about race and racism. There are the stories of explicit racists: the tiki-torch Nazis in Charlottesville, the KKK, and the tweets of Roseanne Barr. These we find easy to condemn (President Trump, of course, being a notable exception). While abhorring such conduct, we simultaneously take comfort in our belief that these hateful racists are outliers, antediluvian throwbacks to the era of Jim Crow, anomalous exceptions to society's broad consensus on the importance of racial equality. But how are we to make sense of broader patterns of pervasive disparate treatment of people of color as evidenced by statistics of police brutality and persistent housing and employment discrimination? Here the stories we tell ourselves are more complex and contested. Is it structural racism? A few bad eggs? Or is it pervasive implicit

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bias? Perhaps a bit of each?

In the spring of 2018, we witnessed two high-profile events that have become emblematic of alternative strategies for conceptualizing and addressing issues of racial justice in our country. First came the well-publicized video of the Starbucks "incident" where two black men were arrested for trespassing while waiting for a third person to show up.[1] Then came the infamous tweet by actress Roseanne Barr about Valerie Jarrett, an advisor to President Obama.[2] Starbucks responded to its incident by closing all its stores in the U.S. for an afternoon of diversity training on issues of implicit bias;[3] meanwhile, ABC cancelled the reboot of Roseanne's sitcom, citing her racist tweet as beyond the pale.[4]

Each response was essentially a corporate effort at public relations damage control, but they also point to two very different approaches to dealing with such issues. One, Starbucks, chose the frame of implicit bias and diversity training to try to help their workers become better versions of themselves. The other, ABC, chose the frame of racism and actually held Roseanne accountable for her actions.

There are thus two frames for addressing racial injustice before us: implicit bias and racism. They are not mutually exclusive, nor are they strictly dichotomous. Indeed, it might be more productive to think of many racially charged attitudes and actions as existing on a spectrum between unconscious implicit bias and deliberate explicit racism. Nonetheless, an excessive focus on implicit bias has led to an underappreciation of the persisting reality and significance of racism in all its manifestations. With the rise of the Black Lives Matter movement and the proliferation of viral videos displaying repeated incidents of egregious race-based misconduct, both by the police and by those who call them, the (white) populace at large is increasingly coming to recognize that explicit, blatant racism remains prevalent. The election of Donald Trump to the presidency has only accelerated and intensified this trend.

Over the past decade, the idea of "implicit bias" has emerged as something of a master narrative for making sense of race and racism in American society. This Article considers how the narrative, while well-intentioned, might in some ways hinder the pursuit of racial justice. I argue that we need to develop a much more explicit and direct engagement with the narrative of persistent racism if

1. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N. Y. TIMES (Apr.15, 2018), http://perma.cc/EQ47-R33E (archived Jan. 16, 2019).

2. John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N. Y. TIMES (May 29, 2018), https://perma.cc/N8CG-YFZE (archived Jan. 16, 2019).

3. Rachel Abrams, *Starbucks to Close 8,000 U.S. Stores for Racial-Bias Training After Arrests*, N.Y. TIMES (Apr. 17, 2018), https://perma.cc/W63S-YKXC] (archived Jan. 16, 2019).

4. Koblin, *supra* note 2.

we hope to make further progress toward racial justice. Part I begins with a brief overview of certain key aspects of the story implicit bias tells us about the nature of racism in society today and some of its limitations. Part II considers how the responses to the Starbucks and Roseanne Barr incidents may be presenting us with a social inflection point for adopting a more direct and explicit method of engaging with issues of explicit racism in society today. Part III argues that this social inflection point needs to be accompanied by a legal inflection point that allows us to reconsider how agents of the state may be complicit in giving force and effect to private racial biases in ways that violate constitutional principles articulated in cases such as *Shelley v. Kraemer* and *Palmore v. Sidoti*. Part IV examines in greater detail the specific phenomenon of white people calling 911 on people of color to police the boundaries of "white" public spaces. I argue that such calls and the subsequent police responses amount to a new sort of racially restrictive covenant—a 911 covenant—through which agents of the state are engaged in creating and enforcing racialized boundaries to public spaces in a manner that violates constitutional guarantees of equal protection. This Article concludes that dismantling this covenant can be a critical way to begin holding people accountable for racist actions and confront our ongoing complicity in larger structural perpetuations of racial injustice.

I. THE NARRATIVE OF IMPLICIT BIAS

Over the past several decades the concept of implicit bias has emerged as a master narrative for talking about race relations in the United States.[5] It even played a prominent role in the 2016 presidential election, where, in response to a question about race and policing, candidate Hillary Clinton declared "I think implicit bias is a problem for everyone, not just police."[6] Clinton's response is thus emblematic of a larger social tendency to invoke implicit bias as a primary frame for discussing issues of racial justice.[7] Her statement, of course, is not an extended disquisition on the difference between implicit bias and explicit racism. But as a reflexive response to a question about the pervasive problem of

5. For an extended discussion of these issues, see generally JONATHAN KAHN, RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE 41-63 (2017).

6. Aaron Blake, *The First Trump-Clinton Presidential Debate Transcript, Annotated*, WASH. POST, (Sept. 26, 2016), https://perma.cc/CR23-RHAD (archived Jan. 29, 2019).

7. Note that even as Clinton famously characterized some of Trump's supporters as a "basket of deplorables," she was careful to specify that "they are not America." *See* Katie Reilly, *Read Hillary Clinton's "Basket of Deplorables" Remarks About Donald Trump Supporters*, TIME (Sept. 6, 2016), https://perma.cc/65XH-V39L (archived Jan. 16, 2019). In this way, she echoed and reinforced a common trope in research on implicit bias, namely, that explicit racism is marginal, distinct, and separate from the "real" America. *See infra* text accompanying notes 24-27.

state-sanctioned use of force on black bodies, it serves as a useful heuristic for examining how implicit bias has become something of a default narrative for characterizing such issues.

There is a lot going on in Clinton's one sentence. First, there is an important acknowledgement of a very real problem—implicit bias. Second, there is the construction of this problem as pervasive, affecting us all, not just the police. Third, there is the implicit (as it were) characterization of contemporary problems of racial justice as primarily a function of implicit bias. Each point of these three points contains a different—and important—story.

A. What is Implicit Bias?

First, just what is "implicit bias"? Generally speaking, it is a concept developed by psychologists to describe attitudes that are beyond our conscious awareness or control. In contrast to the explicit racism exemplified by the Charlottesville marchers, implicit bias is a problem of cognitive "mind bugs" and unconscious stereotypes. We manifest implicit bias without necessarily knowing it—through averting our eyes, or smiling less at a person of color.[8]

More perniciously, implicit bias can be manifest in a police officer who thinks a twelve-year-old African American boy is really a twenty-year-old "thug"; a teacher who thinks an overactive white child in second grade is "rambunctious" but a similar black child is "aggressive"; or an employer who thinks a black job candidate does not give off the right "vibe" and so may not be the best person for the job.[9]

Over the past twenty years, a strain of legal scholarship and advocacy has emerged which invokes findings in the psychology and neuroscience of implicit social cognition (ISC) to argue that while *explicit* intent or bias may be difficult to identify, *implicit* intent or bias remains pervasive and deeply salient in society to an extent that both supports findings of discrimination and justifies taking affirmative action to redress resulting racial inequities.[10] Many of those adopting this approach refer to themselves as "behavioral realists"[11]—"behavioral"

8. Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 13, 17 (Eldar Shafir ed., 2013).

9. For further examples of how implicit bias can manifest, see MAHZARIN BANAJI & ANTHONY GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 189-209 (2018).

10. For a foundational article discussing the distinction between explicit and implicit intent, see Anthony. G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (Jan. 1995).

11. In 2006 the California Law Review published a useful compendium of articles in its *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (July 2006). Particularly useful explications of the idea of behavioral realism can be found in Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate*

because they are primarily looking at the cognitive foundations of individual attitudes; "realists" because they are grounding their work in rigorous empirical methods and quantitative measurement.

As the term "implicit" indicates, the science of ISC purports to examine mental processes that function without the subject's "conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups."[12] More specifically, with respect to intergroup bias, ISC theory argues that "cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping."[13] Stereotyping by itself is nothing special. Categorizing observed phenomena is part of how we make sense of the world. Nonetheless, such stereotypes fundamentally affect judgments and decision-making about different groups. A key point here for behavioral realists is that such biases are cognitive rather than motivational. That is, they occur "beyond the reach of decision-maker self-awareness."[14] Thus, unlike explicit attitudes or biases, they are "'introspectively unidentified' [and] . . . . triggered automatically, often without awareness."[15] For those concerned with racial justice, problems arise not from the stereotypes themselves but from the ways in which they become layered with positive or negative valences.[16]

As leading behavioral realist Jerry Kang has argued, ISC research demonstrates that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities. These implicit biases, however, are not well reflected in explicit self-reported measures. This dissociation arises not merely because we want to sound unprejudiced. Even when we are honest, we simply lack introspective insight. Finally, and most importantly, these implicit biases have real-world consequences.[17]

Treatment, 94 CAL. L. REV. 997 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1064 (2006); *see also* Jerry Kang & Kristin Lane, *Seeing Through Color Blindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

12. Kang & Banaji, *Fair Measures*, *supra* note 11, at 1064.

13. Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

14. *Id.* at 1188.

15. Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCH. SCI. 164, 164-65 (2006) (quoting Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 8 (1995)).

16. In discussing the concept of "valence," Banaji and Greenwald note, "[w]hen categories can be linked to each other via shared goodness or badness, the shared property is what psychologists call *valence*, or emotional value." MAHZARIN BANAJI & ANTHONY GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 39 (2013).

17. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1490, 1494, 1499-508

These attitudes form the basis for the type of cognitive biases with which the law should be concerned.[18] Given the pervasiveness of such attitudes, scholars employing ISC findings argue that legal understandings of the intent standard need to be reconfigured away from an exclusive focus on explicit bias to take into account the presence, here and now, of extensive *implicit* biases shaping existing decisions, practices, and policies.[19]

Implicit bias is real. But, as mentioned above, we have all sorts of implicit biases. Studies show people are biased against short people, old people, female people—in other words, all sorts of people, not only people of color. In this literature, implicit racial bias becomes just one among a panoply of biases. A primary focus on implicit bias thus tends to obscure the distinctive place of racism in this country that differentiates it from these other biases. Indeed, implicit bias frequently distracts us from the persistent reality of explicit racism in this country. To the extent that we embrace implicit bias as the primary problem "non-racists" should be concerned with, it undermines our ability to band together as citizens to fight for broader racial justice. The narrative of implicit bias tends to erase the reality of conscious racism.

How do we know about all these implicit biases if they are beyond our conscious awareness? Implicit bias is a distinctively scientific concept. It is defined, identified, measured, and addressed by social psychology and cognitive neuroscience experts. The most common test of implicit bias is known as the Implicit Association Test (IAT), which millions of people have taken online. It works by taking images from any paired set of categories (black/white, male/female, young/old, etc.) and seeing how quickly a person can associate images from each category with positive or negative images or words (e.g., good/bad, kitten/cobra, pleasure/pain, etc.). For a race IAT, the test-taker typically sits at a computer while images of black or white faces are flashed on the screen and paired with positive or negative concepts. For the first pass through the test you might press the "E" on your keyboard with your left finger every time you see a white face or good concept, or hit the "I" key with your right finger every time you see a black face or a bad concept. Then the test is flipped and you try to match white with bad and black with good. The test measures your response time down to the millisecond. The underlying idea is that the test measures the strength of your unconscious associations of good or bad concepts with white or black faces by capturing your response before you have time to think. For example, if it takes you on average a few milliseconds longer to associate black faces with positive things (or less to associate black faces with bad things) then you are said to have an implicit bias against blacks. While the

(2005).

