

## THE IMPLICIT BIAS OF IMPLICIT BIAS THEORY

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*“Legal liberalism, as well as critical race theory, has examined issues of race, racism, and equality by focusing on the exclusion and marginalization of those subjects and bodies marked as different and/or inferior. The disadvantage of this approach is that the proposed remedies and correctives to the problem – inclusion, protection, and greater access to opportunity – do not ultimately challenge the economy of racial production or its truth claims or interrogate the exclusion constitutive of the norm but instead seek to gain equality, liberation, and redress within its confines.”*

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1. *Processed Lives*, TUMBLR (May 25, 2014, 3:02 PM), <http://processedlives.tumblr.com/post/86817299045/legal-liberalism-as-well-as-critical-race-theory>.

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## INTRODUCTION

Implicit bias theory seems to have cornered the scholarly discourse on race and racism for the first couple decades of the twenty-first century. A cursory online search through my university library's search engine yielded nearly half a million hits for "implicit bias." In the legal academy alone, the research and policy debates are too voluminous to cite in detail.<sup>2</sup> As the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University noted in its *State of the Science: Implicit Bias Review*, a clear indication of the proliferation of implicit bias into public discourse is its frequent presence on mainstream news outlets,<sup>3</sup> with articles in *The New York Times*, *The Washington*

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2. See *Implicit Bias*, NAT'L IMPLICIT BIAS NETWORK, <http://implicitbias.net/> (last visited Apr. 21, 2018) ("The National Implicit Bias Network is one of the country's leading resources and voices on implicit bias and the phenomenon's interaction with structural racism and the resulting inequality in areas such as the legal system, law enforcement, education, employment and housing."); *Research and Strategic Initiatives*, KIRWAN INST. FOR STUDY RACE & ETHNICITY, <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/#implicitbias> (last visited Apr. 21, 2018) (defining implicit bias and identifying some of its common characteristics).

3. CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW* 2015, at 6, <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf> (last visited Apr. 21, 2018).

*Post*, *Huffington Post*, and *Forbes*, among other venues.<sup>4</sup> During the course of the 2017 *Drexel Law Review* Symposium, the wide-ranging and probing discussion on “Race and Policing” featured a number of comments, references, and questions about implicit bias theory.<sup>5</sup> It became apparent that my presentation at the Symposium at least needed to pass through implicit bias theory in order for my intended intervention to register. At the same time, the Symposium underscored for me the limitations of the theory. As a result, this Article resituates the argument I presented at the Symposium regarding the state of black self-defense within an analysis of implicit bias theory.

This Article’s position regarding implicit bias theory is that implicit bias theory does indeed describe a consequential reality. This author has no quarrel with the cognitive science referenced in the various studies, and I know that the unconscious racism to which it refers is endemic to our society.<sup>6</sup> The problem, however, is that implicit bias theory bears an implicit bias of its own that leaves it fatally compromised in charting the way forward to social transformation.<sup>7</sup> Implicit bias theory misrecognizes the nature of racism and thus underestimates the scale of the breach to be crossed through anti-racist agitation.<sup>8</sup> In particular, implicit bias theory displaces the singular position of

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4. See, e.g., Eric Cooper, *Confronting Implicit Bias in Sports, on the Streets and in Our Schools*, HUFF POST (Aug. 22, 2016, 1:43 PM), [https://www.huffingtonpost.com/entry/confronting-implicit-bias\\_b\\_11653312.html](https://www.huffingtonpost.com/entry/confronting-implicit-bias_b_11653312.html); Falon Fatemi, *How Unconscious Biases Are Undercutting Your Business*, FORBES (Aug. 17, 2017, 11:00 AM), <https://www.forbes.com/sites/falonfatemi/2017/08/17/how-unconscious-biases-are-undercutting-your-business/#6ba756b651a3>; Chris Mooney, *Across America, Whites Are Biased and They Don’t Even Know It*, WASH. POST (Dec. 8, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/?utm\\_term=.4be75ed615a6](https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/?utm_term=.4be75ed615a6); Daniel A. Yudkin & Jay Van Bavel, Opinion, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html>.

5. *Symposium Considers Race and Policing: Past, Present and Future*, DREXEL U. THOMAS R. KLINE SCH. L. (Oct. 23, 2017), <http://drexel.edu/law/about/news/articles/overview/2017/October/race-and-policing-symposium-10232017/>.

6. See KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, UNDERSTANDING IMPLICIT BIAS 1-2, [http://kirwaninstitute.osu.edu/docs/implicit-bias\\_5-24-12.pdf](http://kirwaninstitute.osu.edu/docs/implicit-bias_5-24-12.pdf) (explaining the far-reaching societal impact of implicit bias in education, the criminal justice system, and aspects of our everyday lives).

7. See *infra* Part I.

8. See *infra* Part IV.

black people under racial regime.<sup>9</sup> For this reason, this Article suggests that implicit bias theory is particularly inept in dealing with the racist violence of the law. There is an onto-epistemic structure—the basis of our understanding of existence and knowledge—more fundamental than the dynamics revealed in cognitive science. In other words, scientific inquiry into the nature of racism is itself in fee to the prevailing anti-black image of humanity.

This Article begins with a brief review of the implicit bias problem. The focus here is on how implicit bias creates what legal scholars frequently refer to as the intent doctrine's "insuperable barrier" to proving discrimination.<sup>10</sup> This Article then identifies the implicit assumptions underwriting implicit bias theory. When we recognize that "science" is a discourse like any other, we recognize that its truth-claims are as much a function of power as they are a function of the discovery of new "facts"; we can then ascertain the ideology that allows certain scientific findings to emerge at a given historical moment.<sup>11</sup> The cognitive science now privileged in legal discourse on racism is thus a reflection of power relations momentarily emergent through a long-standing struggle over the meaning of black liberation. Implicit bias theory's underlying assumptions, distinct from its cognitive science conclusions, reveal the ongoing hegemony of liberalism, generally, and of colorblindness ideology, specifically. Given this shared ideological seam, this Article recalls two distinct moments in the black freedom movement where black thinkers thoroughly exposed liberal thought as the conceptual scaffolding for racist violence. In light of these devastating critiques, levied during the civil rights era and then during

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9. See *infra* Part IV.

10. Eva Patterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1196 (2008).

11. See MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (2d ed. 1965); MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* (1st ed. 1973); MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1st ed. 1970); RICHARD C. LEWONTIN, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* (1st ed. 1991); RICHARD C. LEWONTIN, Steven Rose & Leon J. Kamin, *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* (1st ed. 1984).

the period of its most vigorous backlash, implicit bias theory today is essentially reinventing the wheel—and constructing a shoddy replica to boot. This leads to the crux of the problem of implicit bias theory: when considered within the historical context of black struggle against law, it stands as yet another method to quarantine black self-determination.

### I. THE PROBLEM OF IMPLICIT BIAS

Implicit bias theory maintains that all people have biases of which they are largely unaware.<sup>12</sup> Our decisions and actions are as determined by these unconscious prejudices as they are by our conscious beliefs.<sup>13</sup> The basic premise of implicit bias theory in criminal law is that police officers, lawyers, judges, juries, and other criminal justice actors have unconscious biases that cause them to make prejudicial decisions against individuals processed in the system.<sup>14</sup> These individual acts of discrimination congeal to produce a disproportionate impact on people of color, especially on black people.<sup>15</sup> Implicit bias theory proposes that if people are educated about their biases, then they will be less likely to act on them, and consequently, there will be less of a discriminatory impact throughout the criminal justice system.<sup>16</sup>

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12. See Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 *CARDOZO J. CONFLICT RESOL.* 75, 75 n.1 (2015); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *CALIF. L. REV.* 945, 946, 951 (2006).

13. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 *VA. L. REV.* 1893, 1902 n.19 (2009).

14. See, e.g., Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 *IND. L.J.* 1333, 1365 (2010) (noting that racial bias affects policing decisions); Jeffrey J. Rachinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1225 (2009) (noting that, due to time constraints and overconfidence, judges may be unable to control implicit racial biases); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 *CONN. L. REV.* 827 (2012) (noting that jurors often harbor implicit racial biases); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *SEATTLE U. L. REV.* 795 (2012) (arguing that implicit racial biases affect prosecutorial decisions).

15. See Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 *WASH. U. J.L. & POL'Y* 23, 28–29 (2014).

16. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. REV.* 465, 511 (2010) (explaining that procedural and structural reforms can

The scientific research on implicit bias has proliferated in recent years, with empirical findings documenting the pervasive reality of unconscious racism. For example, in a recent *Yale Law Journal Forum*, Justin Levinson and Robert Smith reported two empirical studies on implicit bias.<sup>17</sup> The first study found that people automatically devalue black lives, relative to white lives;<sup>18</sup> the second, that participants associated retribution with blackness and leniency with whiteness—leading Levinson and Smith to conclude that core punishment theories have become deeply ingrained with implicit racial bias.<sup>19</sup> Additional studies document empirical findings that implicit biases inform virtually every step in the criminal justice process.<sup>20</sup> The research is clear that even in the absence of conscious prejudice or intentional discrimination and ill will, implicit biases influence all aspects of society, resulting in both individual and systemic discrimination.<sup>21</sup> Eva Patterson and her colleagues, moreover, cite

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disrupt the causal link between implicit biases and behavior).

17. Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 *YALE L.J.F.* 406, 407 (2017), <https://www.yalelawjournal.org/forum/systemic-implicit-bias>.

18. *Id.*

19. *Id.* at 409–10.

20. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1186 (2012) (considering the effects of implicit bias at various stages of criminal trials); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *DUKE L.J.* 345, 345 (2007) (reporting the results of an empirical study that found that mock jurors remembered case facts in racially biased ways); Justin D. Levinson, et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 *N.Y.U. L. REV.* 513, 513 (2014) (reporting that “death qualified” jurors possessed higher levels of both implicit and explicit anti-Black bias than jurors who would be ineligible to serve on death penalty juries); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 *OHIO ST. J. CRIM. L.* 187, 190 (2010) (finding implicit associations between Black and guilty, and White and not guilty).

21. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241, 1243, 1249–50 (2002) (discussing the presence and impact of implicit bias in society); Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1493–94 (2005) (same); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1166–67 (1995) (same); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1723–24, 1726 (2000) (discussing the presence of systematic discrimination and implicit bias in society and the judicial system); Eric K. Yamamoto et al., *Redefining Discrimination: Using Social Cognition Theory to Challenge the Faulty Assumptions of the “Intent Doctrine” in Anti-Discrimination Law 7–8* (2004) (unpublished manuscript) (on file with the Equal Justice Society and Connecticut Law Review) (same).

a Swedish study showing that people's explicit attitudes about race are contradicted by their implicit biases.<sup>22</sup> Consequently, having an unbiased consciousness is not enough; we must identify our unconscious prejudices and understand how they work on and through us.<sup>23</sup>

Due, at least, to the ubiquity of implicit bias, this Article argues that juries in criminal cases are only impaneled after the prospective jurors have satisfactorily *lied* to the court that they will be *unbiased*. *Nobody* is unbiased, and yet, if you state as much – as this Author has done repeatedly when called for jury duty – you are swiftly excused from the jury. The Court has actually recognized the presence of racial bias in juries going back to at least 1931.<sup>24</sup> In *Aldridge v. United States*, the Supreme Court reversed a black defendant's murder conviction where the trial judge refused a defense request to question the venire on racial prejudice.<sup>25</sup> Similarly, in *Turner v. Murray* – which occurred more than fifty years later but long before the rise of implicit bias theory – the Court reversed a black man's capital conviction on the grounds that racial prejudice may have infected the jury's decision because the jury was not warned that the case

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22. Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* 17 (Inst. for the Study of Labor (IZA), Discussion Paper No. 2764, Apr. 2007), <http://ftp.iza.org/dp2764.pdf>.

23. Legal scholars sometimes acknowledge the existence of institutionalized, systemic, systematic, or structural racism, and some have also attempted to integrate an understanding of this phenomenon into their analysis of implicit bias. See, e.g., NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* 181–90 (2016); Justin D. Levinson & Robert J. Smith, *Systematic Implicit Bias*, 126 *YALE L.J.F.* 406, 408 (2016–2017), <https://www.yalelawjournal.org/forum/systemic-implicit-bias>; López, *supra* note 21; L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 862, 886–87 (2017). I find these gestures to structural analysis merely that; however, they tend to be simply aggregated portraits of individual acts of discrimination that accumulate to have effects beyond what any one agent of discrimination accomplishes. They also tend to imply that institutionalized racism is simply that which occurs when unbiased individuals follow race-neutral procedures. While this does indeed happen on a daily basis, it does not account for that individual's psychic and material investments in both the "justness" of that race-neutral procedure and its disparate impact.

24. See *Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("[W]e do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry.").

25. *Id.* at 314–15.

involved a black man killing a white man.<sup>26</sup> The *Turner* Court therefore established a constitutional right to voir dire regarding racial bias in all capital cases involving an interracial crime of violence.<sup>27</sup>

These findings become especially consequential given that anti-discrimination law since the 1976 Supreme Court decision in *Washington v. Davis*<sup>28</sup> has been taken to require plaintiffs to prove that it is the *intention* of defendants to cause discriminatory harm; proving disparate impact is insufficient.<sup>29</sup> David Kairys notes that “[s]ince the mid-1970s, equal protection claims brought by African Americans and other minorities were rejected for lack of proof of purposeful discrimination on issues that significantly defined the not-very-distant segregated past: job discrimination, voting discrimination, housing discrimination, segregated schools, and the death penalty.”<sup>30</sup> Ian Haney-López argues that despite the consensus within the legal academy regarding the intent doctrine’s genesis in *Davis*, the history of the Fourteenth Amendment’s Equal Protection Clause is more complicated.<sup>31</sup> He shows that intent itself has been bifurcated by the Court into what he terms “contextual intent” and “malicious intent.”<sup>32</sup>

“Contextual intent” marked the Court’s dismantling of Jim Crow segregation throughout the 1970s through a “broadly informed inferential approach” that applied intent “only in the

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26. 476 U.S. 28, 35–36 (1986).

27. *Id.* at 36–37; see also Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 847 (2015) (discussing the presence and evolution of implicit bias within voir dire jurisprudence).

28. 426 U.S. 229 (1976).

29. See *id.* at 239 (“Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”); see also *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

30. David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857, 859 n.3 (2011).

31. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012).

32. *Id.*

loosest sense.”<sup>33</sup> López shows that through 1977, in cases such as *Castaneda v. Partida*<sup>34</sup> and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,<sup>35</sup> the “contextual intent” approach worked well at “detecting discrimination against non-Whites and distinguishing invidious from remedial government practices.”<sup>36</sup> The “malicious intent” approach, on the other hand, began to take shape with *Personnel Administrator of Massachusetts v. Feeney*,<sup>37</sup> the 1979 case that first introduced the malice standard.<sup>38</sup> López argues that colorblindness ideology was a response to the intent doctrine and, in turn, the “malicious intent” requirement emerged as colorblindness began to achieve hegemony.<sup>39</sup> In other words, López’s argument about the Court’s “intentional blindness” – racial jurisprudence intentionally blind to racial discrimination against non-whites<sup>40</sup> – is a primer on how *power* is the operative factor shaping both how implicit bias manifests itself and which interpretation of intent shapes the Court’s decision-making at a given moment in time.

In short, there is a great deal of scholarship about the state of implicit bias theory that seems to belabor the obvious. There is a wealth of insight here, but it is outdated. *Of course* racism runs deep, *of course* explicit prohibitions on discriminatory conduct barely scratch the surface of how racism works, and *of course* power – not reason, rational argumentation, social scientific ev-

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33. *Id.*

34. 430 U.S. 482 (1977) (ruling that the defendant was denied Fourteenth Amendment due process and equal protection because of the discrimination against Mexican Americans in the selection of grand juries).

35. 430 U.S. 144 (1977) (ruling that the state’s race considerations in redistricting did not violate the Fourteenth or Fifteenth Amendments because the purpose was to preserve minority voting strength and have the percentage of nonwhites in the districts reflect the percentage of nonwhites in the county).

36. Haney-López, *supra* note 31, at 1786; *see also Castaneda*, 430 U.S. at 495–99 (recognizing the invidious governmental practice of discriminating against Mexican Americans in grand jury selection); *Carey*, 430 U.S. at 171–73 (recognizing the remedial governmental practice of considering race in redistricting to preserve minority voting strength).

37. 442 U.S. at 257 (holding that a state veterans’ hiring preference statute was not created with a discriminatory intent despite the disparate impact on women).

38. *Id.* at 279–80.

39. Haney-López, *supra* note 31, at 1786.

40. *Id.* at 1784.

idence, or textual interpretation – explains the life of equal protection in Fourteenth Amendment jurisprudence. On the face of it, then, at least to those of us who are students of the black liberation struggle across the better part of a millennium, implicit bias theory is simply rehearsing the very same conceptual and political errors to which it purports to be calling our attention. To wit, if racism is so deeply ingrained as to constitute the unconscious, then why would we expect a program of rational consciousness-raising about implicit bias to effectuate changes in the unconscious?

## II. THE ASSUMPTIONS OF IMPLICIT BIAS THEORY AND A COUNTER-THEORY

Although implicit bias theory appears to be drilling down to a deeper conceptual level, in fact, it presents us with a superficial understanding of racism. Implicit in implicit bias theory is the premise that racism *should have* gone away with the eradication of explicit discrimination, that the civil rights gains would not have stalled, become eviscerated, or undergone a reversal, but for this nagging little problem of people's cognitive processes.<sup>41</sup> Racism, according to this theory, begins in the mind as a thought process.<sup>42</sup> Rational people do not want to be racist; they desire to give up the hold of their racist unconscious – at least that appears to be the unstated assumptions of implicit bias theory.<sup>43</sup> The theory almost goes so far as to strip racism from “race” by eliminating the animus of it all; instead of thinking “incorrect” thoughts about “race,” we should strive to think “correct” thoughts – as in, black people are *not* intrinsically

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41. See Kairys, *supra* note 30, at 863–64 (discussing how although legal developments reduced explicit racism, non-explicit forms of discrimination continued).

42. See Kang, *supra* note 21, at 1136–37 (describing how police officers subliminally attribute criminality with African Americans).

43. See Hutchinson, *supra* note 15, at 44–45 (“[S]ever[ing] the correlation between implicit bias and discriminatory behavior . . . requires individuals to acknowledge their own implicit racial attitudes and the possible impact these prejudices could have.”).

pathological beings, they are simply construed as such by a discriminatory criminal justice system.<sup>44</sup> Furthermore, in proclaiming that anyone *can* and everyone *does* have implicit biases, the theory encourages people to look past group differences in power, to let go of collective culpability, institutional processes, and structural realities.<sup>45</sup> If everyone has biases beyond their control, then there is indeed a place prior to prejudice wherein hierarchy is flattened and racial identity is simply “difference.”

A proponent of implicit bias theory might counter this Article by arguing that even though implicit biases are not created by the individual, the individual is nonetheless accountable to them.<sup>46</sup> This point is true on its face, but is unethical at its core because it betrays the realities of racism. Racism does not begin with the idea of “race,” about which society has developed negative and positive valuations in equal measure. This notion is inconsistent with both history and with the present realities of racism. Instead, this Article suggests that racism is an act of violence that produces the notion of “race” as its effect. Racism begets “race,” not the other way around. Racism is the Europeans—and the Arabs before them and the Americans after them—going to the African continent to kidnap and brutalize human beings. The outcome of this collective act of violence—across almost twelve hundred years—is the meaning of “race”: white is human, while black is the human’s negation or, as Frantz Fanon put it, “the white man slaves to reach a human level.”<sup>47</sup> In this sense, “race” is never neutral, but is always the byproduct of violence. It is a placeholder for violence and terror. Implicit bias theory’s idea of “race” as something that can be scrubbed clean of violence by removing or exposing the bias,

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44. James Babikian, Note, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139, 146–47 (2015).

45. See Manuel R. Vargas, *Implicit Bias, Responsibility, and Moral Ecology*, MANUEL R. VARGAS (Oct. 7, 2016), [vargasphilosophy.com/Papers/Implicit%20Bias.pdf](http://vargasphilosophy.com/Papers/Implicit%20Bias.pdf) (“[T]here is a web of issues here about moral culpability where many people are unaware of the bias and it is unclear whether and when some bit of action is a product of bias, even for those aware of the possibility of implicit bias in their own case.”).

46. Jules Holroyd, *Implicit Bias, Awareness, and Imperfect Cognitions*, 33 CONSCIOUSNESS & COGNITION 511, 516 (2015).

47. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 11 (1967).

the *error* of it all, is a pretension that reveals its white authorship. White people are collectively invested in the fallacy that they are individuals first, and only members of a group secondarily and accidentally. Implicit bias theory only makes sense as a way out of being positioned as a collective, of being implicated in the historical crimes of the group. It makes white people's absolution and historical escape feasible: everyone equally is affected by the brain's cognitive processes, the theory claims, regardless of where one is situated in the historically entrenched hierarchy of racial regime.<sup>48</sup>

Implicit bias theory proponents will argue, as Patterson and her colleagues do, that recent developments in cognitive science since the civil rights era provide us a better understanding of how racism pervades the unconscious.<sup>49</sup> This Article does not attempt to validate or invalidate these claims about scientific development as they are inconsequential. Rather, the crux of the instant matter lies within the question of why this supposedly "new" science merely retreads familiar terrain. Moreover, what does it mean that this "new" science supposedly "discovers" truth-claims that have long been levied by black thinkers?

