

**EXPLORING THE INTERPRETATION AND APPLICATION OF  
PROCEDURAL RULES: THE PROBLEM OF IMPLICIT AND  
INSTITUTIONAL RACIAL BIAS**

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I. ASPIRATION AND REALITY

Modern American civil procedure seeks to be clear, fair, and rational. The goal of the Federal Rules of Civil Procedure, the centerpiece of modern

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\* I began work on this subject several years ago and started to draft this essay for the present symposium at the beginning of May 2020. At that point I thought the arguments I was advancing might appear radical or extreme. Now, after the murder of George Floyd and all that followed, these arguments may seem only too obvious and even trite. If the changed social attitudes and energized political movements that have resulted since the Floyd murder detract from whatever value this essay might have, I have no regrets and can only plead the indulgence of readers who find that what I have to say all too familiar.

I would like to thank my colleagues in the New York Law School Faculty Colloquium for their comments on an earlier draft and two of my students, Marc Walcow and Alix Hirst, for their valuable assistance in completing it.

procedural reform, was to eliminate arcane technicalities and get to the substantive issues. Consequently, the original drafters sought to streamline pleading, ensure the presence of properly interested parties, gather all the relevant facts, and enable courts to make well-founded decisions on the merits.<sup>1</sup>

As everyone now knows, the drafters did not quite accomplish their loftiest goal of making federal litigation “just, speedy, and inexpensive.”<sup>2</sup> Ambiguities appeared in the rules, lawyers proved imaginative in exploiting them, interpretive complexities arose, and the gathering of facts proved ever more frustrating and burdensome. Expanding waves of cases began streaming into the courts during the second half of the twentieth century, and a so-called “litigation explosion” generated growing pressures for courts to dispose of ever larger numbers of cases with greater efficiency, less discovery, and more dispositions without trial.<sup>3</sup>

Those changes prompted an escalating battle over procedural reform that highlighted the underlying truth challenging efforts to create a clear, fair, and rational procedural system. It is pointless, we learned, to consider procedural rules abstractly and to judge them only by their purported “simplicity,” “rationality,” and “fairness.” Proceduralists have increasingly

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<sup>1</sup> The Federal Rules of Civil Procedure differ drastically from the Federal Rules of Criminal Procedure, and evidence suggests that unlike the civil rules, the criminal rules were shaped with racist goals and outcomes in mind. For detailed discussions of this history, see generally Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1 (2021) (describing how race was interwoven into early promulgations of criminal procedure); Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 697 (2017) (noting that the need for different procedural rules governing civil and criminal proceedings is “historically contingent”).

<sup>2</sup> The announced purpose of the Federal Rules was “to secure the just, speedy, and inexpensive determination of every action and proceeding” and remains as such. FED. R. CIV. P. 1. Stephen Burbank, of course, wrote one of the classic studies of the origins and goals of the Rules Enabling Act that authorized the Federal Rules. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>3</sup> See generally WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (describing how the time when Americans began to turn to litigation more frequently, dubbed the “litigation explosion,” altered the U.S. legal system). But see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 990–96 (2003) (challenging the nature and significance of a civil “litigation explosion”). In several areas, including the scope of federal question jurisdiction, the Supreme Court has effectuated its policy of restricting the federal caseload where possible. See, e.g., *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) (refusing to extend federal question jurisdiction over suits brought by insurers against beneficiaries to coup medical expenses under the Federal Employees Health Benefits Act of 1959); *Gunn v. Minton*, 568 U.S. 251, 264–65 (2013) (refusing to deprive the state court of jurisdiction over a malpractice case relating to patent law).

recognized that they can never know the actual significance of any procedural rule—however fair and rational it might appear on its face—without empirical evidence showing its uses and practical results.

Changes occur in the interpretation of procedural rules, the impact they have on one another, the social contexts in which they operate, the nature of the parties who use them, and the practical results the parties seek to achieve.<sup>4</sup> The jurisdictional amount for federal diversity jurisdiction, for example, now an almost trivial matter, was for more than half a century one of the most significant economically distributive rules in the American legal system.<sup>5</sup> Similarly, as Stephen Burbank and Sean Farhang have explained, Rule 68 of the Federal Rules of Civil Procedure was designed as a neutral, efficiency-seeking provision meant to encourage settlements, yet it evolved into a tool that defendants used to undermine fee-shifting statutes that Congress had enacted to aid plaintiffs.<sup>6</sup> Now it is a recognized truism that procedural analysis must focus on the way that rules operate in practice and how they serve—or disserve—different social groups and interests.<sup>7</sup>

## II. ALTERNATE PERSPECTIVES

Stephen Burbank has long urged the necessity of empirical studies of civil procedure, and his numerous substantial contributions to the field together with those of many other scholars have shown the value and necessity of such

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<sup>4</sup> A recent book by scholar Amalia D. Kessler argues that many of the most basic procedural assumptions that undergird America's adversarial legal system were developed to establish the professional authority of the lawyer class. AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877*, at 152–57, 198–99, 235, 265, 323 (2017). Further, the book also argues that some of those assumptions were rooted in racist, nativist, and anti-Catholic biases. *Id.* at 6–7, 13–15, 235, 265, 311–16, 322.

<sup>5</sup> EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 97–102 (1992) (“[T]he jurisdictional amount served as a distributive economic force that impinged seriously on individual plaintiffs [suing out-of-state corporations].”).

<sup>6</sup> STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 35, 103–08, 132–35 (2017) [hereinafter BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*].

<sup>7</sup> See, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 464 (2017) (“It is well established that the Rules have a disproportionate adverse effect on certain substantive areas of law and kinds of cases.”). Such empirical analyses are particularly necessary now with COVID-19 and the advent of hearings and oral arguments on Zoom and by telephone, technical developments that will surely change the practice of law and likely bring additional kinds of socially differential consequences. See, e.g., Jed S. Rakoff, *Covid & the Courts*, N.Y. REV., May 28, 2020, at 10 (discussing technological challenges associated with addressing applications from incarcerated prisoners seeking permanent or temporary release due to risks of continued confinement associated with the pandemic).

work.<sup>8</sup> Increasingly sophisticated statistical analyses of caseloads and judicial decisionmaking have been quite revealing, while the varied research of historians, political scientists, sociologists, and psychologists have all deepened our understanding of the complex and changing role that procedural rules play in the American legal system. They have demonstrated that social factors of all kinds—political, cultural, economic, religious, and ideological—shape both the content and interpretation of procedural rules as well as the ways in which diverse parties use these rules to achieve their desired results. A staggering variety of extralegal social factors can influence and determine the outcome of even the simplest case.<sup>9</sup>

Drawing on insights from social psychology, for example, Neal Devins and Lawrence Baum recently advanced a new theory of Supreme Court decisionmaking. They stress the importance not simply of recognized influences on the justices, such as judicial policy preferences and changes in public opinion, but of an additional factor: the informing role of the “elite social networks that the Justices are a part of.”<sup>10</sup> Relying on a “psychological model” of judicial behavior, they argue that judges are acutely sensitive to the views and values of other elites, especially to the relatively cohesive networks of opposed elites that gather together in such activist ideological organizations as the conservative Federalist Society and the liberal American Constitution Society. The Federalist Society seemed particularly significant to them because it has become a de facto judicial employment agency for Republican administrations.<sup>11</sup> All five Republican justices serving on the Court when Devins and Baum wrote had connections with the society, and four of the five were actively involved in the society’s events.<sup>12</sup>

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8 E.g., BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 6, at 130–81 (conducting empirical analyses “to model the relationship between justices’ ideological preferences and their votes on private enforcement issues”); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004) [hereinafter Burbank, *Vanishing Trials*] (“Both my own empirical work and that of many other scholars long ago persuaded me that the picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted . . .”). It is essential, he reiterated, to recognize the undeniable fact that “the law in the books is not a reliable guide to the law in action.” *Id.*

9 See Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons From a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1504–07 (2014) (providing examples of these social factors).

10 NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 10 (2019).

11 *Id.* at 121–28.

