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# THE “INNOCENCE” OF BIAS

Osamudia James\*

BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO. By *Jennifer L. Eberhardt*. New York: Viking, 2019. Pp. 340. Cloth, \$28; paper, \$18.

## INTRODUCTION

*It's simple to explain, but not so easy to see or to rectify.*

—Eberhardt, p. 279.

If multiculturalism was central to the progressive zeitgeist of the 1990s, unconscious bias was the same to the progressive zeitgeist of the early 2000s. Ushered in by the field of implicit social cognition,<sup>1</sup> implicit or unconscious bias refers to the attitudes or stereotypes that affect our actions and decisions in an unconscious manner.<sup>2</sup> As applied to the problem of discrimination in the United States,<sup>3</sup> bias refers to favorable or unfavorable attitudes and beliefs individuals can harbor regarding ingroups and outgroups. Social science literature suggests that the magnitude of implicit bias working against members of outgroups and disfavored racial minorities is pervasive, continually accumulating, and a precursor to discriminatory behavior.<sup>4</sup>

Recognition of unconscious bias quickly migrated from scholarly and academic circles to popular culture. Project Implicit, for example, provides free online access to Implicit Association Tests that allow people to assess their unconscious attitudes toward a number of social groups, including African Americans and European Americans.<sup>5</sup> In addition to using data collected through the site to document biases, Project Implicit has introduced an entire generation of laypersons to the likelihood that they, too, harbor

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1. The field of implicit social cognition focuses on unconscious mental processes that dictate behavior. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467–68 (2010).

2. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

3. Bias is not necessarily negative, and the term refers to “response bias,” or the “displacement of people’s responses along a continuum of possible judgments.” *Id.* at 950.

4. *Id.* at 955–62 (citing to meta-analysis from the Implicit Association Test).

5. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> [<https://perma.cc/E6MU-LRC8>].

unconscious biases.<sup>6</sup> Understanding implicit bias has deeply impacted legal discourse, prompting waves of scholarship addressing how implicit bias operates in the criminal justice system.<sup>7</sup> It is not uncommon for organizations to require bias training for employees, or for colleges and universities to provide bias training for faculty and students on campus. Societal understanding of implicit bias is now so commonplace that presidential candidates are expected to raise the issue in debates.<sup>8</sup>

Perhaps in no sphere has the concept of implicit bias featured more prominently than in movements for racial justice. The Black Lives Matter project was launched in part to combat implicit bias and anti-Black racism.<sup>9</sup> And advocates for social justice are well versed in literature analyzing how implicit biases disadvantage and harm Black people across various social spheres, including medicine, education, housing markets, labor pools, and policing. When twelve-year-old Tamir Rice was killed by Ohio police, popular discourse regarding his killing included speculation that the police officers' perception of Rice as a twenty-year-old man was the manifestation of implicit bias.<sup>10</sup>

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6. See Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1095 (2017) (noting that the work of researchers through Project Implicit has been covered by major news sources and was recently compiled into a book summarizing its data collection). The project, however, has not been without critique. For more on the debate regarding the tests' stability and predictive validity, see Kristin A. Lane, Mahzarin R. Banaji, Brian A. Nosek & Anthony G. Greenwald, *Understanding and Using the Implicit Association Test: IV*, in IMPLICIT MEASURES OF ATTITUDES 59 (Bernd Wittenbrink & Norbert Schwarz eds., 2007); Bertram Gawronski, Mike Morrison, Curtis E. Phillips & Silvia Galdi, *Temporal Stability of Implicit and Explicit Measures: A Longitudinal analysis*, 43 PERSONALITY & SOC. PSYCH. BULL. 300 (2017); Anthony G. Greenwald, T. Andrew Poehlman, Eric Luis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCH. 17 (2009); and Eric Luis Uhlmann, Victoria L. Brescoll & Elizabeth Levy Paluck, *Are Members of Low Status Groups Perceived as Bad, or Badly Off? Egalitarian Negative Associations and Automatic Prejudice*, 42 J. EXPERIMENTAL SOC. PSYCH. 491 (2006).

7. See, e.g., Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) (finding that study participants implicitly associated Black with guilty and white with nonguilty); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 410–13 (2017) (examining what systemic implicit bias could mean for Eighth Amendment analysis of the death penalty and juvenile life without parole); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144 (2012) (arguing that the “reasonable suspicion” legal test is particularly vulnerable to implicit bias).

8. See, e.g., Mark Hensch, *Clinton: We Must Fight ‘Implicit Bias,’* HILL (Sept. 26, 2016, 10:15 PM), <https://thehill.com/blogs/ballot-box/presidential-races/297939-clinton-i-think-implicit-bias-is-a-problem-for-everyone> [<https://perma.cc/T24Z-6993>].

9. *Our Co-Founders*, BLACK LIVES MATTER, <https://blacklivesmatter.com/our-co-founders/> [<https://perma.cc/9LCY-3BWT>].

10. See, e.g., German Lopez, *Police Thought 12-Year-Old Tamir Rice Was 20 when They Shot Him. This Isn't Uncommon*, VOX (Nov. 26, 2014, 6:10 PM), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police> [<https://perma.cc/668T-4BBZ>]; see also REBECCA EPSTEIN,

Into this moment enters Dr. Jennifer Eberhardt’s new book, *Biased: Uncovering the Hidden Prejudice that Shapes What We See, Think, and Do*.<sup>11</sup> In the book, Dr. Eberhardt endeavors to both add to the vast literature documenting implicit bias and lend social and cultural context for the studies so that readers might better understand the material and psychic consequences of unconscious biases. Drawing largely from her own research as a social psychologist and Stanford professor, work for which she was awarded a MacArthur genius grant,<sup>12</sup> Eberhardt details the studies that she and other researchers conduct about implicit biases and its consequences. Peppered throughout are Eberhardt’s personal anecdotes that help bring to life the studies that implicate parenting, policing, education, incarceration, and even migration. The book’s normative conclusion, presented in the third section, is that unconscious bias is not only a burden for people limited by the automatic and unconscious mental shortcuts on which bias trades. Rather, it also corrodes entire communities, alienating teachers from students, police officers from civilians, and residents from their neighbors. Individuals, however, have the capacity to respond to that corrosion with courage. And in the mere act of personal reflection about bias lies the power to create change.