18. Krieger, *supra* note 13, at 1174-76.

19. Kang, *supra* note 17, at 1499-500; Kang & Banaji, *Fair Measures*, *supra* note 11.

science behind these tests has been subject to some dispute, the tests and related approaches to measuring implicit bias remain pervasive and influential.[20]

Unlike common sense understandings of explicit racism ("I know it when I see it"), implicit bias thus is largely under the purview of experts. It is not a subject that the average person has access to or can accurately assess on their own. As a result, implicit bias often appears to be less a political problem than a technical one, which is how Hillary Clinton framed the issue in the debate.

B. Implicit Bias is "Everyone's Problem"

Second, Clinton invoked implicit bias as a "problem for everyone, not just police."[21] Like our ready condemnation of white supremacists, this gives us too easy an out for feeling good about our stance on racism. *Everybody* has implicit biases and since we cannot consciously control these biases it feels like they are not really our fault. We do not have to feel bad about them nor do we have to make substantive concessions to address them. All we have to do is work on ourselves to make us less biased individuals.

One problem here is, if everyone is responsible, then no one can be held accountable. Turning implicit bias into a problem shared by everyone may make it less threatening and hence more palatable to the white majority, but it also reduces racist impulses to merely one among a plethora of stereotypes and biases we may hold. In this telling, there is nothing special about racial bias, it is more or less the same as other cognitive "mind bugs" we may have—like favoring tall people over short or thinking the driver of a red car is more likely to speed.

With implicit bias as the frame, it is also notable that as Clinton continued her response to the question in the debate the primary remedy she hit upon was better "training" for the police.[22] The focus on training, whether for police, employers, or society at large, makes it all about an individual and her own attitudes, not about the person suffering or experiencing the impact of discrimination.

Rather than holding people accountable for their action, the remedies for implicit bias engage us as atomized individual consumers. Like the nostrums of self-help gurus, the programs to address implicit bias largely involve experts telling individuals how to work on themselves to be the best non-biased person they can be.

How are we supposed to achieve this goal? Maybe the experts will tell us to download a screensaver that shows positive minority exemplars like Martin

20. Kahn, *supra* note 5, at 21-39.
21. *See* Blake, *supra* note 6.
22. *Id.*

Luther King, Jr. or Denzel Washington, or perhaps to have a black avatar in a video game. These are real suggestions with peer-reviewed studies behind them. I call such approaches "recreational anti-racism." There is nothing inherently wrong with them, but they allow a person to feel they are fighting racism from the comfort of a computer screen.[23] While making us feel better about ourselves, such interventions have not been shown to make much difference for the people actually subjected to implicit bias.

Diversity management, it turns out, does more to insulate businesses from lawsuits than to increase the representation of minorities in the workforce.[24] More substantively, it might involve following a checklist to ensure one does not make precipitous hiring decisions influenced by subtle unconscious biases. Most likely, it involves enrolling in some sort of diversity training class developed and perhaps implemented by the now multi-billion-dollar diversity management industry. All these remedies share in common the fact they involve individuals, as individuals, following expert prescriptions rather than engaging in a shared civic enterprise of seeking justice. But again, while making us feel better about ourselves, such interventions have not been shown to make much difference for the people actually subjected to implicit bias.[25] This is, in part, because implicit bias misses the ongoing presence in the *here and now* of the structural legacy of generations of racist policies and practices that continue to be felt in the lived experience of people of color throughout the United States.

C. Implicit Bias Marginalizes Racism

Third, glaringly absent from Clinton's response was the word "racism." By its very absence we see the concept of implicit bias coming to occupy the entire field of addressing such pervasive problems as excessive use of force by police against people of color. While purveyors of implicit bias demonstrate how it is present here and now, they largely dismiss the persistent historical legacy of racism as irrelevant. Thus, for example, in *Blind Spot*, the popular book on implicit bias, psychologists and leading ISC researchers Mahzarin Banaji and Anthony Greenwald assert, "it is a mistake to characterize modern America as racist"[26] and suggest instead that "explicit bias is infrequent; implicit bias is pervasive."[27] In other words, implicit bias is what we really need to pay atten-

23. *See, e.g.*, Kahn, *supra* note 5, at 153-65.

24. *See, e.g.*, FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 190, 190-206 (2009); Frank Dobbin et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOCIO. REV. 1014, 1035-37 (2015).

25. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, 94 HARV. BUS. REV. 52, 52-60 (2016).

26. Banaji & Greenwald, *supra* note 16, at 186.

27. *Id.* at 208.

tion to; racism, per se, is deemed marginal.

Neuroscience studies of implicit bias also marginalize the ongoing significance of explicit racism. We see a clear example of this in some statements made by psychologist and neuroscientist Elizabeth Phelps in regard to an article she wrote with Banaji and Jennifer Kubota reviewing the neuroscience of racial perception. In an interview with the journal *Nature* following the publication of the article, Phelps was asked about conducting fMRI scans on people who are overtly prejudiced. "Finding differences in people with extreme views wouldn't be too surprising," she responded, "but I'm not sure we'd see anything more than an exaggerated [emotional] response. We're more interested in 'normal' people."[28] There is a lot to unpack in these two brief sentences. First is the idea that "overt prejudice" is an "extreme view." Certainly, as Banaji and Greenwald note, egalitarian principles have been widely adopted in American laws and institutions and "now appear routinely in informal public discourse."[29] Or, as Phelps and her co-authors put it in their article, "equality norms in American society dictate that behaving in a racially biased manner is unacceptable and many individual Americans share that aspiration."[30] In this sense, one might argue that overt expressions of prejudice are "'extreme" insofar as they deviate from this public standard; but Phelps seems to be implying that such views are also rare and marginal. Second, her lack of interest in finding what she assumes would merely be an "exaggerated [emotional] response" indicates she considers such data to be relatively uninteresting and insignificant. Third, it is "normal" people who interest her; that is, she casts overt prejudice as abnormal, atypical, or, implicitly, largely a thing of the past. Thus, the normalizing of implicit bias as common and pervasive carries with it the implication that explicit bias is abnormal, uncommon, and even scientifically uninteresting.

D. Implicit Bias Consigns Racism to the Dustbin of History

The approach of behavioral realists also provides a new temporal frame, focusing not on past injustices but on the present, ongoing manifestation of implicit bias causing unfair discrimination in everyday practices.[31] This "presentist framing," they argue:

> [A]lso avoids problems with forward-looking "diversity" justifications of affirmative action. These justifications were politically attractive—arguably necessary—because we, as a society, lost political consensus on the magnitude

28. Mo Costandi, *How the Brain Views Race*, NATURE NEWS (June 26, 2012), https://perma.cc/4KE7-3D7H (archived Jan. 16, 2019).

29. Banaji & Greenwald, *supra* note 16, at 184-85.

30. Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 943 (2012).

31. Kang & Banaji, *Fair Measures, supra* note 11, at 1117.

> of bias and discrimination that persisted. With evidence from ISC, the forward-looking frame becomes optional. We do not need to argue about the empirical benefits of diversity—although we can. We do not need to explain why such real-world benefits trump the supposed moral or constitutional imperative of colorblindness—although we can. Instead, by demonstrating discrimination now, this fire can be fought with narrowly tailored fire. Put another way, color consciousness in the form of pervasive implicit bias is what requires color consciousness in the form of prevention and remedies.[32]

The implications of this reframing are both political—speaking "to the many Americans who are willing to adopt fair measures that take race and gender into account only to stop and prevent unwarranted discrimination on the basis of those very attributes"—and doctrinal, articulating how responding to the discrimination found by ISC is a compelling interest sufficient to satisfy the strict standards of review set forth in cases such as *Grutter v. Bollinger*. [33]

In this scheme, just as the tiki-torch Nazis are marginal, so too is the legacy of slavery and Jim Crow. With its focus on bias in the here and now, the frame of implicit bias largely accepts the idea that the racism of the past is irrelevant. It is a story of racial exhaustion: slavery is long gone. Jim Crow is dead. It is time to move on. Interestingly, this argument has been around as long as there have been post-slavery civil rights laws. In 1883, while striking down the Civil Rights Act of 1875, the Supreme Court declared:

> When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.[34]

As in 1883—when the passage of a mere eighteen years was deemed sufficient to eradicate the legacy of centuries of slavery—Chief Justice Roberts similarly struck down key portions of the 1965 Voting Rights Act in 2013 because "things [had] changed dramatically" since it was enacted.[35] Those resisting racial progress are always pleading some form of racial exhaustion and seeking to consign racism itself to some irrelevant past.

Racism, in short, is not some static "thing" that exists only in one particular form under all circumstances. To the contrary, as Michelle Alexander notes:

> [A]ny candid observer of American racial history must acknowledge that racism is highly adaptable. The rules and reasons the political system employs to enforce status relations of any kind, including racial hierarchy, evolve and change as they are challenged.[36]

Similarly, historian George Fredrickson has observed, "a culture of racism,

32. *Id.* at 1075-76.
33. 539 U.S. 306, 326 (2003).
34. The Civil Rights Cases, 109 U.S. 3, 25 (1883).
35. Shelby County v. Holder, 570 U.S. 529, 547 (2013).
36. *Id.* at 21.

once established, can be adapted to more than one agenda and it is difficult to eradicate."[37] It endures and adapts, as Reva Siegel has noted, through a process of "preservation-through-transformation."[38] Or as Ta-Nehisi Coates tersely puts it, "racism is never simple."[39] It seems we are ready and able to either marginalize contemporary instances of racism as aberrant or consign racism itself to the past, but, as Siegel also notes, "that which we retrospectively judge evil was once justified as reasonable."[40] *Plessy v. Ferguson*, for example, was a very popular opinion when first decided; that is, *at the time* most (white) people did not see it as racist.[41] Moreover, it is important to recognize that current Supreme Court decisions "may be rationalizing practices that perpetuate historic forms of stratification, much as *Plessy v. Ferguson* once did."[42] That some do not perceive such recent decisions as racist does not mean that the country has transcended racism anymore than it had in 1896.

We saw a particularly telling analysis (one might even say celebration) of the adaptability of racism in a 1981 statement from Republican political operative Lee Atwater, who was responsible for the infamous "Willie Horton" ad during the 1988 presidential contest between George H.W. Bush and Michael Dukakis.[43] In that interview on the Republican's "Southern Strategy" of using race to court white voters in the South, Atwater observed:

> You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites . . . . "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."[44]

And so, today, a white person might answer a survey about racial attitudes stating that they believe in formal equality but are against busing or raising taxes. Behavioral realists would not see the connection to racism, only the potential implicit bias in how this person might not make eye contact with, or smile less at, a person of color.

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37. GEORGE FREDRICKSON, RACISM: A SHORT HISTORY 93 (2002).

38. Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

39. Ta-Nehisi Coates, *My President Was Black*, ATLANTIC, Jan.-Feb. 2017, https://perma.cc/LS9F-B6WV (archived Jan. 16, 2019).

40. Siegel, *supra* note 38, at 1113.

41. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 25-27 (1996).

42. *Id.* at 1148.

43. Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, NATION (Nov. 13, 2012), https://perma.cc/D2S2-6LU6 (archived Jan. 16, 2019).

44. *Id.*

Racism, in other words, is never the same from era to era. And it is not always easy to recognize its manifestations in one's own time. Moreover, just because a person does not think that what they are saying or doing is racist, does not mean it is not. Understanding this is essential to understanding the persisting influence of racism (not just implicit bias) in our society. Such a changed understanding of racism, in turn, has significant implications for the types of arguments we can make about the legal status and significance of such actions in America today.