### III. REINVENTING THE WHEEL: IMPLICIT BIAS THEORY'S OCCLUSION OF CRITICAL RACE THEORY

Implicit bias theory's definition of where racism comes from and how it operates is not qualitatively different from color-blindness ideology. Leading legal scholarship today ends up reinventing the wheel and propounding absurd contradictory platitudes in the process because it has studiously avoided the insights of black thought across the generations.<sup>50</sup> A major

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48. See Greenwald & Krieger, *supra* note 12, at 956.

49. See, e.g., Patterson et al., *supra* note 10 (discussing unconscious and institutional bias, the science behind them, and the need to change laws requiring intent to prove bias).

50. See, e.g., NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 39 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> (theorizing that traditional "Jim Crow racism" has been replaced with a new "laissez-faire" style of racism that is marked by a "kinder, gentler antiblack ideology").

study published recently by the Sentencing Project, for example, documented a plethora of findings attesting to the pervasiveness of implicit bias, but then concluded with the following statement: “Dispelling the illusion that we are colorblind in our decision making is a crucial first step to mitigating the impact of implicit racial bias.”<sup>51</sup> Colorblindness in the sense deployed here by the Sentencing Project is meant to be taken literally, when in fact colorblindness ideology rests on the very same principles as implicit bias theory.<sup>52</sup> In other words, statements such as this one from the Sentencing Project employ colorblindness as a straw man (as in: *of course people do not stop seeing color*) in order to reaffirm its basic premise that racism begins as an irrational thought process about “race” in which meaning is imputed to skin color.<sup>53</sup> The Sentencing Project, and the weft of legal scholarship on implicit bias theory along with it, presumably would not have made this error if they were familiar with, and had heeded the basic teachings of, Critical Race Theory (CRT) from the 1970s through the mid-1990s.

Critical race theory began to emerge in the late 1970s, as resistance to civil rights had succeeded in reversing the gains of the black freedom movement.<sup>54</sup> Derrick Bell Jr., a veteran of the civil rights struggles in Mississippi with the NAACP Legal Defense and Education Fund, and the preeminent judge and legal historian A. Leon Higginbotham Jr., pioneered legal scholarship that interrogated the “rule of law” in real terms.<sup>55</sup> Bell’s *Race, Racism, and American Law* was groundbreaking and still defines the field today; Higginbotham’s *In the Matter of Color: Race and the American Legal Process 1: The Colonial Period* remains

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51. *Id.*

52. See generally Kang & Lane, *supra* note 16 (discussing the science behind implicit social cognition in regards to colorblindness and implicit bias).

53. *Id.*

54. MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3–4 (1993).

55. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY: THE KEY WRITINGS]; see also Derrick Bell (1930–2011), HARV. L. TODAY (Oct. 6, 2011), <https://today.law.harvard.edu/derrick-bell-1930-2011/>.

an essential history of the formation of U.S. law *through* racial regime.<sup>56</sup> By the late 1970s and early 1980s, critical race theorists were publishing searing departures from conventional liberal and conservative legal scholarship about race and inequality.<sup>57</sup> CRT begins from the starting point that racism is endemic to U.S. society.<sup>58</sup> Thus, the pertinent questions become not whether or how much racial discrimination remains, or even how it can be limited or eradicated (although that is the objective of critical race scholars),<sup>59</sup> but rather how traditional interests, normative values, and institutional processes that appear race-neutral on their face serve as vessels of racial subordination. Along these lines, CRT also calls into question dominant legal claims of neutrality, objectivity, colorblindness, and meritocracy that underwrite the ideology of equal opportunity by telling an ahistorical and abstracted story of racial inequality as a series of disconnected, intentional, and individualized acts.<sup>60</sup> This approach begets a similar interrogation of legal pieties such as the notion of a colorblind Constitution and the unassailability of the legal doctrines created to eradicate discrimination following the civil rights era.<sup>61</sup> In short, CRT attacked civil rights discourse for its role in delimiting freedom *as* the legal doctrines of the civil rights era were being curtailed.

Some of the key CRT interventions that anticipated the implicit bias theorists include Alan Freeman's argument that

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56. See generally DERRICK BELL JR., *RACE, RACISM, AND AMERICAN LAW* (1973) (detailing American racism initiated by whites against blacks and the extent to which the law reflects that racism); A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

57. MATSUDA ET AL., *supra* note 54; *CRITICAL RACE THEORY: THE KEY WRITINGS*, *supra* note 55.

58. Charles R. Lawrence III et al., *Introduction* to MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 6 (1993); see also Derrick A. Bell Jr., *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 302 (1995) (asserting that "[t]he struggle by black people to obtain freedom, justice, and dignity is as old as this nation").

59. See, e.g., Jonathan A. Beyer, Note, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L.J. 537, 545 (2000).

60. Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglas, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 845-49 (2008).

61. See *id.* at 840-46.

American law's "perpetrator perspective" reduces racism to a deviation from an otherwise neutral, rational, and just distribution of social goods.<sup>62</sup> Through this perspective, Freeman argues, race reform can present itself as progressive, all the while legitimizing the basic mythology of American democracy.<sup>63</sup> Derrick Bell Jr. exposed key fault lines in the pillar of anti-discrimination law: school desegregation.<sup>64</sup> He argued that elite civil rights organizations pursued integration through legal reform, while black parents wanted something altogether different: better funding for black schools.<sup>65</sup> Bell also proposed his theory of "interest convergence," wherein he argues that the canonical civil rights victory in *Brown v. Board of Education* was not a breakthrough in jurisprudence or judicial morality, but rather a byproduct of the momentary convergence of white and black interests.<sup>66</sup> Once black advances no longer served the interests of white society, however, they were withdrawn or blocked.<sup>67</sup> In this regard, CRT was decidedly materialist and structuralist, deconstructing law in its socio-political, historical, and economic context.<sup>68</sup> Changes in law, according to CRT, are expressions of power struggles eminent in the society at large.<sup>69</sup>

A key expression of power deconstructed by CRT is color-blindness ideology. In his article *Race Consciousness*, Professor

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62. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978).

63. *Id.* at 1052 (arguing that antidiscrimination doctrine "holds out a promise of liberation" while "refrain[ing] from delivering on the promise if it is to serve its function of merely legitimizing").

64. Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).

65. *Id.* at 476 n.21, 477-79.

66. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 522-27 (1980). For further discussion of the political and economic forces that compelled the *Brown* decision, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (arguing that Cold War policy and international relations lead to superficial amendments to American racism, but stymied the long term movement for racial equality).

67. Bell, *supra* note 66.

68. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 378 (2006).

69. *Id.* at 378-79.

Gary Peller shows that colorblindness and the mainstream civil rights discourse on “race relations” were the product of a confrontation between competing definitions of racism.<sup>70</sup> During the 1960s, a longstanding tradition of self-determination in black communities—*black nationalism*—congealed under the rubric of Black Power.<sup>71</sup> While never meant to take *over* the U.S. power structure, the Black Power Movement was nonetheless sincere in its desire to extricate black futures from mainstream U.S. institutions.<sup>72</sup> Black Power was thus a reconceptualization of the *address* for social change: unlike the integrationist appeal to the mainstream for inclusion, Black Power addressed itself to the black communities under siege by U.S. society, calling forth a radical race-conscious methodology for black empowerment.<sup>73</sup> Contra the liberal conception of universalism driving integrationism, Black Power was clear that racism was the product of historical forces organized to produce black subordination.<sup>74</sup> The definition of racism, therefore, was specific to historical struggles between black and white and could not be extrapolated to other positions or identities. All non-whites are subjected to racism, but the oppression of black people as set forth by slavery and its afterlife cannot be equated or analogized.<sup>75</sup> By the end of the 1960s, writes Peller, this conception of racism and racial struggle stood as a viable and threatening alternative to integrationism.<sup>76</sup>

Integrationism captured the mainstream common sense about racism not because it was more accurate, scientific, rational, inclusive, or persuasive than the nationalist narrative of

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70. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 763 (1990).

71. *Id.* at 787–90.

72. *Id.*

73. See generally ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* (2001) (describing activist Assata Shakur’s experience with the FBI and its criminalization of black activism).

74. STOKELY CARMICHAEL (KWAME TURE), *STOKELY SPEAKS: FROM BLACK POWER TO PAN-AFRICANISM* 31–43 (Ethel N. Minor ed., 2007) (1971).

75. See FRANK B. WILDERSON, III, *RED, WHITE, AND BLACK: CINEMA AND THE STRUCTURE OF U.S. ANTAGONISMS* 8–22 (2010) (discussing the continuing effect slavery has on the black community compared to white people in films).

76. See, e.g., Peller, *supra* note 70, at 823 (noting that during the 1960s and mid-1970s, “black nationalism achieved its most sophisticated articulation and its greatest mass appeal”).

Black Power.<sup>77</sup> Rather, as with most instances of white power, Black Power was defeated through the barrel of the gun. Integrationism assumed the center as Black Power was violently suppressed through the coordinated assaults of the FBI's Counter-Intelligence Program (COINTELPRO) against the black community.<sup>78</sup> Attacks on black activists terrorized the community, but also served as backdrop to integrationism's claims that all forms of race consciousness are extremist, be it the Black Panther Party on the left or the Ku Klux Klan on the right.<sup>79</sup> As Peller explains, all forms of race consciousness were thus censured, leaving us ill-equipped to name the realities of racial regime.<sup>80</sup>

One of the casualties of this power struggle over the meaning of race and the viability of black liberation has been CRT itself. Long before implicit bias theory came along, Charles Lawrence wrote *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in which he demonstrates the prevalence of unconscious racism<sup>81</sup> and exposes anti-discrimination law's inadequacy in grappling with it.<sup>82</sup> An understanding of unconscious racism was manifold throughout the CRT corpus. Neil Gotanda's classic essay *A Critique of "Our Constitution is Color-*

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77. See *id.* at 821-22.

78. See WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 91-95 (2d ed. 2002); DHORUBA BIN WAHAD ET AL., *STILL BLACK, STILL STRONG: SURVIVORS OF THE WAR AGAINST BLACK REVOLUTIONARIES* 243-70 (1993); BOBBY SEALE, *SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* (BLACK CLASSIC PRESS 1996) (1970); WILLIAM F. PEPPER, *AN ACT OF STATE: THE EXECUTION OF MARTIN LUTHER KING* 10 (2003).

79. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 84-87 (3d ed. 2014); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 52-57 (4th ed. 2018).

80. Peller, *supra* note 70, at 762 ("[T]he failure of the progressive and liberal white community to comprehend the possibility of a liberating rather than repressive meaning of race consciousness has distorted our understanding of the politics of race in the past and obscures the ways that we might contribute to a meaningful transformation of race relations in the future.").

81. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) ("Racism is in large part a product of the unconscious.").

82. See *id.* at 387 ("[A]ntidiscrimination law has affirmatively advanced racism by promoting the ideology that justifies the continued economic subjugation of blacks.").

*Blind*” is a treatise on racism’s articulation between the unconscious and its institutionalized processes.<sup>83</sup> Gotanda demonstrates how the Court’s adherence to colorblind constitutionalism belies an unconscious assertion of racial hierarchy that underwrites the distinction between public and private conduct, the non-recognition of race (where it is identified but only to discount its salience), and the various dimensions of socially constructed categories.<sup>84</sup> Cheryl Harris’s equally timeless interrogation of racism’s methodology in *Whiteness as Property* connects endemic unconscious racism to the materiality of white privilege.<sup>85</sup> Harris reminds us that “race” is very much an effect of a fundamental property interest: if one is white, this property interest stems from the twin rights to possess oneself and to possess objectified others.<sup>86</sup> Harris’s concept of whiteness as property proves useful in illuminating how the Court protects this interest against its redistribution through the very legal doctrines ostensibly created toward this end.<sup>87</sup>

Could it be that CRT’s recognition of unconscious racism three decades ago contributed to its marginalization in legal discourse ever since, even as unconscious racism has now become the main reason for implicit bias theory’s influence on legal discourse today? Was Lawrence’s analysis of unconscious racism simply ahead of its time? Does implicit bias theory’s treatment of unconscious racism as a “finding,” and a “new” one at that, simply reveal a gap in legal education’s ability to transmit antecedent insights? Or is something more insidious at work here? Lawrence was clear that the prevalence of unconscious racism and the Court’s establishment of the Intent Doctrine co-conspire to insulate the status quo against attack from black liberation.<sup>88</sup> He acknowledged that unconscious racism

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83. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 44-45 (1991).

84. See *id.* at 54-55.

85. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714-15 (1993).

86. See *id.* at 1743.

87. See *id.* at 1737-38.

88. Lawrence, *supra* note 81, at 324-25.

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was no mystery, and that therefore, the intent requirement's imperviousness to modification registers a concerted disavowal on the part of the dominant racial group to act against its collective self-interest.<sup>89</sup> As Lawrence presciently wrote in his 1987 article, "I do not anticipate that either the Supreme Court or the academic establishment will rush to embrace and incorporate the approach this article proposes."<sup>90</sup> The fact that implicit bias theory has emerged in this historical moment, sidestepping the earlier contributions of CRT, to considerable applause and institutional embrace (as will be discussed below), alerts us to the fundamental differences between CRT and implicit bias theory, and tells us that implicit bias theory's message is well accommodated to the prevailing balance of forces, not a concerted challenge to it. Implicit bias theory retreads some of the same ground previously staked out by CRT, but without the trenchant structural and historical scrutiny of the earlier intervention.<sup>91</sup> Without this dimension, however, implicit bias theory is no threat whatsoever to the way power is organized today.<sup>92</sup>

#### IV. THE PROBLEM OF IMPLICIT BIAS THEORY: SILENCING BLACK VOICES

Implicit bias theory is itself the problem. Not because of the reality it names—unconscious racism is a mundane experience—but because of the political struggle it stymies through the continued subordination of black voices. It is a blatant reminder that black testimony continues to be ignored, that blackness cannot generate theoretical advances, and that true action on the historical problem of anti-black violence is continually deferred. From the perspective of black liberation, implicit bias theory is tantamount to the state or an institution appointing another blue-ribbon commission to study a problem that is already well understood rather than taking substantive action to remedy the problem. It reminds me of the reporter who asked

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89. *Id.* at 323.

90. *Id.* at 387.

91. *See infra* Part IV.

92. *See infra* Part IV.

Malcolm X, “Do you feel we’re making progress?” Malcolm’s response was:

If you stick a knife in my back nine inches and pull it out six inches there’s no progress; you pull it all the way out that’s not progress; the progress is healing the wound that the blow made and they haven’t even begun to pull the knife out much less try to heal the wound; they won’t even admit that the knife’s there.<sup>93</sup>

This is how racism works: black experience remains opaque and illegible until white voices weigh in on the matter. In this case, while there may be black and other non-white scholars advancing the implicit bias thesis, by “white voices” in this case I refer to “science.”<sup>94</sup> One might argue that “science” does not have a racial identity per se, but throughout its history it has been a useful weapon for legitimating white supremacy.<sup>95</sup> In turn, many of the historical advances of science across its many fields of investigation were, and continue to be, made possible through racism.<sup>96</sup>

The purpose here is not to impugn the motives of implicit bias theorists, but to consider the precarious line between witness and spectator, object and subject, invisible suffering and its empathic proxy. Cognitive science and the discourse of implicit

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93. See Finifinito, *Malcolm X - If You Stick a Knife in My Back*, YOUTUBE (Nov. 5, 2011), <https://www.youtube.com/watch?v=XiSiHRNQiQo>.

94. See *infra* note 96 and accompanying text.

95. See, e.g., LEE D. BAKER, *FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE 1896-1954*, at 61-62 (1998); LUNDY BRAUN, *BREATHING RACE INTO THE MACHINE: THE SURPRISING CAREER OF THE SPIROMETER FROM PLANTATION TO GENETICS* 28-30 (2014); DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2012); ALONDRA NELSON, *BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION* 165-66 (2011).

96. See, e.g., HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* (2006).

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bias is a stand-in for black suffering, which can only be recognized to the degree that science acknowledges it.<sup>97</sup> Yet, as a result of this substitution, violence is transmuted to bias and the pained body of racism threatens to disappear altogether.<sup>98</sup> Put differently, the effort to dispel the widespread disavowal that racism still exists in the absence of explicit bias or animus requires that “the white body be positioned in the place of the black body in order to make this suffering visible and intelligible.”<sup>99</sup> But if this violence becomes palpable, and indignation can be fully aroused, and the situation finally becomes actionable through universalizing racism as unintended bias, then implicit bias theory is truly double-edged, both highlighting unconscious racism and downgrading racism from violence to a natural neurobiological phenomenon. Universalism is the language of whiteness whereby the truth of black struggle is occluded, and the objective of equality is obliterated.<sup>100</sup> No policies deriving from this interpretation of the problem will eradicate the intransigence of antiblackness and the very dilemma that created the platform for cognitive science and implicit bias theory to shape discourse on race and the law in the first place is re-instantiated: the denial of black sentience, the obscurity of black suffering, and the effacement of black self-determination integral to the wanton uses of the black body – from mass incarceration to the leading discourse geared towards its reform.<sup>101</sup>

Recall Peller’s argument in *Race Consciousness* that the hegem-

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97. See CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014, at 30-31, <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>.

98. See *id.*

99. SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 19 (1997).

100. See *id.* at 123.

101. See *id.* On the matter of how anti-racism can be anti-black, and specifically, how the movements to abolish prisons and to end “police brutality” can also retrench antiblackness, see Tryon P. Woods, *Blackhood Against the Police Power: Punishment and Disavowal in the “Post-Racial” Era* (East Lansing: Michigan State, forthcoming) (on file with author).

ony of colorblindness was not inevitable but rather the contested outcome of a struggle between (at least) two competing ideologies: liberalism and black nationalism.<sup>102</sup> There are three implications to bear in mind here respecting the problem of implicit bias theory. First, if we had supported black nationalists then, we might not be here now. Would the same people who promote implicit bias today have endorsed Black Power's analysis of racism then? Would today's implicit bias theorists be interested to learn that Kwame Ture and Charles Hamilton, in their seminal 1967 book, warned against the pitfalls for black liberation of interracial coalitions precisely because of the interaction between individual prejudice and institutional racism?<sup>103</sup> This Article suggests that implicit bias theorists are not open to the actual paradigm shift that Black Power entails; rather, the implicit bias theorists seek to recuperate the paradigm that creates racial violence in the first place. It is akin to trying to preserve the Constitution as a colorblind expression of power by simply adding a Thirteenth, Fourteenth, and Fifteenth Amendment.<sup>104</sup> We can see how well that has been working out for black people.<sup>105</sup> Secondly, implicit bias theory does not operate outside of a liberal framework; it reproduces it—meaning it must be seen as part of the problem, not the solution.

The third implication of the relation between power and knowledge signified by implicit bias theory points to the role of philanthropic foundations in forwarding political agendas

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102. See Peller, *supra* note 70.

103. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 111–16 (1967).

104. See Peller, *supra* note 70, at 823.

105. See U.S. CONST. amend. XIII, § 1 (outlawing slavery except for punishment of a crime, thereby transferring it to the purview of the criminal justice system); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (deploying the Fourteenth Amendment to assert "corporate personhood" by white plaintiffs and rights for the corporation against people); Kenneth T. Walsh, *Voting Rights Still a Hot-Button Issue*, U.S. NEWS (Aug. 4, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/08/04/voting-rights-still-a-political-issue-50-years-later> (discussing Fifth Amendment protections and cases relating to gerrymandering, disenfranchising, and voter identification issues).

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through specific knowledge formation, while crowding out others. Large, wealthy foundations seem comfortable investing a lot of money into researching implicit bias and disseminating the findings. The Equal Justice Society received funding for its National Implicit Bias Network from the W.K. Kellogg Foundation and the California Foundation;<sup>106</sup> the Kirwan Institute's Race and Cognition Project also receives support from Kellogg, as well as from the Annie E. Casey Foundation.<sup>107</sup> Phillip Atiba Goff—one of the main figures in the study of implicit bias and the President of the Center for Policing Equity—has received funding from the National Science Foundation, Russell Sage Foundation, W.K. Kellogg Foundation, Open Society Foundations, Open Society Institute-Baltimore, Atlantic Philanthropies, William T. Grant Foundation, the Community Oriented Policing Services (COPS) Office of the Department of Justice, the Major Cities Chiefs Association, the NAACP LDF, National Institutes of Mental Health, the Woodrow Wilson Foundation, the Ford Foundation, the Mellon Foundation, and Google, among others.<sup>108</sup> He was a witness for the President's Task Force on 21st Century Policing and has presented before congressional panels, Senate press briefings, and White House Advisory Councils.<sup>109</sup> This impressive institutional support and consuming audience for implicit bias research is revealing. During the Black Power era of the late 1960s to early 1970s, when students were shutting down historically white universities around the nation to demand the creation of Black Studies programs, philanthropies were at the forefront of the effort to control the movement's impact on the production of knowledge.<sup>110</sup>

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106. *See Implicit Bias*, NAT'L IMPLICIT BIAS NETWORK, <http://implicitbias.net/> (last visited Mar. 25, 2018).