Eberhardt’s work arrived almost two years after the “Unite the Right” rally in Charlottesville, Virginia, exposed very explicit racial bias that many Americans believed was a thing of the past. Thus, some readers might find Eberhardt’s exposition on implicit or unconscious bias less urgent than, say, a reader on the rise of violent white nationalists. And yet, in Eberhardt’s deep dive into the mental processes that produce racial bias lie keys to understanding the sort of dehumanization of the other that paves the path to domestic terrorism.<sup>13</sup>

For these insights, essential for anyone committed to cultivating a more egalitarian society, Eberhardt’s work in *Biased* has justifiably received praise. Moreover, the book’s reminder that people can each harness their commitment to equality is both assuring and empowering. In a world where we are assaulted daily with discouraging examples of implicit and explicit racial discrimination, Eberhardt’s call to individual work is an antidote to despair.<sup>14</sup>

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JAMILIA J. BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD (2017).

11. Dr. Jennifer Eberhardt is a Professor of Psychology, Stanford University.

12. *Jennifer L. Eberhardt*, MACARTHUR FOUND. (Sept. 17, 2014), <https://www.macfound.org/fellows/913/> [https://perma.cc/CU4V-TG9N].

13. See Editorial, *We Have a White Nationalist Terrorist Problem*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/opinion/mass-shootings-domestic-terrorism.html> [https://perma.cc/XQ9Z-RM54].

14. “What can I do?” is a question often posed by whites hoping to affirmatively engage in antibias work. For example, in August 2016, a white male caller contacted C-SPAN to ask Heather McGhee, Demos Action president, how to overcome his fears and prejudices about Black people. *Caller Admits Racism and Is Gently Advised*, C-SPAN (Aug. 22, 2016), <https://www.c-span.org/video/?c4618001/user-clip-caller-admits-racism-gently-advised>. The video has been viewed over eight million times. Jessica Nordell, *Is This How Discrimination*

Individual responses, however, to biases that are baked into American structures are insufficient for substantive and enduring change to America's racial climate. Thus, readers of Eberhardt's exposition on unconscious bias would benefit from understanding the cultural and legal context against which an understanding of unconscious bias operates, and the structural solutions that Eberhardt's work on unconscious bias should necessarily prompt.

Eberhardt is not a lawyer, nor was her goal in writing *Biased* to provide a thorough accounting of the legal architecture of bias. Nevertheless, narratives surrounding the reach and scope of unconscious bias are potentially dangerous ones when unaccompanied by critiques of the inadequacies in our legal system's response to racial discrimination. The solution is not to pretend that unconscious bias doesn't exist; Eberhardt has capably illustrated that it does. Rather, the solution is to contextualize that narrative, using the contextualization both as an illustration of problems with our antidiscrimination regime and as a guide to remedies that might be implemented.

This Review proceeds in three parts. Part I provides an overview of *Biased*, assessing its strengths and contributions to our collective understanding of unconscious bias. Part II contends that although *Biased* powerfully and thoroughly distills the brain science behind bias, a cultural and legal commitment to white innocence—and to understanding racism as a person-to-person problem divorced from larger societal power dynamics—can render engagement with unconscious bias counterproductive. This is a problem Eberhardt amplifies by presenting bias as an individual phenomenon, equally pernicious no matter the race of the offender. Part III considers the likelihood that Eberhardt's proposed solutions will address hidden prejudice in ways that appreciably ameliorate racial subordination and closes with jurisprudential and structural changes that focus less on eradicating unconscious or intentional bias, and more on drastically limiting their impact.

## I. BIASED

Eberhardt's work is comprehensive, deftly weaving together synopses of some of the most insightful cognitive science about race to illustrate the sheer pervasiveness of unconscious bias. Not content, however, to merely summarize experiments, Eberhardt contextualizes the science, serving at turns as autobiographer, historian, and investigative journalist.

The result is an engaging and unintimidating read that Eberhardt organized into three major parts: "What Meets the Eye," summarizing the science behind how the human brain recognizes and categorizes other humans on the basis of race (pp. 11–43); "Where We Find Ourselves," detailing the associations between Blackness and criminality in the criminal justice system (pp. 47–152); and "The Way Out," addressing how race impacts societal outcomes in the context of housing and communities, parenting, and education

(pp. 155–293). This third section also suggests strategies for short-circuiting the automatic mental connections through which unconscious bias runs.

*Biased* makes many contributions to the literature on unconscious bias, only three of which I will address. The first is in the gift of a thorough yet efficient compilation of the most compelling psychological research and data regarding the cognitive science of racial bias. Given the cultural cachet of unconscious bias, one would not be faulted for believing that a multitude of this kind of work already exists, but that belief would be incorrect. Rather, what exists are best-selling books that address racial bias among a broader survey of various types of bias (e.g., gender, class) or that address brain science more generally.<sup>15</sup> Here, thankfully, is a book that drills down into the concept of unconscious bias in the context of race, explaining how the brain processes race, as well as how that processing manifests in everyday interactions (p. 6). Eberhardt brings to this work not only her expertise as one of the country's foremost social psychologists, but also her credibility from having worked with tech companies and police departments to implement policies that can counter unconscious bias.

That Eberhardt does all of this through storytelling is an added benefit. A chapter on how the brain perceives race begins with her own story of being unable to distinguish between the faces of her white classmates upon moving from a Black school to a white school when she turned twelve (pp. 11–13). A section on the promise and perils of integration is punctuated by her son's school experience with racially coded rules about hair (pp. 205–09). A third section, still, is made real by her account of how racial profiling landed her in the back of a police car, handcuffed (pp. 97–101). In using narrative, Eberhardt joins the trend of social scientists who use stories to explain the fruits of their research. Eberhardt, however, is also writing in the tradition of critical race theorists who promote the unique and authoritative voices of people of color, voices forged in the fire that is the experience of race and racism in America.<sup>16</sup> Eberhardt's personal experiences certainly bring heat to *Biased*, daring readers to walk away unsinged.

A final contribution is that Eberhardt's presentation avoids judgment and accusations, choosing instead to describe unconscious bias as a phenomenon to which no one, Black or white, is immune. Although, as will be described below, this framing makes invisible the architecture of American racism, Eberhardt's tone may lure readers who might otherwise be inclined to tune out on account of pluralism anxiety.<sup>17</sup> Indeed, one online book re-

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15. See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT* (2013); MALCOLM GLADWELL, *BLINK* (2005); CAROLINE CRIADO PEREZ, *INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN* (2019).

16. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* 11 (3d ed. 2017).

17. As coined by Kenji Yoshino, "pluralism anxiety" refers to the social backlash to increased recognition and protection for identity groups in the United States. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011).

view noted with relief that there is “[n]o need to fear being scolded in this understanding, revealing look into the insidiousness of partiality.”<sup>18</sup>

## II. BIGGER THAN JUST BIAS

One is hard-pressed to find fault with *Biased* in terms of the science. Rather, the problem is in the cultural and legal context into which *Biased* enters, a context that aggravates rather than ameliorates racial inequality, and that is insufficiently acknowledged in the book.