12 *Id.* at xi. The sixth and most recent Republican appointee to the Court, Justice Amy Coney Barrett, also maintained connections with the Federalist Society. See Elizabeth Dias, Rebecca R. Ruiz & Sharon LaFraniere, *Rooted in Faith, Amy Coney Barrett Represents a New Conservatism*, N.Y. TIMES,

The Devins and Baum study suggests more broadly the potential value of drawing on social psychology and other similar fields, such as anthropology and media studies, in an effort to better understand how and why judges and scholars interpret legal rules as they do. Such broadened approaches raise fascinating and exceptionally complex questions. To what extent, for example, do the views and values of individuals fuse with the cultural and ideological views of the groups they join and influence the way they interpret and apply procedural rules?<sup>13</sup> Again, to what extent do broader social and cultural patterns of belief explain interpretive differences in the way judges construe procedural rules and apply them in different social contexts?

Legal scholars, of course, are well aware of the danger of relying too heavily on social science theories, perhaps psychological ones especially. Those theories have often changed over time and subsequently been targeted for harsh criticisms by later generations.<sup>14</sup> Thus, it is always prudent to use such explanatory theories with great care and, above all, to stay close to both the applicable formal law and established social facts.

With that caution in mind, I suggest three propositions in advancing an alternate approach to the study of civil procedure that employs the

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<https://www.nytimes.com/2020/10/11/us/politics/amy-coney-barrett-life-career-family.html> [<https://perma.cc/J8Q7-C4QA>] (last updated Mar. 4, 2021).

<sup>13</sup> See generally, e.g., William B. Swann, Jr., Jolanda Jetten, Ángel Gómez, Harvey Whitehouse & Brock Bastian, *When Group Membership Gets Personal: A Theory of Identity Fusion*, 119 PSYCH. REV. 441 (2012) (exploring possible causes of identity fusion); Marc Howard Ross, *Culture and Identity in Comparative Political Analysis*, in CULTURE AND POLITICS: A READER 39–70 (Lane Crothers & Charles Lockhart eds., 2000) (discussing contemporary political culture theory); Ann Swidler, *Cultural Power and Social Movements*, CULTURE AND POLITICS: A READER 269–83 (Lane Crothers & Charles Lockhart eds., 2000) (same); Joe Henrich & Robert Boyd, *The Evolution of Conformist Transmission and the Emergence of Between-Group Differences*, 19 EVOLUTION & HUM. BEHAV. 215, 225–30 (1998) (investigating the evolution of “conformist transmission”); Harry C. Triandis, *The Self and Social Behavior in Differing Cultural Contexts*, 96 PSYCH. REV. 506 (1989) (analyzing individualism-collectivism, tightness-looseness, and cultural complexity in relation to the sampling of self, public, and collective aspects of the self).

<sup>14</sup> For example, psychological theories addressing “consciousness,” “responsibility,” “insanity,” and “free will” have informed much of American law, but over time those theories evolved and earlier ones were often discarded. See generally, e.g., SUSANNA L. BLUMENTHAL, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE 2 (2016) (evaluating “the problematic relationship between consciousness and liability in the history of American law . . . .”); THOMAS ANDREW GREEN, FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT 1 (2015) (discussing the “free will problem” in the context of criminal law); JAMES C. MOHR, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA xv (1993) (noting connections between developments in the medical field and American jurisprudence).

psychological theory of “implicit bias.”<sup>15</sup> Specifically, I suggest the following three hypotheses:

1. An understanding of implicit bias and a recognition of its influence may help illuminate the content, interpretation, and application of procedural rules.

2. Implicit bias is especially likely to be influential when procedural rules are applied to issues involving or implicating race, especially issues involving Black Americans.<sup>16</sup>

3. Implicit racial bias can influence both individuals (especially in areas where they are exercising discretion) as well as institutional groups, including the judiciary (in the organized practices that judges develop and the standard interpretations they accept).<sup>17</sup>

Social scientists have methodically studied implicit bias and demonstrated its widespread presence among Americans through a variety of tests and experiments. Central to their results is the finding that, as a general matter, white people have negative associations with Black people and often act or react on the basis of unrecognized and often deeply ingrained negative feelings and stereotypes. This pattern has revealed itself even among those consciously committed to racial equality and sincerely

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<sup>15</sup> Some scholars have already begun to explore this idea in different procedural areas. *See, e.g.*, Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1626–31 (2019) (discussing experimental studies assessing implicit bias among judges); Malveaux, *supra* note 7, at 468 (“Case outcomes may reflect, not legal standards, but variances in personal perceptions.”); Danielle R. Holley, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 53 CASE W. RESV. L. REV. 103, 107 (2003) (arguing that Rule 24 fails as a procedural device because courts regard “intervenors as outsiders in the framework of litigation . . . .”); Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 655 (2017) (“[M]ediation involves telling a story, and the way stories get communicated may perpetrate cultural myths that operate to the disadvantage of a black employee . . . .”).

<sup>16</sup> Racial, ethnic, religious, gender, and sexual biases in America are exceptionally complex, and this hypothesis could be profitably applied to explore implicit (and explicit) biases that may exist in the legal treatment of many other categories of groups.

<sup>17</sup> My consideration of implicit bias assumes (1) that current legal and institutional rules are formally race-neutral, (2) that beyond the realm of legal formalities, racial biases—implicit and explicit—may affect law and legal processes in various ways, and (3) that implicit bias may exist and influence law and legal processes even in the absence of overt, express, conscious, or purposeful racial bias. Edward A. Purcell, Jr., *The Action Was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States, 1875–1945* (giving examples of the way that corporate claims agents exploited race and gender in arranging relatively low out-of-court tort settlements), in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES* 522–26 (Willibald Steinmetz ed., 2000)

convinced that they themselves harbor no racial prejudice.<sup>18</sup> While there is an extensive literature evaluating and critiquing various implicit bias tests,<sup>19</sup> virtually no scholar or social scientist denies the existence and potential significance of implicit biases on human behavior, especially those involving racial interactions. One study, for example, found that such biases among schoolteachers led to racial disparities in school discipline,<sup>20</sup> while numerous studies have shown the significant influence of implicit racial bias on medical doctors in the disparate treatments they give their patients.<sup>21</sup>

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- 18 “[O]ur results are also consistent with aversive racism theory which proposes that many Caucasians can simultaneously hold conscious egalitarian attitudes and unconscious negative feelings and beliefs about African Americans.” Scott A. Ottaway, Davis C. Hayden & Mark A. Oakes, *Implicit Attitudes and Racism: Effects of Word Familiarity and Frequency on the Implicit Association Test*, 19 SOC. COGNITION 97, 133–34 (2001). Other studies have reached similar conclusions. See generally, e.g., 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); Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 PSYCH. SCI. 53 (2006); Nilanjana Dasgupta, Debbie E. McGhee, Anthony G. Greenwald & Mahzarin R. Banaji, *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCH. 316 (2000); Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464 (1998); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553 (2005). See also John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser, Curtis D. Hardin, *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RSCH. ORGANIZATIONAL BEHAV. 39, 47 tbl.1 (2009) (outlining ten recent studies demonstrating implicit bias with respect to race, ethnicity, gender, and social class).
- 19 For examples of such critiques, see Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), <https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism> [<https://perma.cc/9THG-4K2H>] (arguing that the most widely used test for implicit bias “has repeatedly fallen short of basic scientific standards”); Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard & Philip E. Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCH. 171, 188 (2013) (“[Implicit bias tests] provide[] little insight into who will discriminate against whom, and provides no more insight than explicit measures of bias.”).
- 20 Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 J. PSYCH. SCI. 617, 622 (2015) (“We have shown experimentally . . . that teacher responses can contribute to racial disparities in discipline.”).
- 21 See, e.g., Janice A. Sabin, Brian A. Nosek, Anthony G. Greenwald & Frederick P. Rivara, *Physicians’ Implicit and Explicit Attitudes About Race by MD Race, Ethnicity, and Gender*, 20 J. HEALTH CARE FOR THE POOR & UNDERSERVED 896, 907 (2009) (“[I]mplicit attitudes and stereotypes [] may represent one more form of error in medical decision-making.”); Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 SOC’Y GEN. INTERNAL MED. 1231, 1231 (2007) (“As physicians’ prowhite implicit bias increased, so did their likelihood of treating white patients and not treating black patients with thrombolysis . . .”).