II. A SOCIAL INFLECTION POINT?

We may, however, have reached an inflection point in our broader social understandings of the present nature of racism in this country as evidenced in the cases of Starbucks and Roseanne Barr. With the rise of social movements, such as Black Lives Matter, and the proliferation of viral videos and related news coverage, larger swaths of American society are becoming aware of the forms and shapes that racism is taking in our country today. It is not only the tiki-torch Nazis, it is #BBQBecky and #PermitPatty—everyday people engaged in everyday acts of racism.[45]

Nonetheless, the reflexive invocation of implicit bias persists in many situations—as evidenced both in Clinton's 2016 debate response, and more recently in the response of Starbucks corporate management to the widely publicized incident at one of its Philadelphia coffee shops in April 2018. In that case, as briefly recounted by a *Washington Post* article, two black men, Rashon Nelson and Donte Robinson:

> [A]rrived 10 minutes early for a business meeting at a Starbucks in the Center City neighborhood of Philadelphia and wound up leaving the location in handcuffs. Upon arriving, Nelson asked whether he could use the restroom, and was told by a white manager that the restrooms were only for paying customers.
>
> "And I just left it at that," Nelson told "Good Morning America" last month.
>
> After Nelson returned to the table where Robinson was sitting, the manager approached them to ask whether she could help get them drinks or water.
>
> Two minutes later, she called the police to report "two gentlemen in my cafe that are refusing to make a purchase or leave." Officers arrived a few minutes later. Robinson recalled thinking that "they can't be here for us."
>
> Nelson told "Good Morning America" that the police told him and Robinson that they had to leave without any discussion. They were then arrested, and

45. Jessica Guynn, *BBQ Becky, Permit Patty and Why the Internet Is Shaming White People Who Police People "Simply for Being Black*," USA TODAY (July 18, 2018), https://perma.cc/VU8T-WD6W (archived Jan. 16, 2019).

> Robinson said they were not read any rights or told why they were being arrested.
>
> Charges of trespassing and creating a disturbance were dropped that night.[46]

A video of the arrest[47] went viral, public indignation exploded, and Starbucks, to its credit, responded decisively, decrying the incident and declaring that it would be closing all its company-owned U.S. stores on May 29 for an afternoon of "racial-bias education geared toward preventing discrimination in our stores."[48]

Starbucks released the materials used in the training, including several videos, a "Team Guidebook," and a "Personal Notebook."[49] The materials are earnest and well-meaning but speak predominantly of "bias," particularly unconscious or implicit bias, and make only passing reference to racism. With the notable exception of an eight-minute documentary film by Stanley Nelson on the historical experience of racism faced by people of color in public spaces,[50] the Starbucks video and audio presentations focus primarily on the attitudes and experiences of Starbucks employees rather than on the impact of their actions on people experiencing racism. In one striking audio clip intended to provide the basis for further discussion during the training sessions, one Starbucks "partner" (i.e. employee) recounts the story of how one time "an older black man" came up to the register wanting to return a pound of coffee he had purchased but he did not have a receipt. The speaker recounted how he had often seen other white customers make similar returns without any problem (indeed he had done so himself) but noted that technically speaking, Starbucks required a receipt for such returns. Despite this, he states that "for some reason, I just really stuck to the policy and leveraged the policy as the reason why I couldn't give him money back or make an exchange without a receipt."[51]

There are several striking aspects about this brief exchange. First, is the phrase "for some reason." On the one hand, this indicates the speaker's own awareness that there was something discomforting or even improper about his

46. Rachel Siegel, *Two Black Men Arrested at Starbucks Settle with Philadelphia for $1 Each*, WASH. POST (May 3, 2018), https://perma.cc/HL2D-RJ3V (archived Jan. 16, 2019).

47. Guardian News, *Social Media Video Shows Arrests of Black Men at Philadelphia Starbucks*, YOUTUBE (Apr. 15, 2018), https://perma.cc/GKN6-KZNE (archived Jan. 29, 2019).

48. Press Release, STARBUCKS, Starbucks to Close All Stores Nationwide for Racial-Bias Education on May 29 (Apr. 17, 2018), https://perma.cc/E68A-PJQH (archived Jan. 16, 2019).

49. *The Third Place: Our Commitment, Renewed*, STARBUCKS (May 29, 2018), https://perma.cc/ECY9-RJQB (archived Jan. 16, 2019).

50. Starbucks Coffee, *Stanley Nelson—Story of Access*, YOUTUBE (May 29, 2018), https://perma.cc/4ZP3-L2YH (archived Feb. 1, 2019).

51. Starbucks Coffee, Audio recording: *Customer Tries to Return Something Without a Receipt*, YOUTUBE (May 23, 2018), https://perma.cc/LL96-SAL8 (archived Feb. 1, 2019).

behavior here, and it is perhaps laudable that he was willing to communicate this. On the other hand, this fits all too neatly into the training session's frame of implicit bias. "For some reason" implies he did not really know what he was doing, that he somehow was not consciously in control of his actions here and hence not really responsible. The "reason" is left unstated and apparently inaccessible to the speaker. This is the textbook definition of implicit bias—attitudes that are beyond our conscious grasp.

But is it really that inaccessible, or is he simply unwilling to say: "I did this because I still harbor some racist stereotypes"? And just to be clear, stereotypes are not "implicit." We all are aware of racist stereotypes; they are deliberately promulgated and have pervaded American society since white colonists first tried to rationalize slavery in the seventeenth century.[52] Just because your attitudes are informed by racist stereotypes does not make those attitudes "implicit." No one ever thinks they themselves are racist. John C. Calhoun, defending slavery on the 1830s, spoke of how the South's "peculiar institution" was actually a boon to the enslaved Africans.[53] Justice Brown, writing for the majority in *Plessy v. Ferguson* in 1896, saw nothing racist in the doctrine of separate but equal, and the decision itself was broadly popular throughout white America.[54] The white homeowners in Levittown, PA, when confronted by the prospect of residential integration in 1957, declared they were "unprejudiced and undiscriminating" in their wish to keep black people out, asserting instead that they believed that "the Negroes have an equal opportunity to build their own community of equal value and beauty without intermingling with our community."[55]

The Starbucks training scenario also provides a striking example of how discretionary enforcement of rules can lead to discriminatory outcomes. Whether a Starbucks return policy or a municipal loitering code, discretion comes with risks of abuse if there is no accountability.[56] And the primary focus of the Starbucks response was not on accountability but on providing a "learning opportunity." Following the incident, a Starbucks spokesperson announced that the "manager no longer works at that store," part of a "mutual" agreement. The spokesperson did not state, however, whether the manager had actually

52. *See, e.g.*, EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 316–338 (2003); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 31–36 (2016).

53. JOHN C. CALHOUN, THE WORKS OF JOHN C. CALHOUN 631-32 (Richard K. Cralle ed., 1856), https://perma.cc/7KLQ-RCLN.

54. *See* Klarman, *supra* note 41; *see also* Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

55. DAVID KUSHNER, LEVITTOWN: TWO FAMILIES, ONE TYCOON, AND THE FIGHT FOR CIVIL RIGHTS IN AMERICA'S LEGENDARY SUBURB 112 (2009).

56. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 104-09 (New Press rev. ed. 2012).

been fired or merely transferred to another store.[57]

In contrast, the case of Roseanne Barr provides an alterative frame for characterizing and addressing racist behavior. Reported on May 29, the same day as the Starbucks anti-bias training session, ABC cancelled Roseanne Barr's new television show after she posted a racist tweet about Valerie Jarrett, an African American woman who was a senior advisor to President Obama, in which she wrote: "muslim brotherhood & planet of the apes had a baby=vj."[58] It seemed that everybody, including ABC, had no trouble calling out this tweet as racist. No implicit bias here—though it is noteworthy that Barr, while apologizing, attempted to dilute her responsibility by blaming her racism on the sedative Ambien.[59] Beyond the patent ludicrousness of the claim (Sanofi, the manufacturer of Ambien, notably tweeted, "[w]hile all pharmaceutical treatments have side effects, racism is not a known side effect of any Sanofi medication"),[60] the appeal to the idea that she was somehow not consciously responsible for her actions clearly echoes the idea of implicit bias. Nonetheless, whether for cynical corporate public relations or more altruistic concerns about inappropriate behavior, ABC did hold Barr accountable and imposed real consequences for her actions. This is a very different model from Starbucks. It involved the exercise of power to impose consequences for racist actions in contrast to enlisting outside experts to provide training in the hope of altering attitudes.

III. A LEGAL INFLECTION POINT

Since the election of President Trump, we have seen a growing social receptiveness to the frame of racism—an acknowledgement that something more than just implicit bias continues to operate to subordinate and degrade people of color in this country.[61]

57. Emily Prive, *Philadelphia Starbucks Manager No Longer Works at Store Following Controversial Arrest of Black Men*, FORTUNE (Apr. 17, 2018), https://perma.cc/SB85-XBL3 (archived Jan. 29, 2019); *see also* Tanasia Kennedy, *Was She Fired? Folks Want to Know Exactly What Happened to Philly Starbucks Manager Who Called Cops on Black Men*, ATLANTA BLACK STAR (Apr. 17, 2018), https://perma.cc/JM8K-G5JJ (archived Jan. 29, 2019).

58. John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), https://perma.cc/CN96-4LK4 (archived Jan. 16, 2019).

59. Benedict Carey, *Why Ambien Didn't Make Roseanne Tweet Anything*, N.Y. TIMES (May 30, 2018), https://perma.cc/8XWC-DU8G (archived Jan. 16, 2019).

60. *Id*.

61. *See, e.g.*, Elis Cose, *One Year After Charlottesville, Trump Has Normalized Racism in America*, USA TODAY (Aug. 10, 2018), https://perma.cc/K9JY-EDM4 (archived Feb. 1, 2019); NAACP, *NAACP Sees Continued Rise in Hate Crimes, Legacy of Trump's Racism* (June 29, 2018), https://perma.cc/CBF8-V8F2 (archived Jan. 29, 2019); SOUTHERN POVERTY LAW CENTER, 100 DAYS IN TRUMP'S AMERICA (Apr. 27, 2017), https://perma.cc/2TY2-GAU3 (archived Jan. 29, 2019).

To match this social shift, we need to provoke a similar inflection point in the law. We need to bring the frame of explicit racism back to the fore and push for a reconceptualization of what counts both as racism and as state involvement in perpetuating, supporting, or ratifying racist beliefs and practices.

At the outset, it is important to state that racism is not an objective scientific fact that you can definitively "prove" through millisecond measurements on an IAT or by showing how parts of the brain "light up" on an fMRI scan when someone is shown a picture of a person of color. Racism is not a function of data; it is a historically and socially situated exercise of power. Recognizing racism is also an exercise of power, not a natural by-product of simply observing events. In the legal arena this has been evident at least since *Plessy v. Ferguson* where Justice Brown infamously stated:

> 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.[62]

Of course, Justice Harlan saw things very differently in his dissent, where he asserted that "[t]he arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[63]

The triumph of Justice Brown's view resulted from his exercise of power, not his evaluation of data. It is not that there was not enough objective evidence of racism for Justice Harlan to convince Justice Brown of his view. It is that Justices Brown and Harlan had fundamentally different interpretations of what constituted a "badge of servitude" or what we might today call racism. The same can be said of more recent decisions, from *McCleskey v. Kemp*[64] to *Shelby v. Holder*,[65] and now *Abbot v. Perez*.[66] In each of these cases there was voluminous data (much more so than in *Plessy*)—including statistics, legislative testimony, and historical analyses.