### A. *Racism Without Racists*

Social narratives play a significant role in public life, allowing groups of people to unify around a set of shared experiences and beliefs.<sup>19</sup> When dominant societal groups use narratives to explain social phenomena, explanations of inequality tend to highlight individual shortcomings rather than subordination or bias.<sup>20</sup> In the context of race, America’s cultural commitment is to occasionally and tepidly recognize racism while rarely locating any racists.<sup>21</sup> Narratives surrounding racial inequality follow this pattern, characterizing whites as “innocent victims” of policies meant to correct for racial bias.

The white-innocence narrative has featured repeatedly and prominently in Supreme Court cases addressing affirmative action, from *Regents of the University of California v. Bakke* in 1978,<sup>22</sup> to *Wygant v. Jackson Board of Education* in 1986,<sup>23</sup> to *Grutter v. Bollinger* in 2003.<sup>24</sup> In these cases assessing the constitutionality of race-conscious remedial measures, the Court alternately characterizes whites as innocent individuals at whose expense racial classifications were being used to aid victimized groups,<sup>25</sup> as innocent people against whom discriminatory legal remedies were working,<sup>26</sup> and as innocent

18. Jennifer Bort Yacovissi, Book Review, WASH. INDEP. REV. BOOKS (Apr. 1, 2019), <http://www.washingtonindependentreviewofbooks.com/index.php/bookreview/biased-uncovering-the-hidden-prejudice-that-shapes-what-we-see-think-and-do> [https://perma.cc/QAZ9-W3XS].

19. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 924 (2009).

20. *Id.* at 924–25.

21. See ROBIN DIANGELO, WHAT DOES IT MEAN TO BE WHITE?: DEVELOPING WHITE RACIAL LITERACY 193–94 (rev. ed. 2016); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845–52 (1994) (using the context of housing segregation and discrimination to illustrate that racism can be produced by law and policy, despite a lack of intentional racism or legally sanctioned racial discrimination).

22. 438 U.S. 265 (1978).

23. 476 U.S. 267 (1986).

24. 539 U.S. 306 (2003).

25. *Bakke*, 438 U.S. at 307.

26. *Wygant*, 476 U.S. at 276.

persons in need of protection from race-based government action.<sup>27</sup> The image of innocent white victims draws power from the implicit contrast to persons of color who unfairly benefit from affirmative action, buttressed by stereotypes regarding lazy and undeserving minorities.<sup>28</sup> Against this narrative, lawsuits alleging reverse racism—claims that whites are racially discriminated against—capture the nation’s attention,<sup>29</sup> accompanied by increases in the percentage of Americans who believe that whites are subject to more discrimination than nonwhites.<sup>30</sup>

Equality doctrine further enshrines the white-innocence narrative. American antidiscrimination laws and norms are grounded in beliefs that discrimination is the product of conscious and intentional mental processes and behavior.<sup>31</sup> Thus, to be actionable under the Fourteenth Amendment, claims of discrimination must be supported by proof of explicit intent to discriminate,<sup>32</sup> even when the impact of unintentional discrimination on targets is the same. Worse still, that proof must be extreme and egregious, in keep-

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27. *Grutter*, 539 U.S. at 341.

28. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 314–15 (1990).

29. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013); see also Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES (Oct. 8, 2012), <https://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html> [<https://perma.cc/Q4ZU-78S4>] (discussing the Supreme Court’s then-upcoming decision in *Fisher*).

30. See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 216 (2011) (describing the results of an empirical study in which a nationally representative sample of whites believed that there has been more antiwhite than anti-Black racial discrimination in the last decade). More recently, according to a 2017 survey conducted by Harvard’s School of Public Health, the Robert Wood Johnson Foundation, and National Public Radio, 55 percent of white Americans believe discrimination against whites is a problem today. P. 270.

31. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064–67, 1078–79 (2006) (suggesting a new model of affirmative action informed by behavioral realism and its account of implicit bias).

32. Nor is defendant knowledge of a disparate impact on racial groups stemming from state conduct sufficient to find intent. Rather, if a defendant adopts a facially neutral policy despite a racially disparate impact of which they were aware, intent is still not established. *Washington v. Davis*, 426 U.S. 229, 238–42 (1976). The de jure intent requirement has significantly curbed the reach of equal protection in cases of racial discrimination. Not only are most decisionmakers likely to avoid explicitly expressing discriminatory intent in ways that can be observed and presented as proof of intent, but racial disparities are often the product of unconscious or implicit bias, or even adopted in aim of other goals despite anticipated disparate impact. Mario L. Barnes & Erwin Chemerinsky, Essay, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1076–83 (2011) (describing the structural aspects of equal protection that limit the doctrine’s reach). Discounting the negative impact of policies on communities of color is ultimately a form of racial subordination.



ing with how rarely our laws locate actual racists, even when racial exclusion or marginalization is apparent.<sup>33</sup>

The Court has also embraced a “colorblind” approach to equal protection, which finds a potential constitutional violation whenever the state differentiates between similarly situated groups, regardless of whether state policy is intended to entrench or counter white supremacy.<sup>34</sup> Together with intent doctrine, these anti-antidiscrimination commitments<sup>35</sup> have preserved facially neutral laws with a disparate impact on minority groups, while prohibiting race-conscious state policies designed to address racial inequality. By responding to only “intentional” discrimination, the Court ensures that whites who are complicit in either unintentional or unconscious discrimination will always be innocent victims unfairly shouldering the burden of race-conscious programs meant to address that discrimination. This legal commitment to white innocence is only furthered by the Court’s insistence that equal protection rights are guaranteed to individuals and not to groups,<sup>36</sup> and in Court decisions refusing to approve race-conscious remedies for societal discrimination.<sup>37</sup>

The Court’s resistance to societal discrimination notwithstanding, racial subordination does, in fact, operate in larger social and political construction: through race-neutral law and policy with disparate impacts; in interconnected and mutually reinforcing public policies that more often subject people of color to state mechanisms of punishment;<sup>38</sup> and to political pat-

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33. See, e.g., Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 135–38 (2017) (detailing the lengths to which the Supreme Court goes to avoid acknowledging intentional acts of racial discrimination in education and voting rights cases).

34. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (striking down a school-assignment plan that used student racial identity to integrate public schools and counter the impact of race and residential segregation on access to particularly sought-after schools).

35. Jed Rubenfeld, Essay, *The Anti-antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142–43 (2002).

36. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[T]he ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

37. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and overexpansive.”); see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1458–61 (2005) (citing Brief for Respondents Kimberly James et al. at 40–42, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)) (detailing the arguments of the social justice intervenors in *Grutter*, whose briefs explained how university reliance on admissions criteria that disproportionately disadvantaged people of color was the linchpin in a racial caste system).