Understandably, social scientists studying implicit bias have turned their attention to legal issues and institutions. One study of jurors, for example, showed that implicit racial bias influenced determinations about who should suffer the death penalty and who should not. Examining data on Black people convicted of capital crimes in Philadelphia from 1979 to 1999, researchers “found a huge stereotypicality effect. Of the men rated low in stereotypical [Black racial] features, only 24 percent were sentenced to death. But more than 57 percent of the ‘highly stereotypical’ Black defendants were sentenced to die for their crimes.”<sup>22</sup>

That finding “takes implicit bias to a whole other level,” explained Jennifer L. Eberhardt, a social psychologist at Stanford University who specializes in bias training for police departments.<sup>23</sup> That “other level” showed that “an individual’s physical appearance triggers the sort of pernicious stereotypes that suggest that blacks are inherently so dangerous they deserve extermination.”<sup>24</sup> That finding was “a sign,” Eberhardt concluded, “that our perspectives, our criminal justice process, and our institutions are still influenced by primitive racial narratives and imagery.”<sup>25</sup> In the 1950s and 1960s, for example, the Los Angeles Police Department readily and regularly enforced morals offenses against black women because its officers identified “sexual deviance with blackness.”<sup>26</sup>

Legal scholars have drawn on findings about implicit bias to examine a variety of specific issues and areas.<sup>27</sup> They have found evidence, for example,

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<sup>22</sup> JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 129–30 (2019).

<sup>23</sup> *Id.* at 130.

<sup>24</sup> *Id.*

<sup>25</sup> *Id. Accord, e.g.*, Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 643 (2003) (finding that a sample of European Americans more readily perceived threatening affect in Black faces than in White faces). One commentator summarized the results of such studies by noting that “[b]y adulthood . . . most Americans have been exposed to a culture with enough negative messages about African-Americans and other marginalized groups that as much as 80 percent of white Americans hold unconscious bias against black Americans.” ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 186 (2020). That bias was “so automatic that it kick[ed] in before a person [could] process it . . .” *Id.*

<sup>26</sup> Anne Gray Fischer, “*Land of the White Hunter*”: *Legal Liberalism and the Racial Politics of Morals Enforcement in Midcentury Los Angeles*, 105 J. AM. HIST. 868, 871 (2019).

<sup>27</sup> For a path-breaking early work, see Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–23 (1987) (reconsidering the discriminatory purpose doctrine established by *Washington v. Davis* and arguing for removal of the intentional motivation requirement); for a general overview, see, for example, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (summarizing empirical evidence rejecting colorblindness and arguing for law to reflect the

that in the federal courts implicit biases might be disadvantaging both women who bring gender discrimination claims and Black people who bring racial discrimination claims.<sup>28</sup> As a general matter, they point out, the courts have paid insufficient attention to the possible impact of such biases on judicial reasoning and decisionmaking.<sup>29</sup> Theories of implicit and institutional bias cut especially deep when they attempt to address issues of judicial reasoning and decisionmaking, and scholars have sought to identify what role race—as well as class, gender, ethnicity, ideology, sexual orientation, and party affiliation—might play in that decisionmaking.<sup>30</sup>

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existence of implicit bias). For specific studies on the role of implicit bias in the legal system, see generally Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study Of Iqbal's Effect On Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010); 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 (2010); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Tanya K. Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845 (1990).

<sup>28</sup> See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1129–35 (2009) (on race and gender); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 705 (2007) (on gender); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 890 (2006) (on race). See generally Judith Resnik, *Asking about Gender in Courts*, 21 SIGNS 952 (1996) (on gender); Judith Resnik, *Gender Bias From Classes to Courts*, 45 STAN. L. REV. 2195 (1993) (on gender).

<sup>29</sup> See, e.g., Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007) (responding to critics of implicit bias and arguing that the "case for using the law to respond to the problem of implicit bias remains strong"); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006) (arguing that, despite its limitations, "a structural approach to employment discrimination law may be the best hope" to address inequalities caused by unconscious bias and the "boundaryless workplace"); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1007 (2006) (applying the methods of behavioral realism in the law "to the problem of defining and identifying discriminatory motivation in Title VII individual disparate treatment cases.").

<sup>30</sup> For an excellent study of the influence of racial assumptions, as well as other social assumptions, in judicial decisionmaking, see Reginald Oh & Thomas Ross, *Judicial Opinions as Racial Narratives: The Story of Richmond v. Croson*, in RACE LAW STORIES 381–417 (Rachel F. Moran & Devon Wayne Carbedo eds., 2008). For a study on various kinds of racial bias in the courtroom, see Jerry Kang, Mark Bennett, Devon Carbedo, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil,

To begin with, it is fair to say that virtually no one speaking seriously would agree with the discredited mechanical claim that judges merely “call balls and strikes.”<sup>31</sup> A substantial and well-known body of work, to which Stephen Burbank and his colleague Sean Farhang have contributed significantly, demonstrates the complex influence of political ideology and other social factors on the work of the Supreme Court and lower federal courts.<sup>32</sup> Further, while studies on the specific impact of race and gender on judges are fewer and their conclusions often qualified,<sup>33</sup> evidence suggests that in at least some legal areas judges’ race and gender have influenced, and possibly determined, their decisionmaking.<sup>34</sup>

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Anothy G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126–27 (2012).

- <sup>31</sup> That judicial automaton theory occasionally reappears for rhetorical effect. *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109 Cong., 1st Sess. 56 (2005) (statement of John G. Roberts). The baseball analogy is misleading and its implication of “objectivity” unwarranted. As any baseball fan knows, calling “balls and strikes” often involves exceptionally close and highly contestable subjective judgments, and its practice also shows that different individual umpires have different “strike zones.”
- <sup>32</sup> On the Supreme Court, Burbank and Farhang have pointed out that “the growing role of ideology is distinctive and palpable.” Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1529 (2017). Other scholars have arrived at a similar conclusion. See, e.g., LAWRENCE BAUM, *IDEOLOGY IN THE SUPREME COURT* xiii (2017); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 8 (2013); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* REVISITED 110–14 (2002); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999); Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RSCH. Q. 377, 377 (2011); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302 (2004); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155–56 (1998).
- <sup>33</sup> See Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1676 n.37 (2014) (surveying the literature on the link between judges’ ideology and decisionmaking). One early study, for example, found little difference between Black and white judges but some moderate differences between male and female judges. Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613–14 (1985). Another found that the race and gender of the judicial appointees of President Bill Clinton made no significant difference in their decisionmaking. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RSCH. Q. 137, 147–48 (2000). A third found little difference in civil case outcomes decided by judges appointed by presidents of different parties. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 277–78 (1995).
- <sup>34</sup> See Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 237 (2020) (finding that the presence of a single African American on an appellate panel increases the likelihood that the panel will find in favor of class certification); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 30–34 (2008)

In suggesting that the analysis of procedural rules should include inquiries into possible implicit and institutional racial biases in the courts, I follow the astute suggestion that Stephen Burbank and his good friend Stephen Subrin, another distinguished civil procedure scholar, made about the need for reform in the rules allowing pretrial dismissals,<sup>35</sup> especially those involving summary judgment. The goal, Burbank and Subrin explained, should be to prevent “ad hoc judgments that often appear arbitrary because of the amorphous nature of what constitutes an evidentiary foundation sufficient to support a jury finding.”<sup>36</sup> Empirical studies confirm that “a supposedly uniform rule” operates in a “radically different fashion in different parts of the country and in different categories of cases” and that in some cases the “application of the rule has unfairly deprived litigants (usually plaintiffs) of a trial by jury or a trial in open court.”<sup>37</sup>

More specifically, I follow their compelling conclusion that working toward such procedural reform requires inquiry into “the minds and hearts—the attitudes” of everyone, including judges.<sup>38</sup>

### III. Implicit and Institutional Racial Bias in American Procedural Law: Three Variations

If implicit and institutional racial biases influence American procedural law, they would lie deeply buried in court practices, assumptions, and reasoning processes. Except in extraordinary cases, they would surely be masked by legal formalities that would make them exceptionally difficult to

(finding race influential in explaining decisions under the Voting Rights Act of 1965); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406–07 (2010) (observing that male judges are less favorable than female judges to plaintiffs in gender discrimination cases); Kevin Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1585–86 (2008) (finding that Republican male and female judges differ in construing the Class Action Fairness Act); Christina L. Boyd, *She’ll Settle It?*, 1 J.L. & COURTS 193, 211–213 (2013) (finding that female judges secure settlements more commonly and more quickly than male judges); see generally Symposium, *Feminist Jurisprudence and Procedure*, 61 U. CIN. L. REV. 1139 (1993) (highlighting various articles that review the influence of gender on judicial decision-making across several legal areas).