Behavioral realists employing the frame of implicit bias, such as Jerry Kang, may tell us that when the law diverges from "the best scientific evidence available" about the existence of bias that "the law should be changed to com-

62. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

63. *Id.* at 562 (Harlan, J., dissenting).

64. McCleskey v. Kemp, 481 U.S. 279, 279 (1987) (dismissing the significance of statistics showing racial imbalance in the imposition of the death penalty).

65. Shelby County v. Holder, 570 U.S. 529, 551 (2013) (dismissing the significance of historical data showing racial discrimination in voting laws).

66. Abbott v. Perez, 138 S. Ct. 2305, 2313 (2018) (dismissing evidence of legislative motive in upholding racial gerrymanders).

port with science."[67] But data alone is never enough. Even within the world of science, data is derived through a series of human choices and must always be interpreted. When imported into the domain of law, legal interpretation of the meaning and significance of such data becomes paramount. What informs that interpretation in these cases is not just how the judges understand scientific data but more crucially how they understand the historical and social meaning of racism. That is not a scientific question. One cannot say that Justice Brown was objectively wrong and Justice Harlan was objectively right. What we can say is that Justice Brown chose to be willfully blind to the then-present reality of racism animating Jim Crow laws,[68] just as we can say Chief Justice Roberts chose to ignore the continuing reality of racism in *Shelby County* when, in holding Section 5 of the 1965 Voting Rights Act unconstitutional, he declared that "[n]early 50 years later, things have changed dramatically."[69] The difference between majority and dissent in these cases was not a question of data but of meaning. Only by challenging present understanding of the meaning and significance of what counts as racist action and state involvement in such action can we begin to shift our discourse, both social and legal, on how to identify and address present instances of racial injustice.

A. Revisiting and Revising Jody Armour's "Reasonable Racists"

One place to begin is by revisiting Jody Armour's 1994 article, *Race* Ipsa Loquitur: *Of Reasonable Racists. Intelligent Bayesians, and Involuntary Negrophobes*.[70] In this article, Professor Armour argues, among other things, that in admitting race-based evidence in self-defense claims, courts give effect to private prejudice in violation of the Equal Protection Clause of the Fourteenth Amendment.[71] Briefly stated, Armour's basic idea is that self-defense doctrine is structured around the proposition that a person must act reasonably and honestly when using force to defend oneself. Given pervasive negative social stereotypes about black people, the typical white American—or "Reasonable Racist"—who used force in self-defense against a perceived assailant would "reasonably" believe that a black person might be prone to violence and hence pose a threat. [72] Alternatively, the "Intelligent Bayesian" might refer to a pur-

67. Jerry Kang & Mahzarin R. Banaji*, Fair Measures*, *supra* note 11.

68. *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (arguing that recent Supreme Court equal protection jurisprudence seems intentionally blind to the persistence of racial discrimination against non-whites).

69. *Shelby County*, 570 U.S. at 547.

70. Jody D. Armour, *Race* Ipsa Loquitur*: Of Reasonable Racists. Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

71. *Id.* at 781.

72. *Id.* at 787-88.

ported statistical disproportionality with which blacks commit crimes as a "rational" basis for perceiving a threat that called for the use of force.[73] The more particular case of the "Involuntary Negrophobe" involves a situation where "a typical person assaulted by a black individual could conceivably develop a pathological phobia towards *all* blacks."[74]

In each of these cases, Armour suggests, in order to credit the self-defense claims of such parties a court "must articulate and countenance explicit racial categories as in *Palmore* [*v. Sidoti*]."[75] In so doing, "the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent"—something the Court in *Palmore* found to be improper.[76] Additionally, under the rule of *Shelley v. Kraemer,* such recognition would constitute state action and thus violate the Equal Protection Clause of the Fourteenth Amendment.[77]

The cases of *Palmore*[78] and *Shelley*[79] are central to Armour's analysis. *Palmore* involved a child custody dispute between Linda Sidoti Palmore and her former husband, Anthony Sidoti, both white. In 1981 Sidoti sought custody of their child asserting that Palmore's involvement with (and subsequent marriage to) a black man, Clarence Palmore, Jr., amounted to a changed circumstance sufficient to warrant altering a prior judgement granting custody to Palmore. The gravamen of Sidoti's argument was that Palmore "has chosen for herself and for her child, a life-style unacceptable to the father and to society. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice."[80] In his opinion for the Court, Chief Justice Burger acknowledged the persisting reality of racial prejudices that might subject a child of a mixed-race couple to increased social pressure. Nonetheless, he notably held that the Court could neither countenance nor give effect to such private prejudice by taking them into account in awarding custody. "The question," he declared,

> [I]s whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. *The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.* "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deep-

73. *Id.* at 790-99.
74. *Id.* at 800.
75. *Id*. at 808 (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
76. *Id*. at 815.
77. *Id.* at 808 (citing Shelley v. Kraemer, 334 US 1 (1948)).
78. Palmore v. Sidoti, 466 U.S. 429 (1984).
79. Shelley v. Kraemer, 334 US 1 (1948).
80. *Palmore*, 466 U.S. at 430-31 (quoting the record).

ly held."[81]

Similarly, in the earlier case of *Shelley* the Court found that it could not give legal force and effect to racially restrictive housing covenants because doing so would implicate the state in violating the strictures of the Equal Protection Clause.[82] Together, these cases provide a critical framework for assessing when and how the state might become implicated in giving force and effect to private prejudices in a manner that violates the constitutional guarantee of equal protection.

Armour's 1994 analysis was well argued but was not broadly taken up. Nonetheless, it deserves to be revisited because it can be revised and updated to address the need to reorient legal doctrine away from a predominant focus on implicit bias toward a more direct engagement with racism. Indeed, among the limiting factors of Armour's analysis were its adoption of a then-nascent frame of implicit bias and its application only to claims of self-defense. Armour was trying to extend those cases to address subtler forms of stereotyping where he "explore[d] the nature of *unconscious biases*" in arguing that "equal protection doctrine mandates that the race-based evidence and legal arguments of the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe be rejected."[83] His initial insights, however, may gain renewed force if refashioned to apply within a frame of explicit racism to address such situations as the recent spate of 911 calls where police are used to enforce private racial prejudices (as in the Starbucks case). *Shelley* and *Palmore* dealt forthrightly with explicit racial prejudice and could potentially apply to a broader array of situations if we return to and extend their frame of racism.

VI. THE 911 COVENANT

Contract-based racially restrictive housing covenants proliferated during the first half of the twentieth century after the Supreme Court declared racially restrictive zoning ordinances to be unconstitutional in 1917. Such covenants turned to private law to police and maintain the boundaries of white space through residential segregation. Such covenants were explicit. In 1948, the Supreme Court forbade courts from enforcing such covenants, but the covenants themselves were not deemed illegal until the passage of the Fair Housing Act in 1968.[84] The 911 covenant similarly operates to police white space but in a more

81. *Id.* at 433 (quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971*)* (White, J., dissenting)) (emphasis added).

82. Shelley v. Kraemer, 334 US 1, 13, 23 (1948).

83. Armour, *supra* note 70, at 786 (emphasis added).

84. *1948-1968: Unenforceable Restrictive Covenants*, FAIR HOUSING CENTER OF GREATER BOSTON, https://perma.cc/BCG6-2LUM (archived Jan. 16, 2019); *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR

indirect fashion than racially restrictive housing covenants. It is grounded on the tacit understanding that white people can call 911 when they are made uncomfortable by the presence of a person of color in a particular space in which they are perceived to be "out of place." The police respond and confront the person of color, perhaps arresting them. If arrested, the court accepts the arrest as legitimate. In short, the 911 covenant allows white people to invoke the power of the state to enforce their racial animus. This is a new type of racial covenant that enforces the boundaries of white space every bit as powerfully as the housing covenants of old. It is not formally written down, but it is perhaps all the more pernicious for being tacit—and pervasive.

To return to the Starbucks case: what happened there and in other similar 911 cases (like calling the police on a black girl selling water, or a black Ph.D. student napping in a college common room, or black women playing "too slowly" on a golf course, or black people barbecuing in a park, and on and on)[85] was not implicit bias at work—it was racism. Implicit bias operates beyond the realm of consciousness awareness or control. It manifests often in subtle ways, such as averting one's eyes or leaning away from a person, in general feelings of unease or discomfort, or even, perhaps, in a readiness to mistake a wallet for a gun when it is in the hand of a black man. There is nothing unconscious about calling the police to eject two black men from Starbucks only two minutes after they declined to immediately buy something because they were waiting to meet a third person. Here, there was time for reflection and consideration of the situation. Additionally, there was nothing implicit in the officers' response. In their apparent readiness to credit the claims of the manager who called and to disregard assertions of the two black men that they were just there waiting to meet someone. When you view the video[86] of the incident taken by a bystander it is evident that many of the other patrons in the Starbucks are clearly aware that

GOVERNMENT SEGREGATED AMERICA 39-58 (2017); Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 11 (2015); Christopher Silver, *The Racial Origins of Zoning in American Cities* (1997), *in* 34 URBAN PLANNING & THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 57–58 (June M. Thomas & Marsha Ritzdorf, eds., 1997).

85. *See, e.g.*, Brandon Griggs, *A Black Yale Graduate Student Took a Nap in Her Dorm's Common Room, So a White Student Called Police*, CNN (May 12, 2018), https://perma.cc/LB9S-CQ7H (archived Jan. 16, 2019); Tony Marca and Lauren DelValle, *A Group of Black Women Say a Golf Course Called the Cops on Them for Playing Too Slow*, CNN (Apr. 25, 2018), https://perma.cc/HZH5-QBY2 (archived Jan. 16, 2019); Gianluca Mezzofiore, *A White Woman Called Police on Black People Barbecuing, This Is How the Community Responded,* CNN (May 22, 2018), https://perma.cc/4ZY2-CW32 (archived Jan. 16, 2019); Daniel Victor, *When White People Call the Police on Black People*, N.Y. TIMES (May 11, 2018), https://perma.cc/E4K9-E22X (archived Jan. 16, 2019); Jesse Williams & Judith B. Dianis, Opinion, *Starbucks' Incident Proves "Whites Only" Spaces Still Exist*, CNN (May 29, 2018), https://perma.cc/S6YT-C799 (archived Jan. 16, 2019).

86. *Black Guys Arrested in Starbucks*, YOUTUBE (Apr. 12, 2018) https://perma.cc/B7HT-APKP (archived Feb. 3, 2019).

what was happening was an example of racial injustice. There was nothing "implicit" or "unconscious" going on here or in the other 911 call incidents.