38. See, e.g., Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491–92 (2012) (analyzing how the U.S. prison and foster-care systems work together to make Black mothers vulnerable to state mechanisms of surveillance and punishment); George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not*

terns or racial exclusion that self-perpetuate indefinitely if not explicitly countered.<sup>39</sup>

Professor Ibram X. Kendi labels these phenomena as “racist policies” that work with racist ideas to produce and “normalize[] racial inequities,”<sup>40</sup> and they, rather than just unconscious or implicit bias, do the real work of racial subordination.<sup>41</sup> Addressing individual instances of unconscious bias regarding Black laborers in the South at the beginning of the twentieth century, for example, would have been no match for large-scale and race-neutral New Deal regulations that excluded agricultural and domestic workers from Social Security benefits.<sup>42</sup> This exclusion triggered a disinvestment in Black field hands, sharecroppers, maids, and nannies, ultimately to severe and negative intergenerational-wealth implications.<sup>43</sup> Racial subordination is also found in the failure to institute protective policy, as was the case in *McCleskey v. Kemp*.<sup>44</sup> There, the Supreme Court rejected an equal protection challenge to Georgia’s death penalty, despite statistical analysis showing racial bias subjected Blacks to the death penalty more often when they were guilty

*Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1753–65 (2012) (analyzing “how housing and employment discrimination [work together] to make black women and Latinas particularly vulnerable to surveillance, arrest, and incarceration”).

39. See Ford, *supra* note 21, at 1845–52 (using the context of housing segregation and discrimination to illustrate how racial segregation can operate in the absence of intentional racism or legally sanctioned racial discrimination).

40. IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 17–18 (2019).

Racist policies have been described by other terms: “institutional racism,” “structural racism,” and “systemic racism,” . . . [But] “[r]acist policy” says exactly what the problem is and where the problem is . . . “Racist policy” also cuts to the core of racism better than “racial discrimination.” . . . When someone discriminates against a person in a racial group, they are carrying out a policy or taking advantage of the lack of a protective policy. . . . Focusing on “racial discrimination” takes our eyes off the central agents of racism: racist policy and racist policymakers, or what I call racist power.

*Id.* at 18–19.

41. *Id.*

42. Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html> [<https://perma.cc/8AKL-U7UW>].

43. *Id.* (detailing the exclusion of Black agricultural and domestic workers from Roosevelt’s New Deal policies that helped build a solid middle class in the United States); see also Brian Thompson, *The Racial Wealth Gap: Addressing America’s Most Pressing Epidemic*, FORBES (Feb. 18, 2018, 12:15 PM), <https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/> [<https://perma.cc/8ZMB-GEED>].

44. 481 U.S. 279 (1987) (upholding the Georgia death penalty despite conclusive evidence showing that even after accounting for nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence than defendants charged with killing Black victims).

of killing whites.<sup>45</sup> In Georgia, racist ideas about the culpability and rehabilitation of Blacks combined with facially race-neutral death penalty policies to produce racial disparities in capital punishment. Bias, both conscious and unconscious, has the most meaning and impact when backed by state power wielded by dominant groups.<sup>46</sup>

### B. *Unconscious?*

It is into this social and legal reality that *Biased* lands. Likely because it is understood as out of one's individual control, and thus less blameworthy, engagement with the idea of unconscious or implicit bias has been widespread, even as engagement with subordinating law and policy remains thin. In the appeal of unconscious bias, however, lies its defect. That is, its widespread palatability reflects an American cultural commitment to white innocence. Eberhardt admits that in an attempt to ensure individuals don't shut down, trainers reassure trainees that everyone is vulnerable to unconscious bias (pp. 281–82). But the problem is deeper than overly optimistic trainers. Just as law and culture can find no white perpetrators of racial discrimination, unconscious bias finds no whites with a unique obligation to account for their behavior.

Despite the law's insistence on white innocence, social science literature documents the ways in which whites use race as a heuristic for everyday decisionmaking. Economic policies, for example, that the public perceives as benefitting Blacks, even if not explicitly race targeted, become politically vulnerable.<sup>47</sup> Moreover, study after study repeatedly documents that when Americans are able to infer race, racial discrimination follows. Resumes headlined by white-sounding names receive 50 percent more callbacks for job interviews.<sup>48</sup> African Americans with Black-sounding names receive only half the responses of those with white-sounding names regarding requests

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45. *McClesky*, 481 U.S. at 297–99 (acknowledging that although racial bias dictated the statistical disparity, it did not amount to an equal protection violation).

46. Woody Doane, *Rethinking Whiteness Studies*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 3, 7 (Ashley “Woody” Doane & Eduardo Bonilla-Silva eds., 2003) (explaining that “whiteness is grounded in the dynamics of dominant group status,” with whites successfully using “political and cultural hegemony to shape the racial order and racial understandings of American society”).

47. Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOCIO. 135, 160 (2000) (citing MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999)) (finding that when policies like tax breaks for job creation in poor areas or welfare programming become racialized, they face the same public-opinion obstacles as explicitly race-conscious policies).

48. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–1006 (2004) (finding that white-sounding names received 50 percent more callbacks than Black-sounding names, that higher-quality resumes elicit about 30 percent more callbacks for white-sounding names whereas Black-sounding names elicit a smaller increase, and that the amount of discrimination is uniform across occupations and industries).

for legal representation.<sup>49</sup> Law firm partners found more errors in legal memos authored by associates with Black-sounding names than in the exact same memos authored by associates with white-sounding names.<sup>50</sup> In the context of school selection, parents use race as a heuristic when choosing schools, even after controlling for academic performance and educational programming.<sup>51</sup> When purchasing a home, house hunters evaluate homes sold by Black families as in need of more features to be attractive, as less well maintained, as worth nearly \$22,000 less, and as located in areas with inferior shopping, schooling, and city services (pp. 160–61).

Nor can these decisions even be accurately characterized as strictly unconscious. Studies find that despite expressing a preference for integrated schools, white parents nevertheless eschew research regarding programming and academic fit in favor of an assessment of the number of other whites who attend.<sup>52</sup> Social scientists find that whites conduct housing searches in white communities, while Blacks conduct searches in neighborhoods with a variety of racial compositions.<sup>53</sup> Further, during the home-buying process, white agents further use racially coded language and racial stereotypes to give clients advice and talk about neighborhoods.<sup>54</sup> The mental processes of white Americans might be automatic, but the decision to act on those processes—or to refrain from controlling for them—is not. And therein lies a

49. Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020) (finding racial discrimination in obtaining legal services, with no evidence supporting expectations of statistical discrimination theory, or the idea that lawyers are responding not to race but to economically relevant signals correlated with race).

50. ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> [<https://perma.cc/U9ZH-KXE2>].

51. Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 17–19 (2008) (summarizing study finding that even after controlling for educational programming and academic performance, parents use race as a heuristic when choosing schools).

52. See, e.g., ERIC TORRES & RICHARD WEISSBOURD, DO PARENTS REALLY WANT SCHOOL INTEGRATION? (2020), <https://mcc.gse.harvard.edu/s/Do-Parents-Really-Want-School-Integration-2020-FINAL.pdf> [<https://perma.cc/4Q9F-PHWS>] (finding that “many White, advantaged parents appear to determine school quality by how many other White, advantaged parents send their child to [the] school”); Helen F. Ladd & Mavzuna Turaeva, *Parental Preferences for Charter Schools in North Carolina: Implications for Racial Segregation and Isolation* (Annenberg Inst. at Brown Univ., EdWorkingPaper No. 20-195, 2020), <https://www.edworkingpapers.com/sites/default/files/ai20-195.pdf> [<https://perma.cc/348L-WSJ6>] (finding that white families were more drawn to schools where white students made up the majority of the student body than Black families were drawn to schools where Black students were in the majority).

53. See, e.g., Maria Krysan, *Does Race Matter in the Search for Housing?: An Exploratory Study of Search Strategies, Experiences, and Locations*, 37 SOC. SCI. RSCH. 581, 594–97 (2008).

54. Elizabeth Korver-Glenn, *Compounding Inequalities: How Racial Stereotypes and Discrimination Accumulate Across the Stages of Housing Exchange*, 83 AM. SOCIO. REV. 627, 636–43 (2018).

less obvious problem with the focus on unconscious bias: the intellectual and ideological drift it has prompted. The energy and focus put into engaging unconscious bias not only obscures explicit bias.<sup>55</sup> Rather, it has also made more tolerable, under cover of the “unconscious bias” label, behavior that was formerly, and properly, considered odious.

### C. Power

Power differentials must also be acknowledged when engaging unconscious bias. Perhaps hoping to avoid alienating anyone from these difficult but necessary conversations, Eberhardt presents examples of Blacks and whites who are equally guilty of unconscious racial bias (pp. 11–13, 19, 61, 68). The status differentials, however, that bias creates can actually change the impacts of unconscious bias. Racism refers to cultural, social, and political phenomena that maintain and perpetuate power among favored groups of people, including normalized racial inequalities.<sup>56</sup> In the United States, racism favors white people, although not all whites benefit from racism equally.<sup>57</sup> This does not mean that people of color cannot engage in racist behavior or harbor racist attitudes. To the contrary, people of color in positions of power, from policymakers to politicians, from business executives to judicial appointees, all have opportunities to advance or oppose the racist policies that perpetuate racial inequality. It does mean, however, that race impacts outcomes not only because of the explicit or implicit biases individuals harbor but also because of the power dynamics that give the manifestation of those biases meaning and reach. It also means that in a system constructed to maintain white supremacy—even if only among the most

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55. Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (identifying and criticizing legal arguments against the consideration of explicit bias).

56. KENDI, *supra* note 40, at 18. “Race creates new forms of power: the power to categorize and judge, elevate and downgrade, include and exclude. Race makers use that power to process distinct individuals, ethnicities, and nationalities into monolithic races.” *Id.* at 38; Eduardo Bonilla-Silva, “New Racism,” *Color-Blind Racism, and the Future of Whiteness in America*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 46, at 271, 271 (explaining that whiteness is embodied racial power used to give the dominant racial group systematic privileges while denying the same to nonwhites).

57. Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1505–06 (2010) (describing “marginal whites” as “individuals who, because they possess some nonracial, socially stigmatized identity characteristic, have . . . limited access to white privilege”); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770 (2020) (using the criminalization of opioid use during pregnancy to illustrate how white privilege can coexist with disadvantage, the architecture for which can be constructed against a backdrop of anti-Black racism); KENDI, *supra* note 40, at 131–32 (noting that white supremacists support policies that benefit racist power against the interests of the majority of white people, including the refusal to acknowledge climate change, which is impacting spaces white people inhabit; the opposition to affirmative action, which has primarily benefited white women; and the opposition to Obamacare even though 43 percent of those who gained life insurance as a result of the program were white).

powerful whites—unconscious bias has differing consequences depending on who is doing the biased thinking, and who the targets of the biased thinking are.

That members of all races are vulnerable to unconscious biases is made clear throughout *Biased*. What is not explicitly acknowledged is that racial bias operates within a social hierarchy designed to place whites at the top, Blacks at the bottom, and other people of color at various places in between.<sup>58</sup> The book’s introduction, for example, opens with two detailed stories of Black people profiling other Black people, despite the reference later in the book to studies finding that whites engage in anti-Black bias at a higher rate than Blacks (pp. 3–5, 61). In a society where the white imagination often dictates the factors on which profiling is based,<sup>59</sup> detailed vignettes illustrating how Black people profile each other avoids contextualizing bias against power.

Similarly, Chapter One focuses on the challenges of cross-racial identification, presenting as a case study the Black author’s childhood difficulty in discerning white faces (pp. 11–13). Psychologists have found, however, that whites have a harder time assessing emotion on the faces of Black people than they do other white people, a problem that Blacks are less likely to have.<sup>60</sup> What does an inability, then, to distinguish among the faces of people in different racial groups mean in a context where a particular group is consistently in power? In a school where the curriculum probably centers white people, and white cultural and social norms are typically well represented, misrecognition of white children is likely to land as amusing at best and an annoyance at worst. But for Black children in majority-white schools or

58. See Paul Gowder, *Racial Classifications and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 328 (2014) (describing a racial hierarchy in the United States in which Blacks are at the bottom of the hierarchy and are, thus, the hierarchy’s starkest victims).

59. Elijah Anderson writes:

For the larger society, from the nightly news and media reports of rampant black-on-black crime and at times from close observation of black people in public, images of the black ghetto loom large. Here, the ghetto becomes intensely more iconic, symbolized as a distressed place to which blacks have been relegated to live apart from the larger society, thereby encouraging a universally low opinion of blacks as a racial category . . . . [The ghetto serves] as a touchstone for prejudice, a profound source of stereotypes, and a rationalization for discrimination against black people in general. . . . When the anonymous black person enters the white space, others there immediately try to make sense of him or her. . . . In the absence of routine social contact between blacks and whites, stereotypes can rule perceptions, creating a situation that estranges blacks. In these circumstances, almost any unknown black person can experience social distance . . . .

Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 13 (2015).

60. Justin P. Friesen et al., *Perceiving Happiness in an Intergroup Context: The Role of Race and Attention to the Eyes in Differentiating Between True and False Smiles*, 116 J. PERSONALITY & SOC. PSYCH. 375, 381, 387–88 (2019) (finding that due to their higher social status, whites are less likely to make eye contact, and are thus less skilled at reading social cues and emotions on the faces of individuals from minority groups).

schools shaped by second-generation segregation,<sup>61</sup> facial misrecognition takes on deeper, more pernicious meaning, reinforcing a climate where that child may experience racial marginalization and social invisibility<sup>62</sup> as a daily occurrence. The point is not that Blacks are incapable of cross-racial misrecognition but that an implied equivalency between Black and white facial misrecognition dangerously elides the dynamics of white supremacy that animate unconscious racial bias in the United States. Against the backdrop of those dynamics, unconscious bias acted on by Black people regarding whites is circumscribed in both its symbolic and material reach.<sup>63</sup>

### III. UNCOVER AND CONTROL

Eberhardt explains that addressing the problem of unconscious bias does not necessarily warrant training; the value of training is hard to quantify, undercutting rigorous evaluation of the programs (pp. 278–80, 285). Further, to the extent the programs are evaluated, outcomes on the effectiveness of “diversity” or unconscious-bias training (UBT) are mixed and limited. A meta-analysis of the effects of diversity training, for example, found an effect on reactions to training and cognitive learning, but a smaller effect on behavioral and attitudinal/affective learning.<sup>64</sup> That is, trainees reported positive reactions to training and increased awareness about cultural-diversity issues, but more modest changes in the development of trainee skills or trainee attitudes about diversity and self-efficacy.<sup>65</sup> Moreover, behavioral and

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61. While first-generation segregation refers to the racial segregation within a school district, second-generation segregation refers to “the racially correlated allocation of educational opportunities within schools,” typically through curricular grouping or tracking. Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1525 (2003).

62. In the context of discipline, however, Black children are hypervisible. As such, they are overrepresented in public-school suspensions and corporal punishment, with schools more likely to adopt extremely punitive disciplinary policies and less likely to use restorative techniques as the percentage of enrolled Black students increases. These relationships operate independent of crime salience, teacher training, or economic status. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1240; Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 35–41 (2010).

63. Charles Lawrence, an original architect of legal theories regarding unconscious bias, has made similar claims, arguing that when cognitive theories called racial bias normal, they refer to the normalcy of categorization. That does not mean, however, that the content with which our cognitive categories are filled is predetermined. In fact, white supremacy provides the content, and should be “the central concern of our justice project.” Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 961–62 (2008).

64. Katerina Bezrukova, Chester S. Spell, Jamie L. Perry & Karen A. Jehn, *A Meta-analytical Integration of over 40 Years of Research on Diversity Training Evaluation*, 142 PSYCH. BULL. 1227, 1239 (2016).

65. *Id.* at 1229, 1239.

attitudinal changes decayed over time.<sup>66</sup> Other research has found that although UBT training is useful for raising awareness, and can be effective for decreasing unconscious bias, it is unlikely to eliminate it, and that the evidence for UBT's ability to change behavior is limited.<sup>67</sup> Further, to the extent that UBT suggests that stereotypes and biases are unchangeable, UBT can backfire.<sup>68</sup> Eberhardt further notes that the trainings often serve as mere signaling device or moral credential (pp. 279, 282).

Given the limited potential of training, Eberhardt goes beyond training to present several solutions meant to interrupt the mental circuitry that prompts humans to automatically exclude and dehumanize on the basis of race. Instead, she suggests monitoring, as assessment and accountability for decisions impacted by bias can produce sound judgments (p. 286). Eberhardt also suggests that opportunities for intense relationships across racial, religious, or ethnic boundaries can undo the automatic mental associations on which bias trades (pp. 287–89). Finally, she refers to timing and standards. Unconscious bias is often triggered under conditions shaped by speed and ambiguity (pp. 285–86). If individuals and institutions can more often make decisions liberated from time constraints and subjective standards, instances of bias tend to decrease.

Some of these suggestions are limited in their capacity to effect change. The potential of monitoring, for example, is unclear. Policymakers in New York City were impervious to data showing that stop and frisk was not correlated to a reduction in crime, continuing to defend a policy that sanctioned racial profiling of Black and Latino men.<sup>69</sup> Further, although police departments across the country are increasingly adopting body cameras intended to influence officer behavior, early research about the efficacy of cameras is mixed at best, with several studies suggesting that the cameras reduce neither

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66. *Id.* at 1242. The positive effects of diversity training were greater when complemented by other diversity initiatives and targeted to address both awareness and skills development. *Id.* at 1244; see also Edward H. Chang, Katherine L. Milkman, Dena M. Gromet, Robert W. Rebele, Cade Massey, Angela L. Duckworth & Adam M. Grant, *The Mixed Effects of Online Diversity Training*, 116 PROC. NAT'L ACAD. SCI. 7778, 7781 (2019) (concluding that one-off diversity trainings commonplace in organizations do not effectively address bias in the workplace).

67. See, e.g., Chang et al., *supra* note 66, at 7778.

68. DOYIN ATEWOLOGUN, TINU CORNISH & FATIMA TRESH, EQUAL. & HUM. RTS. COMM'N, UNCONSCIOUS BIAS TRAINING: AN ASSESSMENT OF THE EVIDENCE FOR EFFECTIVENESS 19–22 (2018), <https://www.equalityhumanrights.com/sites/default/files/research-report-113-unconscious-bais-training-an-assessment-of-the-evidence-for-effectiveness-pdf.pdf> [<https://perma.cc/6SXZ-X7TV>].

69. See JM Rieger, *It 'Saved Countless Lives': How Mike Bloomberg Defended Stop-and-Frisk for Years Before Running for President*, WASH. POST (Feb. 21, 2020, 1:08 PM), <https://www.washingtonpost.com/politics/2020/02/21/it-saved-countless-lives-how-mike-bloomberg-defended-stop-and-frisk-years-before-running-president/> [<https://perma.cc/37CQ-XW3A>].



instances of officer force nor citizen complaints about excessive force.<sup>70</sup> Moreover, it is still the case that even perception of the officer–civilian interactions “objectively” caught on video can be subjective and impacted by race,<sup>71</sup> as the video-recorded deaths of Eric Garner and Philando Castile at the hands of police suggests.<sup>72</sup> That policymakers, police chiefs, and jurors are disproportionately white only underscores the likelihood that power can undercut monitoring.