<sup>35</sup> Burbank has also criticized two Supreme Court decisions, *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*, interpreting the Rule 8 pleading standard that encourages pretrial dismissal of many civil cases before discovery. See *Has the Supreme Court Limited Americans’ Access to Courts?: Hearing before the S. Comm. on the Judiciary*, 111th Cong., 1st Sess. 7, 8 (2009) (statement of Stephen B. Burbank).

<sup>36</sup> Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 413 (2011).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 412. Justice Sonia Sotomayor has suggested something similar and was criticized for doing so. See Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) (“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”).

identify and bring to light. Still, compelling social science findings suggest that implicit biases exist widely and commonly, especially in racial matters, and hence it seems likely that those biases would also intrude at least on some occasions into the procedural rulings of the courts. An exploration of three modern and well-known cases from three different procedural areas lends support to that hypothesis.

*A. Dismissal for Lack of Standing: Implicit Racial Assumptions in Allen v. Wright*

In *Allen v. Wright*,<sup>39</sup> parents of Black school children brought a nationwide class action challenging the standards and procedures that the Internal Revenue Service (I.R.S.) used to carry out its duty to deny tax-exempt status to private schools that engaged in unlawful racial discrimination. The parents claimed that the existing I.R.S. guidelines were ineffective and allowed many private schools to hold tax-exempt status while continuing to engage in such racial discrimination. They requested an injunction ordering the I.R.S. to adopt new guidelines that would be more effective in curbing these discriminatory practices. Quoting from plaintiffs' complaint, the Court explained that the injunction the parents sought would require the I.R.S.

to deny tax-exempt status to all private schools which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either—

- (1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;
- (2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or
- (3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems . . . .<sup>40</sup>

A five-Justice majority dismissed the complaint on the ground that plaintiffs lacked standing. To maintain their suit, the majority explained, plaintiffs were required to meet a three-pronged standing test. They “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>41</sup>

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<sup>39</sup> 468 U.S. 737 (1984).

<sup>40</sup> *Id.* at 747 (quotation marks omitted).

<sup>41</sup> *Id.* at 751 (citing *Valley Forge Christian Coll. v. Am. United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Although the Court dismissed the first injury plaintiffs alleged as insufficient,<sup>42</sup> it recognized that the second one met the “injury” requirement. That injury—“their children’s diminished ability to receive an education in a racially integrated school”—was not only sufficient, the Court declared, but it was “one of the most serious injuries recognized in our legal system.”<sup>43</sup> That injury, however, failed to satisfy the second prong of the standing test. It was “not fairly traceable to the Government conduct [plaintiffs] challenge as unlawful.”<sup>44</sup> Plaintiffs, therefore, lacked standing and were out of court.

The majority explained its conclusion on the “fairly traceable” prong at length. “The line of causation” between the I.R.S. regulations and the discriminatory nature of defendants’ schools was “attenuated at best.”<sup>45</sup> It was uncertain whether there were enough “discriminatory private schools” to make “an appreciable difference in public school integration” and equally “uncertain how many racially discriminatory private schools [were] in fact receiving tax exemptions.”<sup>46</sup> Most centrally, the Court focused on the contention that the causal connection was too “attenuated” and “indirect” because plaintiffs’ alleged injury resulted not from the I.R.S. regulation, but “from the independent action” of innumerable third parties “not before the court.”<sup>47</sup> According to the majority,

It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure

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<sup>42</sup> The first injury that plaintiffs alleged, one the Court characterized as “stigmatic,” was that the Black parents and children “are harmed directly by the mere fact of Government financial aid to discriminatory private schools.” *Id.* at 752. The Court held that the injury was not sufficiently personal and concrete to constitute a judicially cognizable injury even though it acknowledged that such a “stigmatizing injury [is] often caused by racial discrimination” and that “this sort of noneconomic injury is one of the most serious consequences of discriminatory government action.” *Id.* at 755. It noted, however, that such a “stigmatic” injury was judicially remediable only “to the extent that [the Black parents and children] are personally subject to discriminatory treatment.” *Id.* at 757 n.22. A “stigmatic” racial injury, in other words—however common and “serious”—was by itself insufficient to merit standing and the attention of a federal court.

<sup>43</sup> *Id.* at 756.

<sup>44</sup> *Id.* at 757.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 758. Because the Court was ruling on a motion to dismiss rather than on a motion for summary judgment, its reliance on such factual uncertainty was out of place. *Id.* at 748 (explaining the procedural posture of the case). At that time, plaintiffs were not required to produce factual evidence to prove their allegations on a motion to dismiss. Justice Brennan made that point in his dissent. *Id.* at 766, 767 n.1, 774–75 (Brennan, J., dissenting).

<sup>47</sup> *Id.* at 757 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42 (1976)) (internal quotations omitted).

speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.<sup>48</sup>

Justices Brennan and Stevens issued separate dissents challenging the majority's causal reasoning. While Brennan invoked "common sense" economic reasoning,<sup>49</sup> Stevens elaborated on the more technical grounds of tax-policy analysis and orthodox economic theory. Tax-policy analysis identifies tax exemptions with direct government subsidies because such exemptions constitute "tax expenditures," that is, tax "refunds" intended to encourage selected activities by making them less expensive. That policy analysis, Stevens explained, was based on "nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased."<sup>50</sup> Without their tax-exempt status, discriminatory private schools would become more expensive and, in many cases, too costly "for parents seeking 'a racially segregated alternative' to public schools."<sup>51</sup> The basic "laws of economics," he continued, meant that eliminating the tax-exempt status of discriminatory private schools would change the "incentive structure" for "white parents" and pressure discriminatory private schools to alter or abandon their unlawful admission policies.<sup>52</sup> Thus, Stevens argued, there was a sufficiently close causal connection between the overly lax implementation of the I.R.S. regulation and the successful spread and operation of the discriminatory private schools, a causal connection that injured Black children by reducing their opportunity to receive an education in a racially integrated public school.<sup>53</sup>

Two aspects of the majority's reasoning in *Allen* illustrate the existence and influence of implicit and institutional racial bias. The first concerns the Court's causal analysis. The majority declared that it was "pure speculation" that a broader denial of tax-exempt status to discriminatory private schools would cause parents and schools to change their behavior. If fewer tax exemptions and consequent higher costs would not likely "make an appreciable difference in public school integration,"<sup>54</sup> why would that possibly be true? Why would many parents and schools knowingly and

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<sup>48</sup> *Id.* at 758.

<sup>49</sup> *Id.* at 774 (Brennan, J., dissenting).

<sup>50</sup> *Id.* at 788 (Stevens, J., dissenting).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Given that causal connection, Stevens maintained, plaintiffs' "injury can be fairly traced to the subsidy for purposes of standing analysis." *Id.* at 786.

<sup>54</sup> *Id.* at 758.

purposefully embrace higher costs instead of reducing or abandoning their discriminatory behavior? The answer could only be that their behavior was not driven by economic incentives but rather by other and quite powerful social motives. Those motives were racial: the desire to avoid having white children go to school with Black children. The behavior of the parents and schools, in other words, was shaped largely, if not wholly, by racially biased assumptions and motives. By adopting a causal analysis that implicitly accepted the obviously race-motivated behavior of white parents and private school officials, the Court was essentially crediting and giving legal sanction to their racist attitudes and values.