The Starbucks case and the other 911 incidents involved white people calling in agents of the state—the police—to give force and effect to their private racism. Coming back to Jody Armour's argument about race and claims of self-defense, we see here the combination of state action, the use of racial categorization, and the effectuation of private biases that constitute a violation of Equal Protection under *Palmore* and *Shelley*.[87]

It is important, however, to move beyond Armour's frame of unconscious or implicit bias in these cases. There was nothing unconscious about the types of racism at issue in *Palmore* or *Shelley*. Of course, the parties in those cases likely did not *think* they were racist. Sidoti, for example, was primarily invoking the pressures that *societal* prejudice would put on his child. And in the case of racially restrictive covenants, Kraemer can easily be seen as of a piece with the white homeowners in Levittown who professed their racial innocence even as they sought to keep black people out of their neighborhoods.[88] Similarly, the manager at Starbucks who called the police (or the one referenced in the training materials who "for some reason" demanded a receipt from a black man returning a pound a coffee) likely did not think of her actions as racist. But just because you do not think what you are saying or doing is racist does not mean it is not. Just because you are blind to your own racism does not mean that your bias is "implicit." In this regard, the 911 covenant can be viewed as a particular manifestation of a broader "racial contract" described by Charles Mills as a condition of "epistemologic[al] ignorance" in which "officially sanctioned reality is divergent from actual reality . . . [and where] one has an agreement to *mis*interpret the world."[89] And so, when the police intervene in these situations, they are not just giving force and effect to ambiguous, amorphous, implicit biases—they are giving effect to racism. Claims of implicit bias typically invoke expert studies from cognitive psychology and neuroscience or present voluminous statistical data to demonstrate how, even when controlling for other factors, race remains a primary determinant in differential outcomes in a variety of situations—from employment to policing. Such evidence is produced, measured, and interpreted primarily by experts outside the legal system. Claims of racism, by contrast, are not about data or measurement or statistical "proof"—they are about the interpretation of the legal significance of specific acts and attitudes in historical and social context. Justice Harlan did not need experts and social scientific data to find that Jim Crow laws constituted a badge of servitude. Chief Justice Warren did not need statistics to find that:

87. Armour, *supra* note 70, at 807.

88. David Kushner, *supra* note 55, at 112.

89. CHARLES MILLS, THE RACIAL CONTRACT 18 (1997).

> 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: for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[90]

And more recently, in the case of gay rights, Justice Kennedy did not rely on outside experts to conclude that the reasons offered for the Colorado state constitutional amendment that precluded all governmental efforts designed to protect the status of persons based on their "'homosexual, lesbian or bisexual orientation, conduct, practices or relationships,' . . . seems inexplicable by anything but animus."[91]

Within the frame of racism, we can understand what is going on in these 911 cases as the exact inversion of one of the central original purposes of the Equal Protection Clause: to protect newly freed African Africans from mob violence throughout the South.[92] As historian Eric Foner notes, "virtually from the moment the Civil War ended, the search began [in southern States] for legal means of subordinating a volatile black population."[93] Prominent of among these were "Black Codes" designed to undo Reconstruction and get things "back as near to slavery as possible."[94] Accompanying such Codes was the rise of private vigilante groups, such as the Ku Klux Klan, that spread terror throughout the South while white authorities stood idly by.[95]

In response, the Radical Republicans in Congress passed a Civil Rights Act in 1866, which was followed up two years later with the ratification of the Fourteenth Amendment. As Akhil Amar notes:

> A core purpose of the 1866 Equal Protection Clause was to affirm the rights of black victims of crime; the central idea was not merely to prevent the states from treating black criminal suspects, defendants, and convicts worse than white ones, but also (and perhaps even more emphatically) to guarantee that

90. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); *see also* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960) (asserting that "[t]he charge that [the opinion in *Brown*] is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* Court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense").

91. Romer v. Evans, 517 U.S. 620, 624, 632 (1996) (quoting Colo. Const., art II § 30b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996)).

92. *See generally* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enacting History*, 19 GEO. MASON U. C.R. L. J. 1, 6-9 (2008).

93. ERIC FONER, RECONSTRUCTION 198 (1988).

94. *Id.* at 199.

95. *Id.* at 342-43; *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 40-66, 102-22 (1997).

> black victims of crime receive the same *protection* as white victims.[96]

The Equal Protection Clause of the Fourteenth Amendment constitutionalized this concern. As Lee and Bhagwat argue:

> One of the core, historical objectives of the Equal Protection Clause . . . was to require southern states to protect newly freed slaves from private violence by southern whites, and to prosecute those who engaged in violence against blacks in the same manner that they prosecuted those who attacked whites.[97]

Fast forward 150 years: while the Equal Protection Clause was originally enacted to provide a measure of state protection and recourse to blacks subjected to private acts of racist violence, today we see whites calling upon the agents of the state to act as their proxies in forcibly enacting their private racism upon the bodies and minds of random black people who have the temerity to transgress the boundaries of white space.[98] Not only does this implicate the state in acts that violate the Equal Protection Clause, it amounts to the state becoming the primary agent of such violations.

Policing white space has been a central tenet of racial subordination since the roll-back of Congressional Reconstruction and the rise of Jim Crow laws in the latter part of the nineteenth century. Where once formal separate-but-equal laws and policies such as red-lining black neighborhoods created and maintained separate racialized spaces—spaces designated as appropriate only for blacks or only for whites—today less systematic but still effective methods are being used.[99] For a sense of how racist legal practices enforcing the prerogatives of white space have evolved and adapted to changing times, it is useful to consider the legal management of residential neighborhoods.

As Jim Crow laws proliferated in the late nineteenth and early twentieth centuries, many municipalities enacted ordinances that prohibited black people from buying property in white neighborhoods.[100] In the 1917 case *Buchanan v. Warley*, the Supreme Court declared such ordinances unconstitutional.[101] Notably, the decision by the *Lochner*-era court did not ground its holding in the Equal Protection Clause of the Fourteenth Amendment but rather found such

96. Akhil R. Amar, *Three Cheers (And Two Quibbles) for Professor Kennedy*, 111 HARV. L. REV. 1256, 1261-62 (1998) (emphasis added).

97. Evan T. Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 150.

98. *See, e.g.*, Arica L. Coleman, *Bias Training at Starbucks Is a Reminder That the History of Racism Is About Who Belongs Where*, TIME (May 29, 2018), https://perma.cc/J4EY-TJLL (archived Jan. 16, 2019).

99. *See* Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 57-58 (June M. Thomas & Marsha Ritzdorf eds., 1997); Anderson, *supra* note 84, at 10-21.

100. Silver at 23.

101. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

state-imposed restriction to violate a fundamental liberty of contract.[102] Nonetheless, following the decision, such ordinances could not stand. Not to be deterred, white homeowners adapted by turning to private law, developing contractual covenants that prohibited the sale of land in particular neighborhoods to black people (and sometimes Jews or Asians).

Racially restrictive covenants proliferated after 1926 when the Supreme Court validated them in *Corrigan v. Buckley.*[103] As a review by the Fair Housing Center of Greater Boston notes:

> The practice of using racial covenants became so socially acceptable that "in 1937 a leading magazine of nationwide circulation awarded 10 communities a 'shield of honor' for an umbrella of restrictions against the 'wrong kind of people.'" The practice was so widespread that by 1940, 80% of property in Chicago and Los Angeles carried restrictive covenants barring black families.[104]

In 1948, the Supreme Court revisited the issue in *Shelley v. Kraemer*, where it distinguished but did not overrule *Corrigan*, noting that its decision there had addressed only the validity of the covenants themselves, not the issue of whether state action was implicated in the enforcement of such covenants.[105]

After *Shelley*, racially restrictive covenants could no longer be enforced by a court, but homeowners continued to use them nonetheless; other policies such as racially biased administration of GI Bill benefits and federally subsidized mortgages under the FHA further reinforced the boundaries of white and black spaces.[106] In their foundational 1993 study, *American Apartheid*, Massey and Denton showed how segregation persisted even after the Civil Rights movement and the passage of the Fair Housing Act of 1968.[107] Sociologist Elijah Anderson argues that today the result is that "[t]he city's public spaces, workplaces, and neighborhoods may now be conceptualized essentially as a mosaic of white spaces, black spaces, and cosmopolitan spaces (racially diverse islands of civility)."[108]

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102. *Id.* at 78, 82.

103. Corrigan v. Buckley, 271 U.S. 323, 331-32 (1926).

104. *1920s-1948: Racially Restrictive Covenants*, FAIR HOUSING CENTER OF GREATER BOSTON, https://perma.cc/89FS-7MRY (archived Jan. 16, 2019) (quoting *Understanding Fair Housing*, U.S. Commission on Civil Rights Clearinghouse Publication 42 at 4 (Feb. 1973)).

105. Shelley v. Kraemer, 334 U.S. 1, 8-9 (1948).

106. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 25, 113-15, 163 (2005); Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (Jul. 8, 2015), https://perma.cc/TC9N-PAWF (archived Jan. 16, 2019).

107. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 195–216 (1993).

108. Anderson, *supra* note 84, at 10–11.

One result of the persistence of socially marked white and black spaces is that when black bodies enter white spaces they become suspect, surveilled, and often subject to repressive police force. This is what happened at Starbucks and the numerous other 911 calls recently in the news. *This represents a new sort of racially restrictive covenant*: one between uncomfortable white people and the police.

How then might we characterize or understand this as a covenant? The covenants in *Shelley* were explicit, written down into formal contract. A typical one might read:

> [H]ereafter no part of said property or any portion thereof shall be . . . occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian race.[109]

The 911 covenant is not this explicit. It is the understanding that if white people believe black people are somewhere they shouldn't be, or simply someplace where they are making white people uncomfortable, they can call the police and have them remove the black people from that space. It is not Jim Crow—it is not a private contract between homeowners—but it is nonetheless a functional arrangement whereby white people invoke state power to regulate black bodies in public space. This dynamic exemplifies how the culture and practices of racism, in both society and law, endure and adapt—as Reva Siegel has noted—through a process of "preservation-through-transformation."[110]

The 911 covenant operates like this: a white person sees a black person in a coffee shop, sleeping in a college common room, exiting an AirBnB, or trying to use a public pool, and they call 911. The dispatcher does not question their characterizing the situation as a 911 emergency. This is the first part of the covenant—accept the legitimacy of the call. Given the time constraints and related pressures under which 911 operators work, this might seem to be a prime example of implicit bias at work. And perhaps to a certain extent it is. But it is also something more, because dispatchers do not always unquestioningly accept the legitimacy of 911 calls. Sometimes they inform the person that their call does not merit a 911 response and suggest alternatives.[111] As with the initial decision of the caller to dial 911, this indicates time for reflection and eval-

109. *1920s-1948: Racially Restrictive Covenants*, FAIR HOUSING CENTER OF GREATER BOSTON, https://perma.cc/66M2-WGSB (archived Jan. 16, 2019).

110. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

111. Dean Scoville, *10 Things Dispatchers Want You to Know*, POLICE MAGAZINE (Sept. 13, 2012), https://perma.cc/7843-CQ3V (archived Jan. 16, 2019); *see also* Barry D. Friedman & Maria J. Albo, *Punishing Members of Disadvantaged Minority Groups for Calling 911*, POLICING AND RACE IN AMERICA: ECONOMIC, POLITICAL, AND SOCIAL DYNAMICS 141, 157-59 (James D. Ward ed., 2017).

uation. But not in these cases—that is not part of the covenant. Indeed, in some cases the dispatcher will fail to relay critical information to the officers; most infamous here is the case of twelve-year-old Tamir Rice, where the dispatcher never told officers that the caller said the gun the black child was waiving was "probably a fake." Tamir Rice was shot dead two seconds after the officers arrived. The dispatcher received an eight-day suspension.[112]

Next, the police arrive. They do not question the caller. Instead, they accept that the black men in Starbucks (or wherever) are trespassing. They question the black men, or perhaps they simply order them to leave the premises. If the men do not comply, if they assert a right to be where they are, they are arrested. They are black men in a white space. We see this operating directly in the Starbucks incident where the Philadelphia Police Commissioner, Richard Ross, Jr., argued that because employees had said the two black men were trespassing, "[t]hese officers had legal standing to make this arrest. . . . They followed policy, they did what they were supposed to do."[113] This says it all: "they did what they were supposed to do."[114] That is, the system sanctioned, indeed required, their enforcement of the boundaries of white space at the behest of a white person who had been made uncomfortable by the presence of two black men. They upheld the covenant with the manager, a covenant that did not run to the black men who, apparently, were owed little consideration beyond a warning that if they did not comply with the terms of the covenant, they would be arrested.