107. *Research and Strategic Initiatives*, KIRWAN INST. FOR STUDY RACE & ETHNICITY, <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/#implicitbias>.

108. Phillip Atiba Goff, CENTER FOR POLICING EQUITY, <http://policingequity.org/category/dr-goff/> (last visited Apr. 23, 2018).

109. *See id.*

110. *See generally*, MARTHA BIONDI, *BLACK REVOLUTION ON CAMPUS* (2012); *A COMPANION TO AFRICAN-AMERICAN STUDIES* (Lewis R. Gordon & Jane Anna Gordon eds., 2006); JAMES B. STEWART ET AL., *OUT OF THE REVOLUTION: THE DEVELOPMENT OF AFRICANA STUDIES* (Delores P.

The Ford Foundation, in particular, was a pioneer in shaping Black Studies by diverting funds away from program applications evincing a Black Power sensibility and directing support to applicants who proposed curricula based on integrationism.<sup>111</sup> The Foundation favored educational designs that promoted making white students comfortable with the topic of race and racism, while it disfavored programs that prioritized black empowerment through black history, community accountability, and a critical engagement with Western civilization.<sup>112</sup>

The substance of implicit bias studies recalls this earlier quarantine of the Black Studies movement by the Ford Foundation. Goff and his colleagues write about their study of undergraduate students at Stanford, finding that when white male students were reminded of the stereotype that whites are racist and told that they would be discussing the subject of racial profiling with two partners, the white students positioned their chairs further away from their partners when they thought their partners would be black than when they thought their partners would be white.<sup>113</sup> Reminiscent of white hand-wringing about black students sitting together in the cafeteria, this kind of study fits well with the Ford Foundation's successful effort to make sure that the introduction of the study of race and racism to higher education would not disturb white people's equilibrium<sup>114</sup> nor qualitatively transform the study of knowledge that had shaped the world up to the point of black revolutionary action that temporarily brought business as usual to a halt—except that these Stanford undergraduates would soon fill the jury pools for the

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Aldridge & Carlene Young eds., 2000).

111. See NOLIWE M. ROOKS, *WHITE MONEY/BLACK POWER: THE SURPRISING HISTORY OF AFRICAN-AMERICAN STUDIES AND THE CRISIS OF RACE AND HIGHER EDUCATION* 1-29 (2006).

112. *Id.*

113. Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 96-98 (2008).

114. See ROOKS, *supra* note 111, at 28 (“[W]hile the Ford Foundation is undeniably one of African American Studies’ earliest, biggest, and most enthusiastic financial supporters, it is impossible to ignore the fact that one of the unintended consequences of the strategy it has pursued is that many colleges and universities are hesitant to develop a strategy for moving African American Studies units into the mainstream of the institutional structure.”).

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nation's criminal court proceedings and the study's authors were concerned about what implicit bias theorists call "stereotype threat."<sup>115</sup> The term, "stereotype threat," comes from Claude Steele's research in the 1990s on black students' poor performance on standardized tests.<sup>116</sup> It refers to when people react poorly to information that there is a stereotype that may apply to their situation.<sup>117</sup> In one study, women informed that the test they were about to take was slanted against women did more poorly than women not so informed.<sup>118</sup> Another study claims to have found that white police officers that participated in the research and were most concerned with being perceived as racist were more likely to use physical force than those white officers unconcerned about their image as racist.<sup>119</sup> To the extent that the premise of these studies is sound and their findings true (and we would be wise to raise questions on both scores), implicit bias researchers are concerned with managing how whites experience messages about their own racism.<sup>120</sup> I wonder what Malcolm would have to say about this approach.

#### V. SIX BULLETS FOR MICHAEL BROWN: RACISM AS VIOLENCE

Not only are we not getting anywhere through the liberal-progressive, multicultural-integrationist, anti-discrimination-anti-bias paradigm, but moreover, by any measure things are

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115. See BEVERLY DANIEL TATUM, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE* (2017).

116. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995) (defining stereotype threat as "being at risk of confirming, as self-characteristic, a negative stereotype about one's group"); see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997) (arguing that stereotype threat negatively affects women and African American's standardized test scores).

117. Laurie T. O'Brien & Christian S. Crandall, *Stereotype Threat and Arousal: Effects on Women's Math Performance*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 782, 784 (2003) (noting the stereotype of male superiority in math negatively affects women's math performance).

118. *Id.* at 285-87.

119. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 126-27 (2014).

120. See *id.* at 125 ("[R]ecent innovations demonstrate that majority group members and powerful individuals often experience concerns with being negatively stereotyped in terms of their advantageous group position.").

qualitatively worse in at least three ways: (1) black people's life fortunes have precipitously declined; (2) the ability to name reality for what it is has been dramatically eroded; and (3) as a function of both of these things, the conditions for the majority of the people outside the one percent who control 99% of the wealth in this country have also markedly diminished. Yet, we are still talking about how to prove unconscious bias.

This state of affairs is not a conundrum; it is simply a reflection of how power is distributed and the circumscribed terms in which political struggle operates in the current historical juncture. Legal scholars and practitioners working through an implicit bias framework advocate for trainings for police officers "to help individuals identify their own biases and stereotypes, and subsequently counteract their effects."<sup>121</sup> I have identified the errors in this approach. What would be a more efficacious way of understanding and contesting the violence of policing? We would need to stop privileging the individual and episodic dimensions of policing and focus instead on policing as a structural, historical, and social process.<sup>122</sup> Beginning with the power relations in which we find policing raises six basic starting points for recalibrating how we position the police in the paradigm of antiblackness—six points for the six bullets that Officer Darren Wilson shot into seventeen-year-old Michael Brown of Ferguson, Missouri on August 9, 2014<sup>123</sup>:

1. Much of the harm caused to our society—in terms of financial loss, bodily injury, and premature death—comes from the realm of "white-collar crime" and state crime, not from "street crime," and yet we focus the overwhelming brunt of our attention, resources, and fear on the latter realm of criminal behaviors.<sup>124</sup> I call this the "justice contradiction": society focuses

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121. Patterson et al., *supra* note 10, at 1198.

122. *See id.* at 1179 ("[U]ntil we tackle the psychological and structural sources of racial inequality, we will remain stalled in our efforts to advance racial justice.").

123. *See* TRYON P. WOODS, BLACKHOOD AGAINST THE POLICE POWER: PUNISHMENT AND DISAVOWAL IN THE "POST-RACIAL" ERA (forthcoming 2018) (on file with author).

124. *See* STEVEN BOX, POWER, CRIME, AND MYSTIFICATION 5-6 (1983); STEPHEN ROSOFF ET AL., PROFIT WITHOUT HONOR: WHITE COLLAR CRIME AND THE LOOTING OF AMERICA (6th ed. 2013).

on those behaviors that cause the least amount of harm, socially speaking, while devoting the least amount of attention to those behaviors that wreak the most destruction to society.

2. The “justice contradiction” turns our attention away from “crime” and onto the police themselves: we have a *policing* problem, not a crime problem per se. Members of all races and classes participate in law breaking, yet whites and the wealthy go relatively un-policed and de-criminalized.<sup>125</sup> This means that what gets counted as “crime,” and who shows up as “criminal,” is not merely a reflection of what is actually happening in terms of law-breaking behavior, but is a catalog of police behavior, not to mention an index of the law’s disposition itself.

3. Given this policing problem, we face the reality that we are not policed for what we do, but for who we are or what we represent in the historical structure. Policing is thus largely a cultural and structural phenomenon. It is not principally about enforcing law, making us safe, or keeping a lid on chaos; it is foremost a structural, not an individual, process. In other words, police officers are not dispatched to where “crime” is located, but rather to where blacks, other people of color, and poor and working-class people are to be found. Where policing happens, and how it happens, is a function of the structural design of modern democratic society and the specific policies of law enforcement institutions—*not* the dispositions, implicit or explicit, of individual actors within this structure.

4. The content of this cultural problem is antiblackness, and the historical structure that it maintains is racial slavery. The historical context of slavery as the formative crucible for modern policing presents three crucial insights to incorporate into any analysis of race and policing: (1) modern policing formed through the policing of blackness; (2) modern policing has historically been militaristic with respect to black people; and (3) modern policing is a key mechanism for racialization.<sup>126</sup>

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125. See DARRELL FOX & ELAINE ARNULL, SOCIAL WORK IN THE YOUTH JUSTICE SYSTEM: A MULTIDISCIPLINARY PERSPECTIVE 15 (2013).

126. See David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 176–81 (1996).

Policing is a function of racism, not the other way around. Racism is first and foremost an act of violence and that which we call “race” is the consequence of this violence. To wit, racism is Officer Darren Wilson approaching Michael Brown and shooting him for walking in the street in the middle of the day on August 9, 2014 in Ferguson, Missouri; “race” is Michael Brown lying dead in the street.<sup>127</sup> Racism is the Ferguson police leaving Michael Brown’s dead body lying in the middle of the street uncovered for *four* hours,<sup>128</sup> “race” is the community left to stand by, for four hours, to witness Michael Brown’s dehumanization, which was also their own.<sup>129</sup>

5. Many of the recent calls for reforming police behavior all miss the fundamental point of what the police are about. Suggestions have been made that the police shouldn’t have so much military weaponry; or that they should wear body cameras at all times to record their behaviors; or that they should be better trained.<sup>130</sup> Since the videotaped beating of Rodney King by the Los Angeles Police Department in 1991,<sup>131</sup> a vast archive of visual documentation of police violence exists – none of which has curbed police impunity.<sup>132</sup> This results from “crime” being a racial and political construct that cannot apply to the police themselves or else the racialized structures on which this society is based would collapse. Cities spend millions of dollars annually managing this contradiction in the form of civil suit settlements

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127. See Camille Phillips, *Police Chief Gives First Details of Fatal Ferguson Police Shooting*, ST. LOUIS PUB. RADIO (Aug. 10, 2014), <http://news.stlpublicradio.org/post/police-chief-gives-first-details-fatal-ferguson-police-shooting#stream/0>.