That conclusion is particularly compelling when the Court's causal reasoning in *Allen* is compared to its causal reasoning in a case decided only four years later. In *Boyle v. United Technologies Corp.*,<sup>55</sup> the Court found that a direct causal relationship existed between the imposition of tort liability on a federal government contractor and the economic position of the United States. "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price," the Court declared.<sup>56</sup> "Either way, the interests of the United States will be directly affected."<sup>57</sup>

This causal reasoning was apt precisely because the economic analyses of Justices Brennan and Stevens that the Court rejected in *Allen* applied perfectly to the corporate defendant in *Boyle*—and to the other large government contractors waiting in the wings. Above all else, those contractors were economically rational actors in their profit-seeking negotiations with the government. With them, it was virtually certain that, if their costs increased, they would find some way to pass those increased costs on to the government. Thus, the Court's causal reasoning in *Boyle* was apt precisely because of the nature of the parties involved and the controlling economic incentives that drove their behavior.

In contrast, the Court in *Allen* found that very same causal reasoning wholly inapt and rejected it, and it did so because it understood that the private schools and the white parents involved were not driven by economic motives and would not respond to financial incentives. The motives that drove their behavior were race-driven, not profit-driven. In *Allen*, then, the Court was willing to accept a causal analysis that defied economic logic. Its

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<sup>55</sup> 487 U.S. 500 (1988).

<sup>56</sup> *Id.* at 507.

<sup>57</sup> *Id.*

reasoning implicitly accepted the legitimacy of non-economic and obviously racist incentives, thereby allowing racist motivations to prevent plaintiffs from meeting the “fairly traceable” requirement. That reasoning enabled the Court to deny the Black parents a remedy for “one of the most serious injuries recognized in our legal system.”<sup>58</sup>

The second implicit racial aspect of the Court’s reasoning in *Allen* is a buried presumption that seemed to help shape its decision. Plaintiffs contended that the existing I.R.S. regulations and procedures allowed many discriminatory schools to maintain their tax-exempt status. As a result, those regulations were under-inclusive in their practical effect. Those regulations did not, that is, reach most or all discriminatory private schools. In contrast, the Court characterized the remedial injunction that plaintiffs sought as “requiring the IRS to deny tax exemptions to a considerably broader class of private schools than the class of racially discriminatory private schools.”<sup>59</sup> The remedy plaintiffs requested, in other words, would be over-inclusive. Their proposed regulations would not only reach more discriminatory private schools but could also reach some private schools that did not discriminate.

Thus, the Court reasoned that both the plaintiffs’ proposed remedy and the I.R.S. regulations were similarly flawed because both were, though in different ways, imperfectly tailored. The plaintiffs’ proposed remedy would be unfair, the Court implied, because it would deprive some non-racially discriminatory parents and private schools of tax exemptions which they could otherwise claim.<sup>60</sup> That, it suggested, would be wrong. The Court’s

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<sup>58</sup> *Allen v. Wright*, 468 U.S. 737, 756 (1984). Plaintiffs’ claim was, according to the Court, “beyond any doubt, not only judicially cognizable” but also based on “one of the most serious injuries recognized in [the U.S.] legal system.” *Id.*

<sup>59</sup> *Id.* at 747.

<sup>60</sup> There is a “rhetoric of innocence” in many of the Supreme Court’s affirmative action cases that “relies on the invocation of the ‘innocent white victim’ of affirmative action.” Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298 (1990); see also, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298, 307–08 (1978) (plurality opinion) (reasoning that the Constitution forbids promoting the interests of “relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”); *Fullilove v. Klutznick*, 448 U.S. 448, 514 (1980) (Powell, J., concurring) (“A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties.”); *id.* at 530 n.12 (Stewart, J., dissenting) (“[T]he guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) (suggesting that a race-conscious remedy “could lead to the very system the Court rejected in *Brown v. Board of Education*”); *id.* at 281–82 (comparing the effects of various remedial schemes on non-minority persons). This rationale has been widely critiqued by scholars. See generally, e.g., David Chang, *Discriminatory Impact*,

buried assumption in rejecting plaintiffs' requested remedy meant, implicitly but nevertheless quite clearly, that the case presented a toss-up between two equally flawed regulatory rules and that, in such a case, it was preferable to protect the statutory claim of white schools and parents to a tax benefit rather than to enforce the constitutional right of Black children to a racially integrated public school education.<sup>61</sup>

*Allen's* reasoning incorporated two racial assumptions that worked to the legal disadvantage of Black people.<sup>62</sup> The majority assumed that racist motivations constituted legitimate grounds for rejecting plaintiffs' causal argument, and it assumed that a statutory privilege of white people should be favored over the constitutional right of Black people. Whatever was in the mind of the majority Justices, their assumptions and reasoning illustrated the existence and operation of implicit and institutional racial bias.

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*Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790 (1991); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

61 Revealingly, the Court acknowledged that it had reworked its standing doctrine precisely to deal with "[c]ases such as this, in which the relief requested goes well beyond the violation of law alleged." *Allen*, 468 U.S. at 753 n.19. Before *Allen*, the Court's standing doctrine had only required plaintiffs to show that the defendant's alleged conduct had caused their claimed injury. *Id.*; see, e.g., *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74 (1978) ("The more difficult step in the standing inquiry is establishing that these injuries fairly can be traced to the challenged action of the defendant, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries." (internal citations and quotations omitted)). The Court in *Allen*, however, chose to impose two separate causality requirements, "fairly traceable" and "redressability." According to *Allen*, "[e]ven if the relief respondents request might have a substantial effect on the desegregation of public schools"—even if, that is, plaintiffs' injury was effectively "redressable"—the Court could still use its separate "fairly traceable" causal requirement to block plaintiff's standing. 468 U.S. at 753 n.19. The point of the causal bifurcation was to bar relief that might be overbroad in some way regardless of the gravity of the injury claimed, the Court's ability to effectively redress it, and the balance of equities between parties.

62 The majority also offered other reasons for dismissing plaintiffs' complaint, including an argument based on separation of powers. *Allen*, 468 U.S. at 759–61. Its separation-of-powers analysis, however, was premised on both its prior causal reasoning and the "toss-up" nature of the flaws it identified in plaintiffs' requested injunction and the I.R.S. regulation. *Id.* Plaintiffs' "complaint, which aims at nationwide relief and does not challenge particular identified unlawful IRS actions, alleges no connection between the asserted desegregation injury and the challenged IRS conduct direct enough to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures." *Id.* at 766. Separation-of-powers principles are notoriously malleable and can easily be shaped to support whatever conclusion one desires. See, e.g., EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON 55–69 (2020) (discussing the easy manipulability of separation-of-powers reasoning to support contradictory positions); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 38–47 (2007) ("[T]he distinctions between the powers of the three branches were inherently murky and the founders understood their natures differently.").

B. *Limited Discovery: The Implicit Differential Racial Impact of Harlow v. Fitzgerald*

The law of qualified immunity in civil rights actions under 42 U.S.C. § 1983 is severely weighted in favor of the police.<sup>63</sup> Indeed, the Court has made it clear that its substantive policy is to protect police officers to the greatest extent possible.<sup>64</sup> It is one thing, however, to adopt substantive rules that implement an openly acknowledged policy but quite another to adopt a procedural rule that is “neutral” on its face but biased in effect. In *Harlow v.*

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<sup>63</sup> In recognition of this reality, opposition to the doctrine of qualified immunity has grown substantially in recent years. Since 2018, organized opposition has been led in large part by the Cato Institute, which describes the doctrine as “an ‘unlawful shield’ against accountability” for police and other governmental misconduct. Jay Schweikert & Clark Neily, *As Supreme Court Considers Several Qualified Immunity Cases, A New Ally Joins the Fight*, CATO AT LIBERTY (Jan. 17, 2020, 5:00 PM), <https://www.cato.org/blog/supreme-court-considers-several-qualified-immunity-cases-new-ally-joins-fight> [<https://perma.cc/25CH-ZU3K>]. See generally Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) (analyzing how constitutional litigation would function if qualified immunity were absent). For an extraordinary opinion criticizing the doctrine by a federal judge, see *Jamison v. McClendon*, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) (“Just as the Supreme Court swept away the mistaken doctrine of ‘separate but equal,’ so too should it eliminate the doctrine of qualified immunity.”). For other critiques of qualified immunity, see generally Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1022 (2019) (arguing that the goals of qualified-immunity doctrine “in the policing context have largely gone unmet.”); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (arguing that the Supreme Court should “overhaul or eliminate qualified immunity” on the basis that it undermines Fourth Amendment protections); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017) (attacking the Supreme Court’s premise that qualified immunity shields defendants from burdensome discovery); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219–20 (2015) (analogizing the problems to the Supreme Court’s habeas corpus jurisprudence and the problems with the Court’s qualified immunity jurisprudence).