Even in those situations where the officers do not arrest the black person, where they behave respectfully and establish that the black person does, indeed, have a right to be where they are, this result comes about only *after* the officer has questioned the black person and forced the black person to account for him or herself. No matter how polite, no matter how respectful, this still amounts to a massive assertion of state authority over black bodies at the behest of the white caller.[115] And notably, in these cases where the black person is vindicated there are no formal repercussions for the white caller—that too is part of the covenant.

But, of course, when black people call 911, the story is often very different. For example, the Department of Justice report on the Ferguson Police Depart-

112. Adam Ferrise, *Tamir Rice 911 Call-Taker Suspended*, CLEVELAND.COM (Mar. 14, 2017), https://perma.cc/T3MQ-RSNU (archived Jan. 16, 2019).

113. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrest of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), https://perma.cc/LX3E-DNUZ (archived Jan. 16, 2019).

114. *Id.*

115. Consider, for example, the recent case of a black real estate investor who had the police called on him by a white neighbor. Even though the police vindicated him and treated him respectfully he was nonetheless subjected to the indignity of having to justify himself to state authorities. P.R. Lockhart, *A White Woman Called the Cops on a Black Real Estate Investor. Police Defended Him.*, VOX (May 15, 2018), https://perma.cc/9UUN-F4XK (archived Jan. 16, 2019).

ment recounts a situation where a woman called 911 to report she was being beaten by her boyfriend:

> By the time the police arrived, the woman's boyfriend had left. The police looked through the house and saw indications that the boyfriend lived there. When the woman told police that only she and her brother were listed on the home's occupancy permit, the officer placed the woman under arrest for the permit violation and she was jailed.[116]

This case demonstrates the hazards of dialing 911 while black. More broadly, a study by Friedman and Albo concludes that members of disadvantaged minority groups are disproportionately punished for what are perceived by the police to be frivolous or improper 911 call. For example, they examine several cases where people of color called 911 to complain that one or another fast-food restaurant did not properly fill their order and/or had mischarged them for their meals. In some cases the 911 operator might try to counsel the caller about the misuse of the 911 system, but in others, the caller simply winds up being arrested by the police.[117] The covenant does not apply here.

Clearly, in calling this relationship a "covenant" I mean to invoke *Shelley* and Armour's arguments about how and why court recognition of racial prejudice in claims of self-defense would amount to a violation of the Equal Protection Clause by giving force and effect to private racism in violation of *Palmore*. Critically, in focusing on the covenant we do not need to address issues of the "reasonableness" of an officer's actions in responding to 911 calls. This matters because under current Fourth Amendment jurisprudence, "reasonableness" is the place where claims of racial injustice go to die.[118]

Race has long been understood to be central to what Paul Butler has characterized as "the White Fourth Amendment."[119] Devon Carbado has written powerfully on how the evolution of Fourth Amendment search and seizure jurisprudence from *Terry v. Ohio* to *Whren v. United States* has given police inordinate power to subdue and oppress black people.[120] *Terry* provided the basis for current stop and frisk practices back in 1968.[121] More recently, the 1996

116. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 81 (2015).

117. Friedman & Albo, *supra* note 111, at 141, 143-45.

118. *See generally* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States*,* 83 GEO. WASH. L. REV. 882 (2014) (arguing that, contrary to current doctrine, searches or arrests motivated by race should be deemed "unreasonable" under the Fourth Amendment).

119. Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010).

120. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio's *Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017); Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017).

121. Terry v. Ohio, 392 U.S. 1 (1968) (holding, *inter alia*, that where a reasonably

case *Whren* held that the subjective motivations for a police traffic stop are irrelevant so long as, "objectively," the stop was reasonable.[122] The opinion by Justice Scalia effectively opened the door wide to racial profiling and pretextual police stops even if informed by an officer's racial animus.[123] Carbado notes that cases such as *Whren* not only legalize racial profiling but also allocate a "particular form of racial power" to police officers that is not a "peripheral feature of Fourth Amendment law [but] . . . is embedded in the analytic structure of the doctrine in ways that enable police officers to force engagements with African Americans with little or no basis."[124]

All of this would seem to make possible racial bias on the part of officers (or those who call 911) to be legally irrelevant. But the result might be different if we focus not on the "objective reasonableness" of an officer's actions but instead consider the ways in which those actions, and subsequent actions throughout the criminal justice system, implicate the state in giving force and effect to private racial biases. Chin and Vernon echo Armour in arguing that searches and arrests motivated by race should be considered unconstitutionally "unreasonable" under the Fourth Amendment or alternatively that such searches and arrests should be excluded under the "fruit of the poisonous tree doctrine" as an antecedent violation of the Equal Protection Clause.[125] But this approach still does not deal adequately with the complex relationship between private and public racism implicated by the covenant in encounters such as the Starbucks incident.

Let us foreground the core holding of *Palmore* and consider how it might provide a different frame for assessing what is at stake in a typical case of the 911 covenant. In concluding that possible injuries inflicted by private biases are not permissible considerations for removing a child from the custody of his or her mother, the Court stated, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[126]

Subsequently, in *Graham v. Connor*, the Court made it clear that the constitutionality of a police officer's actions (in this case with regard to a claim of use of excessive force) "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' ap-

prudent officer is warranted in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual for crime).

122. Whren v. United States, 517 U.S. 806, 812 (1996).

123. Chin & Vernon, *supra* note 118, at 884-86.

124. Carbado, *supra* note 120, at 125, 132.

125. Chin & Vernon, *supra* note 118, at 882, 932-33.

126. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

proach."[127] We have seen in the subsequent case of *Whren* that the Court deems any racial animus privately held by the officer to be irrelevant to this determination.[128] But *Palmore* tells us that bowing to "private racial prejudice" can be relevant to assessing the constitutionality of actions by public officials. It is possible to accept that a police officer's action *qua* police officer may be "reasonable" under *Graham* and still find that it violates *Palmore* as an incident of the police officer *qua* state actor giving force and effect to the private prejudices of the 911 caller (or for that matter to the police officer's own private prejudices).

In any given 911 situation or related stop and frisk action, the officer's actions would likely be found "reasonable" under *Graham* and *Whren.* These cases make the subjective motivations of the officers irrelevant to assessing the objective reasonableness of their actions. Any racism they harbor is deemed "private" and beyond the scope of the Court's evaluation. In this regard, Scalia's opinion in *Whren* hearkens back to Justice Brown's statement opinion in *Plessy v. Ferguson* that if "the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[129] Using the language of *Whren*, one could say that to the *Plessy* majority the doctrine of separate but equal appeared to be "objectively reasonable"; any perceived racial stigma was a matter of private perception and irrelevant to the Court's consideration of the constitutionality of the law. Similarly, when black men are led out of Starbucks in handcuffs, when a black graduate student is forced to present her university I.D. to justify her presence in a common room, and black youths are stopped and frisked over and over again, the actions of the police (and of the 911 callers) are deemed "objectively reasonable" and any experience of racial stigma is deemed legally irrelevant—one might say that it exists solely because the subjugated person "chooses to put that construction upon it." Persistence and transformation, indeed.

But consider that in *Palmore* the "reasonableness" of Palmore's request for custody was not at issue. In recognizing the reality that a child might face heightened burdens of social stress by being raised by parents of different races the Court accepted that such a request might be "reasonable" in the sense that it was based on considerations that might affect the child's welfare. What is most striking about *Palmore* is the Court's assertion that *in spite of* the objective reasonableness of such a request, the Court could not grant it because doing so would involve agents of the state giving legal force and effect to private biases.

Notably, after stating that the Court cannot give effect to private biases in

127. Graham v. Connor, 40 U.S. 386, 395 (1989).

128. *See, e.g.*, Chin & Vernon, *supra* note 118.

129. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

his opinion for the Court in *Palmore*, Chief Justice Burger included the following quotation from Justice White's dissent in *Palmer v. Thompson*: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."[130] *Palmer* involved the City of Jackson, Mississippi, which closed its public pools rather than desegregate them after being ordered to do so in 1962.[131] Plaintiffs brought a federal action seeking to force the city to reopen the pools and operate them on a desegregated basis. While Justice Black's opinion for the Court acknowledged that state action was clearly at issue, it refused to find that the closure of the pools was in any way a "scheme to perpetuate segregation"[132] and asserted that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."

Here, Justice Black in *Palmer* sounds very much like Justice Scalia in *Whren*. But both opinions ignore the impact that such actions have on the excluded party. Each imposes racial stigma, not because of the subjective motivations of individual legislators (or police officers) but because of the social understanding of the meaning of those actions. Viewed in context, it is clear that closing the pools, or creating separate but equal railways cars, imposed a badge of inferiority upon black people. This is why it is so important that Chief Justice Burger cited Justice White's *Palmer* dissent in *Palmore*. In that dissent, Justice White also stated that:

> Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.[133]

Justice White here placed *Palmore* in the tradition of *Brown*, where the Court focused on the *impact* such "official denigrations of the race" had independent of their subjective motivation. Chief Justice Warren's opinion in *Brown* focused almost entirely on how, when viewed in context, separating children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[134] In the nearly sixty years between *Plessy* and *Brown* courts repeatedly found a variety of Jim

130. *Palmore,* 466 U.S. at 433 (quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

131. *Palmer*, 403 U.S. at 218-19.

132. *Id.* at 222, 224.

133. *Id.* at 241.

134. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

Crow laws[135] to be "objectively justifiable" as Justice Scalia would later put it in *Whren*.[136] What made the difference for Chief Justice Warren in *Brown* was not the subjective motivations of those who wrote the laws, nor was it the bare fact of a racial classification; no, it was his willingness to adopt an anti-racist frame for interpreting how such laws operated in social and historical context. Such laws were racist and intended to stamp black people with a badge of inferiority.

This was the type of framing Justice White employed in *Palmer*. To him, it was obvious in context that the closing of the pools was motivated by racial animus and constituted an official act of racial denigration. By incorporating White's language into his majority opinion in *Palmore*, Chief Justice Burger (no racial progressive by any stretch of the imagination) recognized the legal significance of social context in creating legally cognizable affronts to equal protection. Whether Palmore himself was motivated by racism was irrelevant to the Court's holding. What mattered was that the Court recognized first, the continuing reality of racism in 1980s America, and second, that the Court could not be implicated in giving force or effect to such racism.

Along the same lines as *Palmore* was *Jones v. Alfred H. Mayer Co.*,[137] which affirmed that the Thirteenth Amendment empowered Congress to remove all "the badges and the incidents of slavery," including, in this case, legislating against housing discrimination.[138] Notably, the Court here recognized that racially policing spaces could be viewed as a "badge or incident" of slavery and hence subject to the strictures of the Thirteenth Amendment's abolition of slavery. In this, the opinion hearkens back to Justice Harlan's dissent in *Plessy*, which was not grounded solely in the Equal Protection Clause of the Fourteenth Amendment but also recognized that Jim Crow laws constituted a "badge of servitude" sufficient to violate the Thirteenth Amendment as well.[139]

Palmore and *Jones*, however, have had very limited legacies, especially compared to more conservative Burger Court decisions such as *Washington v. Davis*[140] and *Personnel Administrator of Massachusetts v. Feeney.*[141] Armour tried valiantly to revive their legacy in his 1994 article, *Race* Ipsa Loquitur,[142]

135. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006) (exploring the dramatic changes in racial attitudes and legal practices that occurred between 1900 and 1950).