128. See Richard Schapiro, *Unarmed 18-Year-Old Man Shot Dead by Police in Missouri: Witnesses*, N.Y. DAILY NEWS (Aug. 10, 2014, 12:20 AM), <http://www.nydailynews.com/news/national/18-year-old-shot-dead-missouri-witnesses-article-1.1898333>.

129. See *id.*

130. See Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559, 585–88, 594–97 (2016).

131. See Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES (Mar. 7, 1991), <http://www.nytimes.com/1991/03/07/us/tape-of-beating-by-police-revives-charges-of-racism.html?pagewanted=all>.

132. See generally Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791 (2017) (detailing video recordings of police officers in excessive force cases).

with the victims of policing.<sup>133</sup> Police officers, however, are rarely held criminally liable for their actions.<sup>134</sup> This means that taxpayers – presumably inclusive of the victims’ families – end up paying restitution *to themselves* for the violence that their public servants (the police) perpetrate on them.<sup>135</sup> The calculus of this process is that black bodies are worth more dead than alive.<sup>136</sup> It is time to recognize this reality for what it is: two bodies of law – a criminal one for human beings and a civil one for dehumanized beings. Policing is the reflection of this structural divide.

6. The prerogative to ignore police violence is part of what it means to be white or non-black – to be *human*. One of the most common ways in which white society ignores police violence is to accept what the police tell us: that the streets are war zones; that they patrol the frontlines; that they are in the trenches fighting hard on our behalf, making tough, split-second decisions of life and death.<sup>137</sup> This is not true.

First of all, policing is only slightly above average in terms of occupational dangers, far below truck driver, construction worker, agricultural worker, landscaper, miner, and fisherman.<sup>138</sup> The inflated perception of danger is solely attributable to the fear of blackness. Secondly, the police are not even the frontline. Civil society is the frontline and the police are merely

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133. *City Lawsuit Costs Report*, GOVERNING, <http://www.governing.com/gov-data/city-lawsuit-legal-costs-financial-data.html> (last visited Mar. 28, 2018).

134. See Amanda Taub & Dara Lind, *Baltimore Police Will Face Criminal Charges for Killing Freddie Gray. That's Incredibly Rare.*, VOX, <https://www.vox.com/2014/11/25/7173695/ferguson-police-officer-prosecution> (last updated May 1, 2015, 11:48 AM).

135. See Nick Wing, *We Pay a Shocking Amount for Police Misconduct, and Cops Want Us Just to Accept It. We Shouldn't.*, HUFFPOST (May 29, 2015, 7:39 AM), [https://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements\\_n\\_7423386.html](https://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html).

136. Journalist Utrice Leid makes this point in her coverage of the ongoing spectacles of policing violence and the civil court settlements with victims’ families. See Utrice Leid, LEID STORIES, <http://leidstories.podbean.com/> (last visited Mar. 28, 2018).

137. See Radley Balko, *SWAT Cop Says American Neighborhoods Are 'Battlefields' Claims Cops Face Same Dangers as Soldiers in Afghanistan*, HUFFPOST, (Aug. 21, 2013, 10:47 AM), [https://www.huffingtonpost.com/2013/08/18/swat-cop-says-american-ne\\_n\\_3776501.html](https://www.huffingtonpost.com/2013/08/18/swat-cop-says-american-ne_n_3776501.html).

138. See KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 19–20 (2007) (citing U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000, at 4 (2001), <https://www.bls.gov/iif/oshwc/cfoi/cfnr0007.pdf>).

the back-ups, reinforcing the terms of antiblackness that society establishes. For four hundred years of American chattel slavery, and one hundred years of lynching, it was the common white person who policed all black people.<sup>139</sup> While this duty largely transferred to the state in the form of the cops by the 1970s—meaning it has only been in their hands for a mere four decades—the recent killings of Trayvon Martin, Renisha McBride, Jordan Davis, and others at the hands of non-police officers remind us that this police power rests foremost with civil society, not with law enforcement.

With these six bullets serving as the point of departure for a structural approach to challenging the prevailing discourse on race and policing, we can note that the police are many things, but law enforcement is not one of them. Moreover, the police are secondary to the police power of civil society from which the criminal justice apparatus derives its power.<sup>140</sup> The police do not have power of their own (except situationally, of course); theirs is merely an expression of power located elsewhere in society. They are an appendage of power, not power itself. While the criminal justice system at times may operate autonomously from these power relations—like an appendage that has turned on its host, holding the social body hostage to terms that it now wields *against* society rather than receives *from* it—criminal justice remains merely symptomatic of the structure's disposition. When the best that legal analysis can conjure is to focus on implicit bias in policing,<sup>141</sup> then legal scholars, in a sense, act as the police power against the black struggle for self-determination.

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139. See *Lynching in America: Targeting Black Veterans*, EQUAL JUST. INITIATIVE, <https://ejj.org/reports/online/lynching-in-america-targeting-black-veterans> (last visited Mar. 28, 2018).

140. See WILLIAMS, *supra* note 138, at 74–76.

141. See, e.g., Tanya Johnson, *Implicit Bias and the Law*, UCONN L. BLOG (Mar. 7, 2017, 2:30 PM), <https://blog.law.uconn.edu/blog/implicit-bias-and-law>.

## VI. FIVE BULLETS FOR KORRYN GAINES: A PRÉCIS FOR BLACK SELF-DEFENSE

The analysis presented in this Article thus far is meant to support the claim that policing is intrinsically racist. It is redundant at this point to emphasize that individual police officers, or even their commanders who designate where and how they move, need not be driven by racial animus or explicitly express racist attitudes for their very existence to be racist. The purpose of policing in a slaveholding society stratified by race and class such as ours ensures this reality.<sup>142</sup> Quite beyond the cul-de-sac of implicit bias, then, we should be delving critically into the intrinsic racism of “stop-and-frisk,” “reasonable suspicion,” “crime control,” “danger,” “risk,” and other basic facets of Fourth Amendment jurisprudence and law and order.<sup>143</sup> Nothing challenges the present paradigm constraining black thought against the police power more than to inquire into the state of black self-defense. In this closing section, I offer five points towards a précis for black self-defense—five points for the five bullets that Baltimore County police officers shot into Korryn Gaines on August 1, 2016 as she attempted to defend her home with a shotgun against police attempting to serve a warrant for her arrest for a minor traffic violation.<sup>144</sup>

1. A full review of the law on self-defense requires an extensive re-examination of Fourth Amendment case law, and this appraisal is beyond the scope of this Article. Additionally, this review must be done in real terms—meaning, within the context of the racial hierarchy in which law arises and to which

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142. See generally Dara Lind, *Telling White People the Criminal Justice System is Racist Makes Them Like it More*, VOX (Aug. 7, 2014, 2:10 PM), <https://www.vox.com/2014/8/7/5978551/study-racism-criminal-justice-stop-and-frisk-reform-support> (discussing latent racism in the criminal justice system).

143. See generally Donald F. Tibbs & Tryon P. Woods, *Requiem for Laquan McDonald: Policing as Punishment and Abolishing Reasonable Suspicion*, 89 TEMP. L. REV. 763 (2017) (discussing, in part, Fourth Amendment jurisprudence implicit in modern policing tactics).

144. See Christina Cauterucci, *Korryn Gaines Is the Ninth Black Woman Shot and Killed by Police in the U.S. This Year*, SLATE (Aug. 3, 2016, 1:14 PM), [http://www.slate.com/blogs/xx\\_factor/2016/08/03/korryn\\_gaines\\_is\\_the\\_ninth\\_black\\_woman\\_shot\\_and\\_killed\\_by\\_police\\_in\\_the.html](http://www.slate.com/blogs/xx_factor/2016/08/03/korryn_gaines_is_the_ninth_black_woman_shot_and_killed_by_police_in_the.html).

it refers.<sup>145</sup> In other words, although the courts have definitively stated in a number of cases that an individual has the right to use force to resist an unlawful arrest, today it may seem this right is moot for *everybody* in the face of law enforcement orders to submit.<sup>146</sup> On the contrary, while most of the major cases through which the courts have steadily circumscribed the Fourth Amendment's protections in the face of police powers have occurred at black defendants' expense,<sup>147</sup> this Article suggests that white people today *do* retain the right to self-defense specified in the various self-defense cases. The recent appearance of "stand your ground" laws, which are enhanced reiterations of the principles laid out in the self-defense cases; the successful use of these "stand your ground" laws by non-black defendants versus the disqualification of black defendants from "stand your ground" defense; and the ability of white people to legislate and practice *their* armed self-defense in the form of open-carry laws, so-called "free speech" militias, and the like also needs to be considered in this overall appraisal of self-defense law.<sup>148</sup> Finally, the efficacy of non-black self-defense before the law is dependent upon the presence of a black threat,

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145. See López, *supra* note 21, at 1776.

146. See generally *Bad Elk v. United States*, 177 U.S. 529 (1900) (holding it was an error for the trial court to fail to instruct the jury that defendant had the right to use all necessary force to overcome unlawful arrest); *State v. Mobley*, 240 N.C. 476 (1954) (analyzing a person's right to use force); *Runyan v. State*, 57 Ind. 80 (1877) (holding it was an error for the trial court to instruct the jury that defendant had a duty to retreat before using force to overcome unlawful arrest).

147. See generally *Illinois v. Wardlow*, 528 U.S. 119 (2000) (applying the reasonable suspicion standard); *Whren v. United States*, 517 U.S. 806 (1996) (holding that temporary detention upon probable cause of a minor traffic violation was not an unreasonable seizure); *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that a random search conducted with the individual's consent is not per se unconstitutional); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that reasonable suspicion of criminal activity is enough to justify a search for weapons).

148. See generally Yamiche Alcindor, *Zimmerman Jury Reaches a Verdict*, USA TODAY, <https://www.usatoday.com/story/news/nation/2013/07/13/george-zimmerman-trayvon-martin-jury-saturday-deliberations/2514233/> (last updated July 13, 2013, 9:54 PM) (discussing the jury deliberations and verdict of the George Zimmerman case); Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 Years for "Warning Shot": Did She Stand Her Ground?*, CBS NEWS (May 16, 2012, 4:21 PM), <https://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground/> (stating Marissa Alexander was sentenced to twenty years in prison for aggravated assault with a lethal weapon after firing a warning shot into the ceiling after her husband threatened her in Jacksonville, Florida on August 1, 2010);

actual or imagined.<sup>149</sup> In a slaveholding society, even after the formal institution of chattel slavery has ended, each and every legal principle ultimately expresses this foundational antagonism between non-black and black, between the freedom of self-possessing human subjects and the un-freedom of objectified beings construed as black and dangerous. Ultimately, this disqualified black people from exercising self-defense: they cannot concurrently personify danger and possess the capacity to ward off the very threat that they embody.