<sup>64</sup> There was no such qualified immunity doctrine at common law when Congress enacted section 1983. See, e.g., David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972) (explaining how, in the nineteenth century in the United States, public officials could be sued for allegedly tortious conduct); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987) (describing how the Marshall Court “developed a consistent theory of individual officer accountability” that enabled plaintiffs to obtain damages from and injunctions against public officials); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010) (“During the early republic, the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability.”). The Court has, however, often claimed the contrary. See, e.g., *Filarsky v. Delia*, 566 U.S. 377, 383 (2012); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967). On other occasions, however, it has acknowledged that its qualified immunity doctrine is based on policy analysis, not on the common law. *Anderson v. Creighton*, 483 U.S. 635, 644–645 (1987); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

*Fitzgerald*<sup>65</sup> the Court adopted such a procedural rule, one that is in practice not only substantively biased but, far worse, racially biased. Its rule operates with special force to protect police officers against civil rights claims by Black people.

The Court's substantive law protecting police officers imposes often insurmountable barriers against civil rights plaintiffs. First, qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law,"<sup>66</sup> a test that means that only police officers who engage in the most outrageous and readily proven abuses are likely to be denied immunity. Second, qualified immunity prevails unless an officer violates "clearly established" law that a reasonable officer should have known,<sup>67</sup> a test that the Court has made excessively demanding by defining "clearly established" to require precedents on nearly identical facts from either a "controlling authority" or "a robust 'consensus of cases of persuasive authority.'"<sup>68</sup> Third, even glaring mistakes by police officers do not deprive them of qualified immunity,<sup>69</sup> a rule that invites them to act rashly, or far worse.<sup>70</sup> Fourth, in excessive force cases—a major source of civil rights claims

<sup>65</sup> 457 U.S. 800 (1982).

<sup>66</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citing *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)).

<sup>67</sup> *White*, 137 S. Ct. at 551.

<sup>68</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)) (making the latter requirement even stricter by adding the word "robust"). The Court has suggested that, in the event of inconsistent circuit court decisions, "established law" probably requires one of its own rulings that addresses a highly similar factual situation. *Taylor v. Barks*, 135 S. Ct. 2042, 2044–45 (2015) (per curiam). For example, in Fourth Amendment excessive force cases, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (per curiam) (citing *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). See also *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam) (finding no precedent squarely on point and therefore granting qualified immunity); *Anderson*, 483 U.S. at 646 (declining to recognize an exception to the "general rule of qualified immunity" in the context of "cases involving allegedly unlawful warrantless searches of innocent third parties' homes in search of fugitives."). On occasion, the Court states the requirement somewhat differently. Although the "Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551 (internal quotations omitted).

<sup>69</sup> *Anderson*, 483 U.S. at 641 ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable." (internal citation omitted)). Accord *Saucier v. Katz*, 533 U.S. 194, 205–06 (2001) (reasoning that qualified immunity also protects officers in the gray zone that exists between acceptable and unacceptable uses of force); *Malley*, 475 U.S. at 343 (discussing the rationale for maintaining qualified, as opposed to absolute, immunity in the context of officers requesting warrants).

<sup>70</sup> The Court's decision to uphold qualified immunity "is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first

against police—the Court gives officers two separate and distinct chances to escape liability on “reasonableness” grounds, one under Fourth Amendment analysis and another under qualified immunity principles.<sup>71</sup> Finally, in considering “reasonableness” courts are required to view the facts from the officer’s perspective.<sup>72</sup> All possible doubts, in other words, are resolved in the favor of the police.

The Court’s decision in *Harlow* added another muscular protection for police officers. Invoking the supposedly “neutral” grounds of efficiency and social utility, it overrode the otherwise controlling provisions of the Federal Rules and created a severe limitation on the ability of civil rights claimants to conduct discovery.<sup>73</sup> The disproportionately heavy burden its rule imposes on Black plaintiffs is clear: it blocks them from obtaining evidence of racial bias.

*Harlow* discarded the subjective “good faith” element involving “intent” or “malice” that had previously been part of the Court’s qualified immunity test.<sup>74</sup> In its place, it proclaimed an “objective reasonableness” standard

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and think later, and it tells the public that palpably unreasonable conduct will go unpunished. . . . [T]here is nothing right or just under the law about this . . . .” *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). Cases caused by obvious and avoidable police “mistakes” continue to recur regularly. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740 (2021) (chronicling a case in which officers mistook an individual for a fugitive). These cases often have tragic results, as in the tragic case of Breonna Taylor in Louisville, Kentucky, where police made mistake after mistake and then shot to death an entirely innocent young woman who had been asleep in her own apartment. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Case and Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/KB8R-QDQ2].

<sup>71</sup> *Saucier*, 533 U.S. at 205; *accord Anderson*, 483 U.S. at 639–41 (emphasizing the importance of qualified immunity in the context of officers’ probable-cause determinations).

<sup>72</sup> The Court has emphasized “that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving. . . .” *Graham v. Connor*, 490 U.S. 386, 397 (1989). *See also Tolan v. Cotton*, 854 F. Supp. 2d 444, 475 (S.D. Tex. 2012) (emphasizing the importance of qualified immunity applying in the context of officers making probable-cause determinations).

<sup>73</sup> *Compare* FED. R. CIV. P. 26–37 (allowing broad discovery into potentially relevant information), *with Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“Until [the] threshold immunity question is resolved, discovery should not be allowed.”).

<sup>74</sup> Seven years earlier, in *Wood v. Strickland*, the Court denied immunity from suit to a school board member who “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.” 420 U.S. 308, 322 (1975); *accord Pierson v. Ray*, 386 U.S. 547 (1967) (Douglas, J., dissenting) (opining that qualified immunity does not shield judges from qualified immunity for “the knowing and intentional deprivation of a person’s civil rights.”).

“measured by reference to clearly established law.”<sup>75</sup> The earlier test was grounded in the assumption that it would allow “insubstantial lawsuits” to be dismissed without trial, *Harlow* explained, but experience had revealed the assumption to be unwarranted: Because “disputed questions of fact ordinarily may not be decided on motions for summary judgment . . . [a]nd an official’s subjective good faith has been considered to be a question of fact,” the Court explained, summary judgment was ordinarily not available as long as qualified immunity involved an element of motive.<sup>76</sup>

It was “now . . . clear,” *Harlow* continued, “that substantial costs attend the litigation of the subjective good faith of government officials.”<sup>77</sup> There were “general costs of subjecting officials to the risks of trial,” such as distracting them from their duties, inhibiting “discretionary action,” and deterring able people from public service.<sup>78</sup> In addition, it cited other “special costs to ‘subjective’ inquiries of this kind.”<sup>79</sup> Because “judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions,” it followed that summary judgment was rarely available to address “questions of subjective intent.”<sup>80</sup> Often there was “no clear end to the relevant evidence,” and the result was “broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues.”<sup>81</sup> Such broad-ranging discovery “can be peculiarly disruptive of effective government.”<sup>82</sup> Thus, the Court concluded, the “subjective” element of the qualified immunity test had to be discarded in order to limit discovery and facilitate summary judgments dismissing plaintiffs’ claims.<sup>83</sup>

<sup>75</sup> *Harlow*, 457 U.S. at 818.

<sup>76</sup> *Id.* at 814, 816.

<sup>77</sup> *Id.* at 816. The Court went on to describe the costs as including “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.” *Id.* at 814. It added as further costs the dangers to public officials of being sued for actions pursuant to their duties. *Id.* (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

<sup>78</sup> *Id.* at 816.

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

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 817.

<sup>82</sup> *Id.* (internal citations omitted).

<sup>83</sup> *Harlow* also sought to protect police officers, noting that “it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty,” and it emphasized that the costs of discovery were burdensome “not only to the defendant officials, but to society as a whole.” *Id.* at 814.