136. *Whren*, 517 U.S. 806, 813 (1996).

137. 392 U.S. 409 (1968).

138. *Id.* at 439-40.

139. *Plessy*, 163 U.S. 537, 562 (1896). For a discussion of the significance of the Thirteenth Amendment in the arena of housing segregation, see generally Richard Rothstein, *supra* note 84, at vii-ix, 177-185.

140. Washington v. Davis, 426 U.S. 229 (1976).

141. 442 U.S. 256 (1979).

142. Armour, *supra* note 70, at 781-816.

but he was focused more on issues of unconscious racism rather than on directly engaging and building upon *Palmore's* acknowledgement that explicit racism continued to be a real, persisting, and legally significant social phenomenon in America. Armour's work was soon followed by Linda Krieger's deeply influential article, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*,[143] which came out in 1995 just around the same time psychologists were developing the IAT to provide a technical means to measure and quantify unconscious bias.[144] From this point on, a focus on implicit bias—instead of explicit racism—came increasingly to dominate both liberal legal discourse of civil rights and broader social and political discussions of the nature of racial prejudice in contemporary America.[145]

The problem with the dominance of the frame of implicit bias is not that it is unimportant or fictitious. Instead, the issue is that, in marginalizing the significance of persisting racism, it reinforced a counter-frame that racism was no longer a problem. To revive the promise of *Palmore* and *Shelley* we need to redirect our focus back to direct engagement with questions of explicit racism and state actions that stigmatize. To understand the nature and scope of the harm caused by the new 911 covenant and other similar types of racist state actions that suffuse the criminal justice system, we need to situate them in the interpretive tradition that reaches back to Justice Harlan's dissent in *Plessy* through *Shelley* and *Brown* up to *Palmore*. *Whren* tells us that the private motivations of police officers are irrelevant in assessing the constitutionality of their searches or seizures. So be it. But if their biases are, in effect, private—distinct, as it were from their public persona as officers of the law—then they fall into the realm of private prejudice covered by *Palmore.*

Considered in this light, we can characterize the 911 covenant in relation to *Shelley* and *Palmore* as follows: there exists a tacit racially restrictive covenant among white people calling 911 and the criminal justice system. Generally speaking, white people know they can call 911 to have police remove black people from white spaces regardless of whether they are openly engaged in any illegal or threatening conduct. In accepting their calls without sufficient questioning as to the true nature of the "emergency" and in passing along these calls to police officers without all relevant information (*e.g.* "it looks like a toy gun") 911 dispatchers are giving force and effect to the private racial prejudice of these callers. In following up on a racist 911 call by focusing their attention on the black target and not on the caller (if their identity is known) and not questioning the legitimacy of the "emergency," police officers are giving further

143. Linda H. Krieger, *supra* note 13.
144. Kahn, *supra* note 5, at 27-28.
145. *Id.* at 41-62.

force and effect to private racism—in some cases doubly so by acting upon not only the caller's racism but their personal racial prejudice as well. Even if the officers do not arrest the black person, they have exercised the force of the state upon them and forced them to account for themselves solely based on the racial prejudice of the 911 caller. If the black person is arrested and brought before a court, the court gives further force and effect to the private racism both of the caller and the officer if it imposes any penalty. The final characteristic of the covenant is that no one is held accountable for abusing the criminal justice system; not the caller, the dispatcher, the officers, or the court.

It is an unwritten script played out again and again; a tacit rather than formal contract; it is in the air white America breathes. Every time a Starbucks incident occurs, agents of the state are enforcing a racially restrictive covenant that polices white spaces just as surely as did the racially restrictive housing covenants of a bygone era.

Each stage in the enforcement of the 911 covenant should be understood as a violation of the principles of *Palmore* and *Shelley*. While civil rights lawsuits against police officers brought under 42 U.S.C. § 1983 might be limited by holdings such as *Whren*, court enforcement of arrests made under these circumstances should be deemed every bit as impermissible as court enforcement of a racially restrictive housing covenant. This is why it is important to move beyond considerations of "reasonableness" and directly engage issues of state complicity in effectuating private racism.

Beyond this, additional responses need not be limited to paying millions of dollars to outside consultants in the diversity management business to conduct implicit bias training sessions or issuing "debiasing" instructions to juries. These measures may have their merit, but studies have shown at best mixed results for diversity training. We see a troubling, if anecdotal, example of the limits of diversity training in one infamous case from the summer of 2015, where a video captured Officer Eric Casebolt brutally subduing a fifteen-year-old black girl at a pool party. Officer Casebolt was responding to a call about a disturbance at a party at a community pool in McKinney, Texas. News reports of the incident noted that Officer Casebolt had taken eight hours of diversity training at a local community college and had also taken courses on racial profiling and the use of force.[146] Sociologists Frank Dobbin and Alexandra Kalev have made a forceful case that such programs fail more than they succeed. What works, they find, is holding people accountable for improving diversity.[147]

If accountability is key, then we must also consider how to dismantle the

146. *Texas Pool Party Incident Sparks Protests—and Police Support*, CBS NEWS (June 9, 2015, 9:52 AM), https://perma.cc/N34V-T6XE (archived Jan. 16, 2019).

147. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, 94 HARV. BUS. REV. 14 (2016); *see also* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 135-36 (2009).

911 covenant by finding additional means to hold the parties to it accountable for their violations of black people's civil rights. Accountability is necessary not only to deter the 911 calls themselves but also because such calls can have potentially lethal consequences. In a recent *Washington Post* op-ed, Stacey Patton and Anthony Farley list several possible avenues of redress.[148] They assert, for example, that federal law forbids places of public accommodation from ejecting people on the basis of their race. People who resist such demands are within their rights and therefore not trespassing. If they are not trespassing but are nonetheless removed by the police at the behest of a 911 caller, then that is, by definition, a false arrest—an independent tort that does not simply seek the suppression of evidence or the dismissal of a charge, but acts affirmatively to hold the offending officers accountable.[149]

Patton and Farley also propose measures to hold 911 callers themselves accountable. Among these are enforcing laws that make it a crime to file a false police report. The callers who enlist the police to enforce the 911 covenant and remove black people from public spaces where they have a right to be "should be investigated and prosecuted for making false police reports."[150] Patton and Farley also note that the targets of 911 calls themselves could seek direct redress by suing for defamation, malicious prosecution, and even intentional infliction of emotional distress.[151] While such civil remedies are beyond the reach of the current conservative Supreme Court's cramped Fourth Amendment jurisprudence, many jurisdictions have a variety of graded sanctions for those who misuse or abuse the 911 system. Such sanctions might range from simply focusing on the caller instead of the target and issuing a formal warning that educates them about how and why they misused the system; presenting them with a citation, analogous to a traffic ticket; or formally charging them with a misdemeanor.[152] Typically such sanctions have been imposed for prank calls,

148. Stacey Patton & Anthony P. Farley, *There's No Cost to White People Who Call 911 About Black People. There Should Be.*, WASH. POST (May 16, 2018), https://perma.cc/A4UE-UPWG (archived Jan. 16, 2019).

149. *Id.*

150. *Id.*

151. *Id.*

152. Rana Sampson, *Misuse and Abuse of 911*, U.S. DEP'T OF JUSTICE OFFICE OF COMTY. ORIENTED POLICING SERVICES 21-22 (Problem-Oriented Guides for Police, Problem-Specific Guides Ser. No. 19, 2004). For example, in Hawaii misuse of the 911 service is a misdemeanor. HAW. REV. STAT. § 710-1014.5 (2018). In New Hampshire "[a]ny deliberate use of the universal emergency telephone number 911 for any reason other than seeking emergency assistance from fire, police, or other safety related agencies shall constitute misuse of the 911 system. The third and any subsequent misuse of the 911 system in a calendar year shall constitute a violation." N.H. REV. STAT. ANN. § 106-H:15 (2018). In California, upon a first violation for misuse of 911 the violator shall be issued a written warning; for a second violation, a fine of $50; a $100 fine for a third violation; and $250 for a fourth. CAL. PENAL CODE § 653y (Deering 2018).

repeated frivolous calls, or—more ominously—for the phenomenon known as "SWATing," where a person will falsely call in a life-threatening emergency in order to have a SWAT team called to the house of someone they wish to harass.[153] There is no reason, however, that such graded sanctions could not be applied to impose accountability upon people who invoke the 911 covenant to have the police effectuate their racial animus.

There is a danger here in reinforcing the racial disparities in how police respond to 911 calls, discussed above.[154] Nonetheless, making explicit the issue of the state's implication in ratifying the private racism on 911 callers would help prevent this directive from creating increased racially differential imposition of 911 sanctions. Moreover, if applied in a graded manner, such sanctions would be less likely to result in further suppression of legitimate 911 calls, particularly from people of color who might already have reason to suspect the system. More specifically, if cast in a frame that explicitly engages issues of racism, the focus of such sanctions would remain on situations that might implicate the state in sanctioning private racism. Indeed, bringing such issues out into the open might have the salutary effect of lessening racially disparate responses to 911 calls.

Having run through potential solutions, let us now return to the Starbucks incident. According to the *Philadelphia Tribune*, there was a sharp uptick in 911 calls from that Starbucks after Holly Hylton (the employee who called 911 on the two black men) was hired in early 2017. The article further noted that of sixty-nine 911 calls placed from that Starbucks over a twenty-seven-month period surrounding the incident, only one resulted in an arrest. Repeated frivolous calls are supposed to be a paradigmatic basis for some sort of police sanction, whether simply education, a warning, or something more formal.[155] Nothing of the sort seems to have happened here, either before or after the Starbucks incident. Instead, the Police Commissioner emphasized that the officers acted properly under the circumstances and in accordance with law and policy.[156]

Graded sanctions themselves could also serve as a different sort of diversity training for the officers imposing them. Instead of training officers to become better versions of themselves by working on their own psychological predispositions, imposing sanctions would call upon officers to actually hold people accountable for their biased actions. Learning that there are consequences to racism could educate both parties to the encounter. For the next Starbucks incident consider the possible difference if—instead of receiving the

153. *See, e.g.*, Sampson, *supra* note 152 at 5.

154. See *supra* notes 113-15 and accompanying text.

155. John Mitchell, *Uptick in 911 Calls for Starbucks Manager*, PHILA. TRIB. (May 14, 2018), https://perma.cc/RNL7-J7X3 (archived Jan. 16, 2019).

156. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrest of Two Black Men*, N.Y. TIMES (Apr. 15, 2018), https://perma.cc/EQ47-R33E (archived Jan. 16, 2019).

same sort of diversity training as Officer Casebolt—the officers instead were given clear instructions on how to deal with a situation where a white person calls 911 on people of color and there is no imminent threat of violence when they arrive.