2. The disqualification of black people from the right to self-defense begins with slavery but refines itself through post-Emancipation Fourth Amendment jurisprudence. In 1900, the Supreme Court in *Bad Elk v. United States*<sup>150</sup> found that Bad Elk was within his rights when he shot the police officer that was attempting to arrest him because the attempted arrest was unlawful.<sup>151</sup> The same Supreme Court that decided *Bad Elk* in 1900 had, only four years prior, come up with its landmark “separate but equal” doctrine in *Plessy v. Ferguson* (there was only one change in Justices between the two cases).<sup>152</sup> What, then, does “separate but equal” mean for the matter of self-defense? John Bad Elk’s position as a legal subject for whom the Court affirmed the right to self-defense against unlawful arrest stood in stark contrast to the numerous black people lynched while his

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Leah Sottile, *Jury Acquits Ammon Bundy, Six Others for Standoff at Oregon Wildlife Refuge*, WASH. POST (Oct. 27, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm\\_term=.22b9af769a97](https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm_term=.22b9af769a97) (detailing the October 26, 2016 acquittal of all seven defendants in the armed takeover of the Oregon Wildlife Refuge).

149. See JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 19–67* (2000).

150. 177 U.S. 529 (1900).

151. See *id.* at 537–38.

152. See *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The *Plessy* Court consisted of: Chief Justice Melville Fuller and Associate Justices Stephen Field, John Harlan, Horace Gray, David Brewer, Henry Brown, George Shiras Jr., Edward White, and Rufus Peckham. See *List of Supreme Court Justices of the United States*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/list-of-Supreme-Court-justices-of-the-United-States-1788861> (last visited Mar. 29, 2018). The *Bad Elk* Court consisted of Chief Justice Fuller and Associate Justices Harlan, Gray, Brewer, Brown, Shiras Jr., White, Peckham, and Joseph McKenna. See *id.*

case moved through the courts. According to the Tuskegee Institute, there were 106 black lynch victims in 1900, or an average of two lynchings per week.<sup>153</sup> The Court's reasoning in *Plessy* is well-known: government may make civil and political equality, but it cannot compel social equality.<sup>154</sup> In this sentiment the Court was echoing *Dred Scott v. Sandford*,<sup>155</sup> in which it stated that Scott had no juridical standing because he had no political standing: his degradation was not the result of law or jurisprudence, and hence it was not a matter for the courts.<sup>156</sup> Rather, the Court said, Scott was degraded simply because he was black.<sup>157</sup> The questions of free states or slave states, or whether his master inadvertently freed him upon his travels through free territories, were immaterial to the *Dred Scott* Court.<sup>158</sup> Scott was a slave through and through, across space and time, because he was not a person.<sup>159</sup>

The Court's reiteration of the right to self-defense against unlawful arrest for non-blacks in the *Bad Elk* case<sup>160</sup> is thus elaborated within the penumbra of *Dred Scott* and *Plessy*. Although there is slippage in the Court's terminology between *Dred Scott* and *Plessy*, the Court is consistent in recognizing that racial equality is not a matter of law and that there is a superseding structure of authority to which the law must adhere.<sup>161</sup> "Juridical" for the *Dred Scott* Court was "civil and political" for the *Plessy* Court,<sup>162</sup> while "political" for the *Dred Scott* Court meant

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153. Douglas O. Linder, *Lynchings: By Year and Race*, FAMOUS TRIALS, [www.famous-trials.com/sheriffshipp/1084-lynchingsyear](http://www.famous-trials.com/sheriffshipp/1084-lynchingsyear) (last visited Mar. 29, 2018).

154. See *Plessy*, 163 U.S. at 552 ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

155. 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

156. See *id.* at 426-27, 454.

157. See *id.* at 404-27.

158. See *id.* at 405 ("It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States.").

159. See *id.* at 404-27.

160. *Bad Elk v. United States*, 177 U.S. 529 (1900).

161. See *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Scott*, 60 U.S. at 412.

162. See *Plessy*, 163 U.S. at 551-52; see also *Scott*, 60 U.S. at 620-21 (Curtis, J., dissenting).

“social” for the *Plessy* Court.<sup>163</sup> The different word choices, however, do not hide the fact that both decisions are faithful to the racial order of which the law itself is merely a feature; in this realm there is no racial equality, only racial hierarchy.<sup>164</sup> Frank Wilderson calls this “[b]lack ontological isolation” – the solitary standing of black beings outside the human family,<sup>165</sup> while Anthony Farley discusses it as the “white-over-black order of things.”<sup>166</sup> In his 2005 *Loyola University Chicago Law Journal* article, *Perfecting Slavery*, Farley writes, “The movement from slavery to segregation to neosegregation to whatever form of white-over-black it is that may come with post-modernity or after is not toward freedom . . . . [It] is the movement of slavery perfecting itself.”<sup>167</sup> In this vein, the law is not becoming progressively more just or increasingly rehabilitated from its white supremacist origins; rather, it is refining its capacity over time to implement enslavement.<sup>168</sup>

Justice John Marshall Harlan’s famous dissent in *Plessy* is an illustration of slavery perfecting itself.<sup>169</sup> Farley points out that Harlan agreed with the majority in *Plessy* on the historical continuity of white-over-black.<sup>170</sup> Harlan states, “[T]he white race deems itself to be the dominant race in this country . . . . So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”<sup>171</sup> Farley explains that Harlan’s objection with the majority in *Plessy* – most notably his famous statement that

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163. See *Plessy*, 163 U.S. at 551–52; *Scott*, 60 U.S. at 409–13, 519.

164. See generally Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 247 (2004) (discussing the concepts of race, slavery, and racial hierarchy).

165. See Frank B. Wilderson, III, *The Vengeance of Vertigo: Aphasia and Abjection in the Political Trials of Black Insurgents*, in ON MARRONAGE: ETHICAL CONFRONTATIONS WITH ANTIBLACKNESS 244, 244 (P. Khalil Saucier & Tryon P. Woods eds., 2015).

166. Farley, *supra* note 164, at 238.

167. *Id.* at 225–26.

168. See *id.* at 226.

169. See *id.* at 244 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

170. See *id.*

171. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

the “[C]onstitution is color-blind”<sup>172</sup>—reflected his recognition that as law became less encumbered by racial specificity—*purser*, if you will—it would become a more perfect vessel for white-over-black.<sup>173</sup> Half a century later, Harlan’s dissent in *Plessy* would become, in fact, the majority decision in *Brown v. Board of Education*.<sup>174</sup> And with the *Brown* decision came not a new high point of racial equity in the law, but rather the most effective fortification for racial hierarchy yet articulated.<sup>175</sup> The era of formal legal equality and de jure colorblindness ushered in by *Brown* has made it almost impossible to prove racial discrimination in the courts today.<sup>176</sup> The refinement of racial hierarchy—in Farley’s words, slavery perfected.<sup>177</sup>

3. We see a similar refinement of white-over-black in the landmark Fourth Amendment case *Terry v. Ohio*<sup>178</sup> and its legacy. Harlan’s dissent was supposed to stand as a notable instance of moral resistance against the *Plessy* Court’s majority.<sup>179</sup> So too with Justice William O. Douglas’s famous dissent in *Terry*.<sup>180</sup> As with Harlan’s dissent in *Plessy*, Douglas’s works *together with*, not in opposition to, the Court majority.<sup>181</sup> Together, they make the ongoing reality of slavery that much more difficult to name it for what it is—again, *slavery perfected*. Douglas claimed that the majority’s opinion in *Terry* gave the police greater authority to make a seizure and to conduct a search than a judge has to authorize such action, warning that the Court was taking “a long step down the totalitarian path.”<sup>182</sup> Douglas’s dissent continues to reverberate in both the legal academy

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172. *Id.*

173. See Farley, *supra* note 164, at 244.

174. See 347 U.S. 483, 494–96 (1954).

175. See Farley, *supra* note 164, at 244–46.

176. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 527 (1980).

177. See Farley, *supra* note 164, at 226.

178. 392 U.S. 1 (1968).

179. See *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

180. See *Terry*, 392 U.S. at 35–39 (Douglas, J., dissenting).

181. See *id.*; see also *Plessy*, 163 U.S. at 552–64 (Harlan, J., dissenting).

182. *Terry*, 392 U.S. at 38.

and in court decisions such as the recent *Floyd v. City of New York*.<sup>183</sup> Here, the court ruled against the NYPD's stop-and-frisk program.<sup>184</sup> Everywhere the question is posed as to whether the *Terry* decision gave police too much power or whether we can return to the principles of reasonableness of *Terry*,<sup>185</sup> ignoring the reality that the police have exercised totalitarian powers with impunity over black people since the dawn of the slave trade.<sup>186</sup> The debate about stop-and-frisk itself, then, does not fundamentally confront the order of white-over-black – which is to say, it too refines slavery's reach. As Farley puts it, "Everyone, then, in a white-over-black order of things, is called to that order. The order to which we are called ('our social conditions of existence') is the structure of thought itself (of our 'diversified and characteristic sentiments, illusions, habits of thought, and outlooks on life in general')." <sup>187</sup>

4. In a lesser-known case decided the same year as *Terry*, Justice Douglas offered another dissenting opinion that explicitly links *Terry*'s "reasonable suspicion" doctrine to the prohibition on black self-defense.<sup>188</sup> In *Wainwright v. City of New Orleans*, the Court was asked to decide "whether a person who is unconstitutionally arrested must submit to a search of his person, or whether he may offer token resistance."<sup>189</sup> The per curiam decision in *Wainwright*, to which Justice John Marshall Harlan II, the grandson of Justice Harlan from the *Plessy* Court, was a part of, refused to acknowledge that the arrest was unlawful in the first place, dismissing the case as improvidently granted.<sup>190</sup> Justice Douglas's dissent, however, points out that

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183. 959 F. Supp. 2d 540, 782 (S.D.N.Y. 2013).

184. *Id.* at 658–67.

185. *See Terry*, 392 U.S. at 21.

186. *See Tracey Maclin, Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, ST. JOHN'S L. REV. 1271, 1278, 1320 (1998).

187. Farley, *supra* note 164, at 238.

188. *See Wainwright v. City of New Orleans*, 392 U.S. 598, 610–15 (1968) (Douglas, J., dissenting).

189. *Id.* at 610.