The Court’s severe institutional bias in favor of police is made even clearer by the subsequent standard it adopted that officers deserve qualified immunity unless they are “plainly incompetent” or “knowingly violate the law.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotations and citations omitted); *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Malley v.*

In the decades since *Harlow*, the Court has rigorously enforced its “objective” standard and held that any and all evidence concerning an officer’s “subjective intent” was “simply irrelevant.”<sup>84</sup> The Court has also pressed the lower courts to dismiss cases on qualified immunity grounds as early as possible and “long before trial.”<sup>85</sup> When federal appellate courts failed to enforce that policy, the Court has repeatedly and summarily reversed their decisions.<sup>86</sup>

The racial significance of the ostensibly “neutral” and “objective” *Harlow* rule is apparent. While discovery into a defendant’s “motive,” “intent,” “good faith,” or “malice” could be burdensome on defendants, those elements are also critical and material—and quite possibly decisive—in cases where police officers harass, abuse, injure, or kill Black people. Though *Harlow*’s limitation on discovery is formally justified as a “neutral” procedural rule based on “efficiency” grounds, it functions in practice as a substantial institutionalized racial bias in the law’s operations. It not only prevents inquiry into police officers’ racial beliefs, intentions, motivations, and past

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Briggs, 475 U.S. 335, 341 (1986). *Harlow* eliminated the “good faith” requirement of prior qualified immunity law on the ground that it was “subjective,” but its new “knowingly violate the law” standard incorporates its own “subjective” requirement, one essentially requiring plaintiff to show some kind of “bad faith.” 457 U.S. at 815. Thus, in order to make it even more difficult for plaintiffs to overcome qualified immunity, the Court has departed from *Harlow*’s underlying “objectivity” principle by incorporating into the law a slightly disguised version of “bad faith” and “intent” that raises subjective issues that plaintiffs must prove, but that would in most cases be exceptionally difficult or impossible to prove.

<sup>84</sup> Crawford-El v. Britton, 523 U.S. 574, 588 (1998). *Crawford-El* made clear the Court’s determination to prevent or limit to the greatest extent possible discovery into a defendant’s motives. *Id.* at 593 n.14. The Court adopted a similar rule limiting claims under the Fourth Amendment. It rejected the proposition “that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment,” and “flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification.” *Whren v. United States*, 517 U.S. 806, 812 (1996); accord *Scott v. United States*, 436 U.S. 128, 138 (1978) (explaining that the law may protect an officer’s actions as long as the relevant circumstances, viewed objectively, justified the officer’s actions). Claims of racial discrimination, the court ruled, were not cognizable under the Fourth Amendment but only under the Equal Protection Clause. *Whren*, 517 U.S. at 813 (“But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).

<sup>85</sup> See *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam).

<sup>86</sup> In *San Francisco v. Sheehan*, the Court emphasized the importance of qualified immunity “to society as a whole,” and identified that as the reason why “the Court often corrects lower courts when they wrongly subject individual officers to liability.” 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). See also *White v. Pauly*, 137 S. Ct. 548, 552–53 (2017) (per curiam) (reversing the district court’s and court of appeals’ denial of qualified immunity); *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015) (per curiam) (doing the same); *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004) (per curiam) (reversing the Ninth Circuit’s reversal of the district court’s finding that an officer was entitled to qualified immunity).

behavior, but it also enables them to hide racially-related or motivated actions behind a screen of formalistic legal arguments about “established law.”<sup>87</sup>

To compound its effect of suppressing evidence of implicit racial bias, *Harlow*’s “objective” test is not actually “objective.” Rather, both its “established law” and “reasonableness” components involve judicial discretion and widely varied subjective judgments about the relevant facts in the record, the “level of generality” to be applied in identifying potentially applicable precedents, and the proper weight of those precedents in evaluating their “authoritative” or “persuasive” nature.<sup>88</sup>

Regardless of *Harlow*’s policy justifications and proclaimed “objectivity,” two undeniable social facts determine its practical significance. One is that police officers harass, mistreat, injure, and kill Black people far more commonly than they do white people.<sup>89</sup> The other is that *Harlow* does not merely protect officers, but it protects them most effectively when they commit racially influenced or motivated abuses. Beyond the fact that there are legions of cases involving disproportionate police violence against Black people, it is apparent that a good many of the specific instances that come to public attention each year—especially now with the widespread availability of phone cameras—seem so unnecessary, brutal, and extreme in the physical force used that it is hard to believe that some form of racial antagonism or hatred did not help kindle, spur, or direct the abuse.<sup>90</sup> The de facto racial

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<sup>87</sup> The Court has made clear that an improper or racist “motive” does not invalidate “objectively justifiable behavior under the Fourth Amendment,” no matter how trivial an officer’s pretextual “legal justification.” *Whren*, 517 U.S. at 812. Thus, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.* at 813. Indeed, the decision noted that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.” *Id.* at 813. The Court has trivialized the Fourth Amendment in other ways as well. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (holding that the Fourth Amendment does not forbid “a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.”).

<sup>88</sup> See *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987) (identifying the “level of generality” problem). Compare *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.”), with *Kisela*, 138 S. Ct. at 1153 (per curiam) (“[P]olice officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”).

<sup>89</sup> EBERHARDT, *supra* note 22, at 78 (“[N]ot only were blacks significantly more likely than whites to be stopped but blacks were significantly more likely to be searched, handcuffed, and arrested.”).

<sup>90</sup> The most salient example in recent years may be the murder of George Floyd captured on video. See Amy Forliti, *Four Officers Fired After Black Man Dies in Minneapolis Police Custody and Video Shows an Officer Kneeling on his Neck*, ASSOCIATED PRESS, <https://www.usatoday.com/story/news/nation/2020/05/26/black-man-dies-minneapolis-police-custody-said-he-couldnt-breathe/525802100/> [https://perma.cc/23A2-RQ2T] (last

context of policing in the United States makes *Harlow*, in practice, a biased procedural rule.

Mounds of evidence have shown that overt and explicit racial bias exists among police officers and sometimes even throughout entire departments. Examples are common, widespread, and often painfully familiar.<sup>91</sup> Police unions in many cities have long histories of racial insensitivity and abuse, and New York City's Police Benevolent Association is not only the nation's largest but one of the worst.<sup>92</sup> In Chicago between 1972 and 1991, police officers ran organized torture operations against Black people, with at least 125 cases documented and more than 500 others still under investigation.<sup>93</sup> The Los Angeles Police Department fostered a culture of racism and racial abuse for decades,<sup>94</sup> and an investigation after the beating of Rodney King in 1991 unearthed transcripts of conversations between officers that "likened [B]lacks to jungle animals" (including monkeys and gorillas), while others used a code for incidents involving Black people—"NHI," which stood for "[n]o humans involved."<sup>95</sup> In 2014 a federal investigation found an unconstitutional pattern of racial bias in searches and arrests by the Newark, New Jersey Police

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updated May 26, 2020, 8:47 PM). For another unfortunate example, see Simon Romero, Giulia McDonnell Nieto del Rio & Nicholas Bogel-Burroughs, *Another Nightmare Video and the Police on the Defense in Tucson*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/carlos-ingram-lopez-death-tucson-police.html> [<https://perma.cc/L653-7J8H>].

<sup>91</sup> See Richard A. Oppel, Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> [<https://perma.cc/3W3M-LDV8>] (demonstrating that in Minneapolis police use of physical force is far more frequent against Black people than white people, and Black people accounted for 58 percent of police uses of force). Black people constitute 19 percent of the population of Minneapolis, and white people 60 percent, but since 2015 Black people suffered 6,650 instances of the use of force while white people suffered only 2,750 such instances. *Id.*

<sup>92</sup> William Finnegan, *How Police Unions Fight Reform*, THE NEW YORKER (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> [<https://perma.cc/L4DA-6EEU>] ("As [New York City] erupted in protests against police brutality, the N.Y.P.D. responded with vivid displays of more police brutality. Much of the violence was caught on video.").

<sup>93</sup> Peter C. Baker, *A Legacy of Torture in Chicago*, N.Y. REV. OF BOOKS, July 2, 2020, at 43.