A full consideration of the possible nature of such directions is beyond both the scope of this article and my own expertise, but an appropriate roadmap might be along the lines of: assess the situation; if there is no public disturbance or immediate threat of violence, ask to talk to the person who dialed 911 before approaching the targets of the call; ascertain from the caller the nature of the purported emergency and evaluate whether it appropriately merited a 911 call; if appropriate, inform the caller that it is against the law to enforce trespassing claims differentially against people of color in places of public accommodation, and that if the caller does not regularly ask white customers to leave under similar circumstances they could be liable for civil penalties; if the caller persists in demanding the targets of the call be removed, approach the targets and ask them for their side of the story before taking any further action; after getting both sides of the story attempt to resolve the situation without resorting to arrest; if this is not possible, make an assessment as to which party merits some form of sanction, the caller for making a frivolous 911 call, or the targets of the call for actual trespass. Finally, if the officers do not follow this (or whatever similar) protocol, then they themselves would need to be held accountable, again perhaps through some graded imposition of sanctions.[157]

This scenario is more or less what we have witnessed in some other viral videos, such as when a white woman called the police on a black real estate investor who was coming to inspect a run-down property he was considering purchasing. In the video we see the police acting respectfully toward the man and ultimately telling the caller that he had a right to be there.[158] Many police departments likely incorporate something along the lines I suggest into their 911 response training.[159] Nonetheless, focusing on this sort of specific response with graded steps of intervention, an emphasis on hearing both sides, and on imposing accountability on all parties involved might be insufficient. The one

157. In cases not involving trespass, such as those involving barbecuing in public or selling water without a permit, it bears considering that historically laws against such related practices variously characterized as "vagrancy" or "loitering" were used in the later nineteenth and early twentieth centuries to perpetuate what Douglas Blackmon has characterized as "[s]lavery by [a]nother [n]ame" by subjecting black men to incarceration basically for the crime of existing in white spaces. DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME 53, 124 (2008). *See also* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 27 (2014); MICHELLE ALEXANDER, THE NEW JIM CROW 28-29 (2012). The racially differential enforcement of such laws in response to racist 911 calls is as violative of equal protection as is racially differential invocation of trespassing in cases such as the Starbucks case.

158. Lockhart, *supra* note 115.

159. *See, e.g.*, Sampson, *supra* note 152.

thing we do not see, which would be a welcome and indeed critical addition to the encounter, would be the police giving the caller a formal warning and/or citation saying that such calls may constitute an abuse of the 911 system. As well as the encounter with the black real estate investor turned out, he was still forced to account for himself to armed police officers while the white woman who called suffered no consequences.

Beyond such formal legal methods of accountability there are also forms of social accountability, as old as ostracism but remade for our times by viral social media. For example, even though the woman who called the police on the black real estate investor apparently faced no repercussions, the woman branded as "#PermitPatty" was forced to resign from her position as CEO of her California cannabis company, TreatWell Health, in the wake of the social backlash against a viral video showing her calling 911 on an eight-year-old black girl selling bottled water in front of her apartment building to raise money for tickets to Disneyland.[160] Or similarly, the white manager of a Memphis apartment complex was fired after another video went viral showing her calling the police on a black man wearing socks at the pool on the Fourth of July.[161]

Such social sanctions are perhaps the most heartening part of this story. The new phenomenon of cell-phone video, particularly in the Trump era, seems to be awakening broader swaths of America to the persisting and pervasive reality of explicit racism. Shifting the narrative is critical. In these videos (not to mention in the statements of the President himself) we see that much more than "implicit bias" is at work. As such, we should rethink how we understand the problem, how we respond, and who we hold accountable.

If we focus on the 911 covenant instead of on the conduct of the officers, we can move beyond Fourth Amendment questions of "reasonableness." "Objectively" the two men in the Starbucks *may* have been technically trespassing when the manager called the police a mere two minutes after asking whether they would buy something. But so then would thousands of other Starbucks customers who technically trespass every day. The call was not made because they were trespassing; it was made because they were black. Is it possible to "objectively" prove this with direct evidence of the manager's motives? Probably not. But as Charles Black so eloquently noted with respect to Chief Justice Warren's holding in *Brown*, while equality

> [H]as marginal areas where philosophic difficulties are encountered. . . . [I]f a whole race of people finds itself confined within a system which is set up and

160. Ashley May, *'Permit Patty' Resigns as CEO of Cannabis Company Following Viral Video Backlash*, USA TODAY (June 27, 2018), https://perma.cc/W8T7-4HLR (archived Jan. 16, 2019).

161. Sarah Mervosh, *A Black Man Wore Socks in the Pool. After Calling the Police on Him, A Manager Got Fired*, N.Y. TIMES (July 9, 2018), https://perma.cc/8DZD-M2G4 (archived Jan. 16, 2019).

> continued for the very purpose of keeping it in an inferior station, and if the question is the solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.[162]

Black was speaking of school segregation and the old Jim Crow, but the same may (and must) rightly be said about evolving forms of the new Jim Crow.

Black's conclusion had nothing to do with implicit bias. His understanding of how systems of oppression work did not involve probing the unconscious motivations of individual actors. He did not need statistical analyses and fMRI readings to come to his conclusion, no more than did Justice Harlan in *Plessy* or Chief Justice Warren in *Brown.* An excessive focus on implicit bias obscures our ability to appreciate the deeper—yet in some ways more obvious—interpretive truth seen by Black. It is a truth directly accessible to the judge, and indeed to the citizen, without the mediation of experts. In the present situation, the frame of implicit bias directs us away from appreciating the larger dynamic of a system like the 911 covenant—or other similar systems of racial oppression at work throughout our society today.

We hear an echo, albeit faint, of this interpretive approach in Justice Kennedy's jurisprudence of dignity and animus—most prominently in his opinions in *Romer v. Evans*,[163] *Lawrence v. Texas*,[164] and *Obergefell v. Hodges*,[165] and also, if somewhat more problematically, in his opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[166] Each of these cases involved gay rights. In *Romer*, Justice Kennedy wrote the opinion for the Court striking down a state constitutional amendment that was passed, in effect, to deny homosexuals the same basic legal protections as heterosexuals. In reaching this conclusion about the amendment, Justice Kennedy noted that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus . . . ."[167] Much as Chief Justice Warren's holdings in *Brown* and *Loving*, Justice Kennedy's conclusion was not buttressed by statistical evidence or expert testimony but by a common-sense interpretation of the legal significance of the context in which the Fourteenth Amendment was adopted. Similarly, in *Lawrence*, striking down a Texas law that criminalized homosexual sodomy, Justice Kennedy, relying again on historical and social interpretation rather than scientific evidence or psychological measurements, noted that the mere existence of the statute imposed a "nontrivi-

162. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

163. 517 U.S. 620 (1996).

164. 539 U.S. 558 (2003).

165. 135 S. Ct. 2584 (2015).

166. 138 S. Ct. 1719 (2018).

167. 517 U.S. at 632.

al" stigma on homosexuals,[168] and concluded that "the State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[169] Then, in *Obergefell,* which declared that states must allow same-sex marriage, Justice Kennedy recognized the need to move beyond earlier understandings that "did not deem homosexuals to have dignity in their own distinct identity" to affirm a new constitutional understanding that "that gays and lesbians had a just claim to dignity."[170] Justice Kennedy concluded his opinion asserting that the petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right."[171] More recently, in *Masterpiece Cakeshop*, Justice Kennedy continued to be willing to exercise contextual legal interpretation to consider statements of certain members of Colorado Civil Rights Commission as evidencing an impermissible level of hostility toward the religious convictions of a man who violated a statute forbidding places of public accommodation from discriminating against people based on their sexual orientation.[172]

As this last result makes clear, the interpretive approach may not always lead to results that liberals may want. But it is notable that, in contrast to his decisions in *Romer*, *Lawrence*, and *Obergefell*, Justice Kennedy did not strike down the statute in *Masterpiece Cakeshop*. His concern remained focused on understanding how state-imposed stigma worked in context, and so he was able to let the statute stand while finding its application in this case to be impermissibly tainted with religious hostility.

Here is a lesson for the 911 covenant: it is possible to let trespassing and other related laws stand while using common sense contextual interpretation to find particular applications of those laws to be impermissibly tainted by racial animus. Such an approach is as old as *Yick Wo v. Hopkins*[173] and as new as *Masterpiece Cakeshop.* It is possible to make reasoned judgments about when a 911 call is motivated by racial animus without shutting down the entire 911 system. Such judgment can be exercised at any stage of the process, allowing for a certain redundancy of protection. If animus is suspected, operators can question callers before dispatching police, police arriving on the scene can question the legitimacy of the complaint, prosecutors can decide not to charge, and judges do not have to let such a case go to trial.

Nonetheless, the scope and reach of Justice Kennedy's interpretive juris-

168. 539 U.S. at 575.

169. *Id.* at 579.

170. 135 S. Ct. at 2596.

171. *Id.* at 2608.

172. 138 S. Ct. at 1729-32.

173. 118 U.S. 356 (1886) (finding that a law that is race-neutral on its face but is administered in a prejudicial manner is an infringement of the Equal Protection Clause of the Fourteenth Amendment).

prudence, while potentially broad, has in practice been relatively narrow and generally not extended to people of color. We see this most egregiously in his signing on to the majority opinion in *Trump v. Hawaii*, upholding the President's pretextual camouflaging of his Muslim travel ban.[174] Here the majority willfully ignored the context in which the travel ban emerged. The most striking contrast with *Masterpiece Cakeshop* is Justice Kennedy's apparent willingness to overlook remarks from President Trump that demonstrated hostility to a religion as clearly as anything uttered by members of the Colorado Civil Rights Commission. The fig leaf here apparently was a felt need to grant the President greater deference in matters of immigration and foreign affairs.[175] What this shows is that *doctrine* is not being contested so much as the *frame* within which doctrine is being applied. How such decisions come out turns as much upon the story that is being told, and the scope of context that is being considered, as it does upon the application of particular legal principles.

What makes such laws an affront to human dignity is not simply the motivation of those implementing them, it is the *impact* they have on their targets. Like these laws, the 911 covenant subjects its targets to far more than material harm. Its very existence humiliates and subordinates. Both motivation and impact can be apprehended in and through interpreting social context and meaning. Naming the 911 covenant as a distinct phenomenon provides the foundation for such apprehension. Identifying the 911 covenant in operation does not require direct proof of the subjective motivations of particular actors, whether state legislators, police officers, or judges. It involves an approach to constitutional interpretation grounded in the tradition of Justice Harlan's understanding that the badge of servitude experienced by Homer Plessy was not simply a construction he "chose" to put on Jim Crow laws but a social fact—the denial of which should elicit from us a good burst of Charles Black's righteous laughter.

CONCLUSION

We need to start telling different stories about race and racism in our country. Implicit bias is real, but it is not everything. Ultimately, the holding in *Palmore* is a declaration that the state cannot be complicit in the perpetuation of societal racism. If we turn a blind eye to the present reality of racism and the enduring legacy of past racism then we are complicit in its persistence. When agents of the state enforce racial agreements such as the 911 covenant, they render the state complicit in giving force and effect to private racial biases. Such complicity also comes more broadly in the form of each citizen's failure to recognize and name racism as it exists today and engage in the hard work of

174. 138 S. Ct. 2392 (2018).

175. *Id.* at 2424 (Kennedy, J., concurring); *see also id.* at 2408-09 (majority opinion).

confronting it. This is a broad and pervasive problem, but its enormity should not overwhelm us. Instead, we can pick particular places to engage. We can capitalize on discrete inflection points as they arise. One particular site to confront such complicity is to address our collective failure to hold people accountable for calling upon the police to enact and enforce their private racial discomfort. This includes legally confronting complicit state actors, especially the courts, who ratify and give effect to broader racist attitudes pervading society.

Confronting our complicity in perpetuating racism is much more difficult than simply acknowledging our implicit bias. It is uncomfortable and unsettling. It demands not only that we work on our personal attitudes but that we hold people accountable for racist acts and enact laws and policies to substantively address persistent structural inequalities in our society. The civil rights protesters of the 1960s were not calling for simple changes in attitudes; they were calling for changes in law and policy. Recognizing and addressing implicit bias may be a valid part of a solution but, if it is the primary way we see the problem, we risk sacrificing true progress on the altar of smug self-congratulation. We might righteously condemn tiki-torch Nazis, but we will fail to take on more substantive programs for achieving racial justice.