190. *See id.* at 598 (per curiam). *See generally* Linda Greenhouse, *A Justice Champions a Witness to History*, N.Y. TIMES (Aug. 5, 2001), <http://www.nytimes.com/2001/08/05/us/a-justice-champions-a-witness-to-history.html> (discussing Justice Harlan's memoir and both his and his

while there was no probable cause for the arrest, in the aftermath of *Terry*, Wainwright was no longer able to exercise self-defense because his Fourth Amendment protections are overwhelmed by the mere suspicions of the officers, probability be damned.<sup>191</sup> For Farley, this is why the narrative of historical progress up from slavery is a lie, a lie which “is told juridically in the form of the rule of law.”<sup>192</sup> Since slavery is social death, there is no up from slavery – it is the end.<sup>193</sup> As noted above, the Critical Race Theory movement has shown that post-civil-rights jurisprudence refines itself in colorblind terms to achieve the same hierarchical effect as in the four hundred years or so prior to *Brown* and the Civil Rights Act.<sup>194</sup> Unfortunately, we have largely failed to put this insight to work for us in confronting the paradigm that bonds the law and its critics together.<sup>195</sup> Whereas Justice Taney pointed to Dred Scott’s *prima facie* status as a non-person,<sup>196</sup> contemporary courts similarly state that probable cause is not needed to arrest simply because it is reasonable with black suspects to infer that no human is involved – or NHI, in police-speak.<sup>197</sup>

5. Humans get self-defense; dehumanized people do not. The jury acquitted George Zimmerman for the murder of Trayvon Martin on these very same terms.<sup>198</sup> The same logic compelled the Baltimore police to pursue and seize Freddie Gray for making eye contact with them in April 2015;<sup>199</sup> it also informed the Texas state trooper’s pursuit and abuse of Sandra

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grandson’s commitment to equality).

191. See *Wainwright*, 392 U.S. at 612–15 (Douglas, J., dissenting).

192. See Farley, *supra* note 164, at 226.

193. *Id.* at 233.

194. See *supra* Part III.

195. See *supra* Part III; see also Patterson et al., *supra* note 10, at 1186.

196. See *Scott v. Sandford*, 60 U.S. 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

197. See *Wainwright v. City of New Orleans*, 392 U.S. 598, 599 (1968) (Fortas, J., concurring).

198. See Alcindor, *supra* note 148.

199. See Jonathan Capehart, “After Making Eye Contact,” *Baltimore Chases Ferguson*, WASH. POST. (April 23, 2015), [https://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/23/after-making-eye-contact-baltimore-chases-ferguson/?utm\\_term=.992a0ea09d4a](https://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/23/after-making-eye-contact-baltimore-chases-ferguson/?utm_term=.992a0ea09d4a).

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Bland by the roadside later that same year.<sup>200</sup> All three of these cases are fundamentally about the prohibition against black self-defense. What would it mean for black people on the streets and on the roadways if the law recognized their ability to resist unlawful arrest, even to kill an officer who attempts to restrict their free movement unconstitutionally? With the Korryn Gaines case, we got a preview of the converse – of what it looks like when a black person stares down the law’s phobic response to black self-possession.<sup>201</sup> Gaines’s decision to use armed self-defense was precipitated by a series of harrowing experiences at the hands of police: she and her child were assaulted, she was beaten, she was held in isolation for two days with no water which may have resulted in a miscarriage, and she was charged with assaulting an officer and resisting arrest – all as a result of a traffic stop for an offense punishable only by a ticket.<sup>202</sup> As Gaines put it afterwards, she realized that she was “a hostage from the very beginning of the traffic stop.”<sup>203</sup> She had cardboard affixed to her license plates that read “free traveler” and “any Government official who compromises this pursuit to happiness and right to travel, will be held criminally responsible and fined, as this is a natural right and freedom.”<sup>204</sup> Just like the recent myopia that the National Anthem is meant to honor soldiers is only a product of the post-September 11, 2001 national security state’s payments to the National Football League for the purpose of marketing its military, so too the use of SWAT teams to serve search and arrest warrants on low-level non-violent suspects is a recent phenomenon, borne out of the war on drugs’ enhanced militarization of policing and the mainstreaming of the COINTELPRO era’s use of law enforcement to

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200. See Josh Sanburn, *Everything We Know About the Sandra Bland Case*, TIME, <http://time.com/3966220/sandra-bland-video/> (last updated July 23, 2015, 6:07 PM).

201. See Breanna Edwards, *Everything We Know About Korryn Gaines*, ROOT (Aug. 2, 2016, 1:16 PM), <https://www.theroot.com/everything-we-know-about-korryn-gaines-1790856303>.

202. See *id.*

203. *Id.*

204. Cauterucci, *supra* note 144.

terrorize black communities.<sup>205</sup> But not even the presence of the SWAT unit, nor the presence of the legally purchased and registered shotgun that Gaines used to defend her home, justify her death. After Gaines was killed, the website Blavity.com published a roundup of eleven highly publicized incidents from the last few years where police were able to disarm white people without killing them.<sup>206</sup> This includes the 177 bikers involved in the Twin Peaks shootout in Waco, Texas in 2015;<sup>207</sup> the man who killed three people and wounded nine in an attack on a Planned Parenthood clinic in Colorado Springs in 2015;<sup>208</sup> and Dylan Roof, who killed nine people at the Mother Emanuel AME Church in Charleston, South Carolina in 2015.<sup>209</sup> In Roof's case, not only did the police not shoot him, but they treated him to a meal at Burger King after arresting him but before transporting him to the police station.<sup>210</sup> Mind you, none of these white gunmen were acting in self-defense, and yet the police treated them with the respect that the right to self-defense presupposes.<sup>211</sup>

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205. See Radley Balko, *Data Show That in Utah, SWAT-Style Tactics are Overwhelmingly Used to Serve Drug Warrants*, WASH. POST (Aug. 17, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/08/17/data-show-that-in-utah-swat-style-tactics-are-overwhelmingly-used-to-serve-drug-warrants/?utm\\_term=.83b85961c113](https://www.washingtonpost.com/news/the-watch/wp/2015/08/17/data-show-that-in-utah-swat-style-tactics-are-overwhelmingly-used-to-serve-drug-warrants/?utm_term=.83b85961c113); Alex Kane, *11 Shocking Facts About America's Militarized Police Forces*, ALTERNET (June 27, 2014, 5:16 AM), <https://www.alternet.org/civil-liberties/11-shocking-facts-about-americas-militarized-police-forces>; Melanie Schmitz, *How the NFL Sold Patriotism to the U.S. Military for Millions*, THINKPROGRESS (Sept. 25, 2017, 2:19 PM), <https://thinkprogress.org/nfl-dod-national-anthem-6f682cebc7cd/>.

206. Ebony F., *11 Times Police Successfully Disarmed White People Without Killing Anyone*, BLAVITY, <http://blavity.com/11-times-police-successfully-disarmed-white-people-without-killing-anyone/> (last visited Apr. 20, 2018).

207. See *id.*; see also Holly Yan & Jeremy Grisham, *48 More Bikers Indicted in Deadly Shootout at Waco, Texas, Restaurant*, CNN, <http://www.cnn.com/2016/03/24/us/waco-more-bikers-indicted/> (last updated Mar. 24, 2016, 6:24 AM).

208. See Ebony F., *supra* note 206; Bill Chappell, *Planned Parenthood Shooting Suspect Robert Lewis Dear to Appear in Court Monday*, NPR (Nov. 28, 2015, 8:54 AM), <http://www.npr.org/sections/thetwo-way/2015/11/28/457674369/planned-parenthood-shooting-police-name-suspect-procession-for-fallen-officer>.

209. See Ebony F., *supra* note 206; see also Jason Silverstein, *Cops Bought Dylan Roof Burger King After His Calm Arrest: Report*, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/dylann-roof-burger-king-cops-meal-article-1.2267615> (last updated June 23, 2015, 4:03 PM).

210. See Silverstein, *supra* note 209.

211. See *supra* notes 207-10.

## CONCLUSION

This understanding of the stark realities proscribing black self-defense is strictly off-limits to us if we work with the definition of race and racism disseminated by implicit bias theory. Implicit bias short circuits legal analysis because it is a truncated conception of how racism works. We do not need to submit to the quarantine of black thought that it requires. Speaking at a *Temple Law Review* Symposium in 2010 on the evolution of civil rights litigation, David Kairys stated that the Court's decisions over the past few decades have made it easy for whites to invalidate good faith efforts to use race to counter racism, while making it impossible for non-whites to prove racial discrimination.

The Court has essentially established two distinct sets of rules, assumptions, and approaches—one characterized by insensitivity to race and the other by hypersensitivity to race—which applies in particular circumstances depends on whether whites or minorities are claiming discrimination. The result of this retrenchment is that over the last few decades almost all of the winning plaintiffs in equal protection race cases before the Supreme Court have been white.<sup>212</sup>

Keeping up with this reality would be maddening, like trying to reason with a psychopath. Implicit bias deals with this madness by attempting to impose a historical order marked by rupture and progress that is not reflected in the reality of racism's continuities: most legal analysts employing this discourse talk about existing "beyond" explicit racism, about a "modern-day" form of prejudice, "a society significantly beyond George Wallace but still in denial about race," and the need "to root out contemporary discrimination."<sup>213</sup>

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212. David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857, 862–63 (2011); see also David Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751, 753–56 (2006) (highlighting the Supreme Court's development of the intentional discrimination rule where "there is no constitutional violation unless there is also direct proof that the action or measure was taken for the specific purpose of discriminating against or with animus toward the minority").

213. Patterson et al., *supra* note 10, at 1188, 1195–96.

If we work, however, from the perspective that law necessarily reflects society's foundational antiblackness, and recognize that this fundamental organizing principle remains as solid today as ever, then the fallacy of a break from a more racist past can be set aside and we can deal with things as they are, not as we would wish them to be. As Fanon put it, "since no agreement was possible on the level of reason, I threw myself back toward unreason."<sup>214</sup> In other words, when blackness enters the room, all reasonable behavior flees, compelling us towards other means of agitating. Kairys's summation, and the legal analysis presented in this article, means that neither rational argument nor scientific illumination will win the day—there is only power and struggle.<sup>215</sup> Analysis, evidence, and science should be marshalled towards understanding *this* reality. This analysis has been on tap in the black studies archive for many generations, should we care to listen or explore. Even the insights of the critical race theorists will not take us far enough; we need to think beyond the constraints of the paradigm to which even CRT's critique is tethered; but at least we could build upon, not bypass, the struggles of earlier generations, rather than spinning our wheels. Once we deal with this reality for what it is, we can better grasp equal protection doctrine as slavery perfecting itself and find constructive ways of dealing with the imperative for black self-defense.

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214. FANON, *supra* note 47, at 93.

215. *See supra* Part II.