Relational solutions are also limited in their potential to address bias. As an initial matter, legal precedents that stymie attempts to better integrate public schools all but ensure that racial segregation and isolation will remain the order of the day in American society.<sup>73</sup> Thus, the restorative potential of cross-racial relationships as a solution is undercut before they are even underway among children. Further, relational solutions only reinforce faulty beliefs about the interpersonal nature of bias.

To be sure, interpersonal racial harms not immediately derivative of structural racism can be injurious to individuals. Moreover, it is also in these

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70. Cynthia Lum, Megan Stoltz, Christopher S. Koper & J. Amber Scherer, *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY & PUB. POL’Y 93, 110–11 (2019) (concluding that although officers and citizens are generally supportive of body cameras, they have not had statistically significant or consistent effects on most measures of officer and citizen behavior or citizens’ views of police); Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior, Study Says*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/police-body-camera-study.html> [<https://perma.cc/VAZ2-QMG3>] (summarizing the results of a rigorous eighteen-month study involving more than 2,000 police officers in Washington). *But see* p. 298 (reporting that after the Oakland Police Department adopted body cameras in 2010, both citizen complaints and police use of force declined).

71. *See, e.g.*, Julie Bosman, Mitch Smith & Michael Wines, *Jurors Find Video Isn’t Providing 20/20 Vision in Police Shootings*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/2017/06/25/us/police-shootings-trials-video-body-cam.html> [<https://perma.cc/XRL6-GQTE>] (reporting that video from body cameras has repeatedly failed to persuade juries of police misconduct).

72. Justin Hansford, *Body Cameras Won’t Stop Police Brutality. Eric Garner Is Only One of Several Reasons Why*, WASH. POST (Dec. 4, 2014, 2:02 PM), <https://www.washingtonpost.com/posteverything/wp/2014/12/04/body-cameras-wont-stop-police-brutality-eric-garner-is-only-one-of-several-reasons-why/> [<https://perma.cc/BG7Z-ZA6C>]; Osamudia James, *Police Video Won’t Deliver Justice. Philando Castile’s Case Proved It.*, WASH. POST (June 22, 2017, 11:17 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/06/22/police-video-wont-deliver-justice-philando-castiles-case-proved-it/> [<https://perma.cc/42SS-L69J>].

73. GARY ORFIELD & ERICA FRANKENBERG WITH JONGYEON EE & JOHN KUSCERA, CIV. RTS. PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 2, 10 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/U8L7-F3PH>] (concluding that Black students in the South are less likely to attend a school that is majority white than about fifty years ago); Alvin Chang, *The Data Proves that School Segregation Is Getting Worse*, VOX (Mar. 5, 2018, 1:50 PM), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> [<https://perma.cc/V3DE-KFDZ>] (explaining that although the United States is racially distributing students about as well as the country did a few decades ago, the most vulnerable students are increasingly isolated).

interpersonal engagements that racial hierarchies are reproduced.<sup>74</sup> Nevertheless, a key harm of racial bias lies in the racist policies and institutional practices that produce racial inequalities—inequalities that can continue even if every individual was magically cured of racial bias.<sup>75</sup> Relational solutions, however, reinforce entrenched but flawed cultural and legal commitments to understanding racism exclusively as a series of interpersonal slights or abuses, rather than as social and political patterns of disfavor that produce psychic and material consequences across societal spheres. The heavy emphasis in *Biased* on relational solutions at the same time that the book engages the broader systems of policing, education, and housing problematically conflates the problem of race between people and the problem of race within institutions.

Although more human connections can undoubtedly break down the raced walls that separate us, relationships are no match for bias entrenched in social institutions and legal doctrine. This focus on the workings of individual minds in the context of addressing solutions problematically frames racism as a matter of private concern, potentially leading readers to conclude that racism lies beyond the reach of state and institutional remedies.<sup>76</sup>

Eberhardt’s suggestion regarding standard setting, however, reminds us that law can be used to improve entire systems. Equality law in the United States is currently defined by principles of anticlassification or “formal equality.” A formal approach to equality suggests that the Constitution prevents the government from assigning racial identity for differential treatment. As such, state action that is facially neutral but imparts a racially disparate impact is immune from challenge.<sup>77</sup> In contrast, an antisubordination approach to equal protection focuses on the discriminatory effects of state action rather than on the explicit intent of policymakers.<sup>78</sup> This approach would subject to judicial review law and policy that reinforce or impart racial disadvantage.<sup>79</sup> Alternately, a redistributive-justice model of equal protection would impose on the state an affirmative obligation to dismantle inequalities created by historical systems of domination; like an antisubordi-

74. CECILIA L. RIDGEWAY, STATUS: WHY IS IT EVERYWHERE? WHY DOES IT MATTER? 77, 130–35 (2019) (describing the interactional reproduction of status hierarchy).

75. Ford, *supra* note 21, at 1845.

76. Lawrence, *supra* note 63, at 942.

77. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287–89 (2011). This interpretation has subjected race-conscious policies meant to remediate racism and discrimination to typically fatal strict scrutiny review. See *Johnson v. California*, 543 U.S. 499, 505–07 (2005) (holding that both benign and invidious uses of race are subject to strict scrutiny).

78. Siegel, *supra* note 77, at 1288–89.

79. Barnes & Chemerinsky, *supra* note 32, at 1066–76 (analyzing the Reconstruction Amendments to conclude, in part, that the Amendments redefined Blacks as citizens for whom substantive, and not just formal, equality was needed).

nation regime, redistributive justice operates without regard to intent.<sup>80</sup> Under both models, state policies with disparate racial impact, often the aggregated manifestation of individual and unconscious biases, can be interrogated, improved, or avoided all together.

Consider, for example, criminal law. The Georgia death penalty at issue in *McCleskey v. Kemp* might have been deemed unconstitutional under an antisubordination approach to equal protection. Or, consider economic policy. Under a redistributive-justice approach to equality, the New Deal policies that excluded agricultural and domestic workers in the early twentieth century might have been expanded to ensure Black Americans were not again excluded from American wealth and prosperity. In fact, any number of the state policies with racially disparate outcomes that Eberhardt canvasses in her book, from the NYPD's "stop and frisk" policies in Chapter Three (pp. 63–64), to traffic stops in Chapter Five (pp. 101–06), to the legal rulings that undercut school integration referenced in Chapter Eight (pp. 209–10),<sup>81</sup> might be ended or assessed differently under an antisubordination or redistributive justice approach to equal protection. Equality scholars have thus far tilled only barren legal soil in pursuit of these more fruitful approaches. Nevertheless, these models of equality are the more effective responses to unconscious bias that goes unacknowledged and unaddressed in our current cultural and legal environment.

These changes to equality doctrine are not the objective standards Eberhardt extols. And setting objective criteria for resume reviews may, in fact, decrease the impact of unconscious bias on job candidates selected for interviews (p. 285). Many areas of American life, however, are regulated by subjective standards rather than clear-cut rules, and for good reason. In the criminal justice context, assessments of police use of lethal force are based on whether officers believed such force to be "objectively reasonable" or "necessary."<sup>82</sup> The problem is not that officers lack hard and fast rules for when force is or is not reasonable. To the contrary, most civilians understand that in dangerous situations, officers must rapidly consider many factors and need latitude to make these split-second professional assessments. Rather, the problem is that race too often skews both subjective and objective as-

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80. Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 623.

81. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that absent interdistrict segregation violations, a district cannot mandate government expenditures for plans that solicit voluntary interdistrict integration); *Freeman v. Pitts*, 503 U.S. 467 (1992) (giving federal courts the authority to relinquish their supervision of desegregation in piecemeal fashion, even if students never experience comprehensively integrated school systems); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (endorsing the termination of desegregation orders once school districts become unitary, even if the consequences is resegregation); *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that absent an interdistrict violation, federal courts cannot order an interdistrict remedy).

82. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

assessments of what is reasonable or necessary. Similarly, discretion exists in various stages of the criminal justice system. Again, the problem is not that discretion exists, but that race too often dictates when that discretion is used in service of severity or leniency.<sup>83</sup> An antisubordination or redistributive model for assessing racial disparities in these systems, however, would create accountability for the way race operates, placing an affirmative obligation on leaders and policymakers to make the system-wide cultural and operational changes that can control for the impact of unconscious bias.

Take, for example, policing policies. Broken-windows policing focuses on petty offenses and neighborhood disorder in low-income and minority communities.<sup>84</sup> This type of policing, which has only a modest impact on serious crime, disproportionately subjects Black and brown people to arrests for misdemeanors, summons for violations of administrative codes like bicycling on the sidewalk, and potentially lethal police encounters.<sup>85</sup> Similarly, the War on Drugs, operating in tandem with stop and frisk or broken-windows policing, results in disproportionate arrests of Black people for drug-law violations, even though drug-use rates do not differ substantially by race and ethnicity.<sup>86</sup> Although rates of marijuana use between Blacks and whites are comparable, in 2010 the ACLU found that Blacks were 3.7 times more likely to be arrested for marijuana possession.<sup>87</sup>

If, as Eberhardt suggests, bias is triggered under conditions of ambiguity, and some policies necessitate subjectivity, then our legal system would do well to subject those policies to interrogation for racial disparities and, where necessary, prompt replacement. In the state of California, lawmakers passed legislation permitting police officers to use lethal force in response to a threat “only when necessary in defense of human life,” a change from permitting officers to use lethal force as an “objectively reasonable” response to a threat.<sup>88</sup> Although opinions differ on whether the change in standards went

83. KATHERINE J. ROSICH, AM. SOCIO. ASS’N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 10, 14–15 (2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> [<https://perma.cc/8LF5-8VK2>] (referring to literature suggesting that police discretion results in higher arrest rates and harsher treatment at arrest for minorities and that unfettered prosecutorial discretion to charge offenses has been used with the effect of racial discrimination).

84. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1989, at 29), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/A5FD-SLD8>].

85. SENT’G PROJECT, REPORT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 4–5 (2018).

86. Drug users also generally purchase drugs from people of the same race or ethnicity, thus undercutting counters that racial disparities in arrests are based on sale and distribution. *Id.* at 3–4.

87. *Id.*

88. Act of Aug. 19, 2019, ch. 170, 2019 Cal. Stat. 2500 (codified at CAL. PENAL CODE §§ 196, 835a); Bill Chappell, *New California Law Says Police Should Kill Only When ‘Necessary,’*

far enough,<sup>89</sup> the new policy diminishes opportunities for potentially lethal confrontations between police officers and Black civilians. An antisubordination approach to evaluating policing disparities by race can prompt changes like these that better account for race, and not only in those regions where the political stars align. Eberhardt applies her solutions in the context of individual and company-level decisionmaking but avoids the logical extension of these solutions to larger social systems, instead falling back on improving interpersonal interactions. That omission merits analysis in any academic engagement with her work.

#### CONCLUSION

American discourse regarding bias must change, as a legal shift from white innocence to white accountability can usher in cultural shifts that are crucial for racial truth and reconciliation in the United States. Although providing much-needed clarity on the brain science of unconscious bias, some of Eberhardt's framing nevertheless delays this shift. Bias may be unconscious, but people and institutions can be held accountable for their decisions to act on it, or their failures to control for it. In this shift, it would be a mistake to equate accountability with blame. Although our culture of taken-for-granted white innocence is a problem, it is also true that assigning blame will create the defensiveness that Eberhardt sought to avoid. The solution, however, is not to suggest that the impact of all bias is the same or to focus on addressing bias only in interpersonal interactions. Rather, political power must be acknowledged, and system-wide solutions that can control for the impact of unconscious bias adopted. And those solutions can only emerge after accountability is established.<sup>90</sup> Ultimately, we must lean away from talking about unconscious bias as an uncontrollable problem between individuals, and toward understanding it as a set of structural problems that dominant groups are responsible for dismantling. When unconscious bias serves as a guide to where our cultural and legal systems need changing, we'll finally be able to reckon with its devastating impact.

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NPR (Aug. 19, 2019, 2:46 PM), <https://www.npr.org/2019/08/19/752364459/new-california-law-says-police-should-kill-only-when-necessary> [<https://perma.cc/NJ82-XVPG>]; Laurel Rosenhall, *Deal: California Poised to Pass One of Nation's Toughest Police Use-of-Force Standards*, CALMATTERS (May 23, 2019), <https://calmatters.org/politics/2019/05/california-police-use-of-force-standards-lethal-shootings-legislature/> [<https://perma.cc/TB95-AKRC>].

89. Compromises to the bill, which included removing provisions that would have held officers criminally liable in more cases and defined "necessary" as when there is "no reasonable alternative," and that paired the new law with a bill that sends more money to police budgets, prompted the Black Lives Matter movement, an early sponsor of the bill, to withdraw its support. Chappell, *supra* note 88; Rosenhall, *supra* note 88.

90. See, e.g., Nordell, *supra* note 14 ("Avoiding blame is key. The resulting message is carefully balanced: Bias is normal, but it's not acceptable. You must change, but you're not a bad person.") (describing an approach to addressing unconscious bias that suggests that bias is a habit that can be unlearned if people understanding themselves as accountable for it).