<sup>94</sup> MAX FELKER-KANTOR, *POLICING LOS ANGELES: RACE, RESISTANCE, AND THE RISE OF THE LAPD* 2 (2018) ("Racial targeting was central to the LAPD's expansion of police power and efforts to control the streets at all costs."); KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965*, at 147 (2017) (noting the LAPD's involvement in increasing the number of incarcerations of Mexicans in Los Angeles); GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S* 134-37, 150-52 (1995) (chronicling the seriousness of LAPD brutality); Fischer, *supra* note 26, at 871 ("The police in Los Angeles played a crucial role in buttressing a white narrative that conflated urban blackness with immorality and criminality, especially through the common police practice of funneling vice to the city's segregated black neighborhoods.")

<sup>95</sup> EBERHARDT, *supra* note 22, at 145.

Department.<sup>96</sup> The next year, the U.S. Department of Justice found systematic racial bias in the Ferguson, Missouri Police Department. The extreme disparate treatment of Black people in Ferguson, the Department of Justice concluded, occurred “at least in part . . . because Ferguson law enforcement practices are directly shaped and perpetuated by racial bias.”<sup>97</sup> In 2016 text messages surfaced between San Francisco police officers that “described [B]lacks and other minorities as wild animals, cockroaches, savages, barbarians, and monkeys.”<sup>98</sup> An even more recent study of 3,500 current and former police officers in eight cities across the country found that one in five current officers and two in five former officers used racist or otherwise biased materials in their private Facebook posts.<sup>99</sup> Even more recently, in June 2020, three members of the Wilmington, North Carolina Police Department were caught on video making “racist and threatening comments” about Black people, one of whom said “a civil war [sic] [was] necessary to wipe black people off the map.”<sup>100</sup>

Evidence of such vicious and explicit racism suggests that implicit and institutional racism is likely widespread and even more common among police officers and police departments. One study of implicit bias, for example, showed that “self-categorization” within a social group—the group’s effort to categorize itself in terms of its racial attitudes—can “dramatically shift automatic social perception and evaluation.”<sup>101</sup> Such self-categorization processes could influence the attitudes and behavior of

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<sup>96</sup> Monique O. Madan, *U.S. Inquiry Reports Bias by the Police in Newark*, N.Y. TIMES (July 22, 2014), <https://www.nytimes.com/2014/07/23/nyregion/inquiry-of-newark-police-cites-a-pattern-of-bias.html> [https://perma.cc/GE68-PYHJ].

<sup>97</sup> Matt Apuzzo & John Eligon, *Ferguson Police Tainted by Bias, Justice Department Says*, N.Y. TIMES, Mar. 5, 2015, at A1. The practices are hardly new and characterize the history of many American police departments. See, e.g., Jeffrey S. Adler, *Shoot to Kill: The Use of Deadly Force by the Chicago Police, 1875-1920*, 38 J. INTERDISC. HIST. 233, 245 (finding that between 1910 and 1920 twenty-one percent of the victims of police homicides were Black even though Black people constituted only three percent of the city’s population); FELKER-KANTOR, *supra* note 94.

<sup>98</sup> EBERHARDT, *supra* note 22, at 145. Such racist comments are not limited to police officers. *Id.* at 144–50.

<sup>99</sup> Shaila Dewan, *When Police Officers Vent on Facebook*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/us/politics/police-officers-facebook.html> [https://perma.cc/XZ7U-6WT2] (“About one in five of the current officers, including many in supervisory roles, and more than two in five former officers, used content that was racist, misogynist, Islamophobic or otherwise biased, or that undermined the concept of due process . . .”).

<sup>100</sup> *Three North Carolina Cops Fired For Racist and Threatening Comments Caught on Lengthy Video*, CBS NEWS (June 26, 2020, 7:50 AM), <https://www.cbsnews.com/news/three-north-carolina-police-officers-fired-racial-slurs-video/> [https://perma.cc/EE9N-4TUR].

<sup>101</sup> Jay J. Van Bavel & William A. Cunningham, *Self-Categorization With a Novel Mixed-Race Group Moderates Automatic Social and Racial Biases*, 35 PERSONALITY & SOC. PSYCH. BULL. 321, 333 (2009).

individual police officers and spread through whole police departments, especially smaller and special departmental units. “It is implausible to believe,” Eberhardt concluded, “that officers—or anyone else—can be immersed in an environment that repetitively exposes them to the categorical pairing of blacks with crime and not have that affect how they think, feel, or behave.”<sup>102</sup>

Statistical studies, moreover, have repeatedly shown a broad pattern of police discrimination against Black people. A Department of Justice study of police encounters in 1998 found that, on a per capita basis, police were approximately four times more likely to shoot a Black person than a white person.<sup>103</sup> Although Black people constituted only about 12.5% of the nation’s population, another Justice Department study in 2011 found that between 2003 and 2009 they accounted for 31.8% of reported arrest-related deaths.<sup>104</sup> In 2015, police officers killed at least seventy-eight unarmed Black people, an average of nearly two a week. Thirty-six percent of all the unarmed people that police killed were Black, almost five times the rate that police killed unarmed white people.<sup>105</sup> In 2019, another statistical study concluded that “young men of color face exceptionally high risk of being killed by police” and were two and a half times more likely to be killed by police than were white men.<sup>106</sup>

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<sup>102</sup> EBERHARDT, *supra* note 22, at 81. “In the United States, blacks are so strongly associated with threat and aggression that this stereotypic association can even impact our ability to accurately read the facial expressions of black people.” *Id.* at 35; *accord* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004) (finding the study results consistent with the stereotypical association of Blacks and crime).

<sup>103</sup> JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP’T JUST., NCJ 180987, POLICING AND HOMICIDE, 1976–98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS i, iii (2001).

<sup>104</sup> ANDREA M. BURCH, U.S. DEP’T OF JUST., NCJ 235385, ARREST-RELATED DEATHS, 2003–2009—STATISTICAL TABLES 1 (2011), <http://www.bjs.gov/content/pub/pdf/ard0309st.pdf> [<https://perma.cc/AP43-XN7G>].

<sup>105</sup> Samuel Sinyangwe, *Mapping Police Violence*, <https://mappingpoliceviolence.org/> [<https://perma.cc/GN3A-8SUS>].

<sup>106</sup> Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. FOR NAT’L ACAD. OF SCIS. 16793, 16794, 16796 (2019). An experimental study showing that training could reduce or even largely eliminate racial bias nonetheless also found that even trained police officers continued to show some racial bias in choosing to shoot or not to shoot and that “special-unit officers” as opposed to “beat” officers “showed robust bias.” Joshua Correll, Sean M. Hudson, Steffanie Guillermo & Debbie S. Ma, *The Police Officer’s Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCH. COMPASS 201, 209 (2014).

Paul Butler, a law professor at Georgetown University, aptly summarized the nature of racial policing in America: “Cops routinely hurt and humiliate black people because that is what they are paid to do,” he declared.<sup>107</sup> “Virtually every objective investigation of a U.S. law enforcement agency finds that the police, *as policy*, treat African Americans with contempt.”<sup>108</sup> Both the U.S. Justice Department and the federal courts have repeatedly found “that the *official* practices of police departments include violating the rights of African Americans.”<sup>109</sup> Officers “kill, wound, pepper spray, beat up, detain, frisk, handcuff, and use dogs against blacks in circumstances in which they do not do the same to white people.”<sup>110</sup>

All of those studies show a common and persistent pattern, not the random actions of “bad apples” but severe and pervasive racial bias against Black people among large numbers of individual police officers and departments. Those patterns can never be undone, nor their results remedied, as long as *Harlow* and the current law of qualified immunity stand and police officers are allowed and even implicitly encouraged to use force rashly, heedlessly, or worse, and when they so often do so, especially to Black people. The widespread and systemic operation of racial bias—implicit and institutional as well as express and overt—shows that expanded discovery is essential and that such discovery should be extended not only into the views, values, motivations, and prior records of individual officers but also into the policies, values, and practices of their entire departments and special units.<sup>111</sup>

While there could be any number of possible illicit motives—jealousy, avarice, scapegoating, sexual predation, or simple personal animosity—behind police harassment or abuse, there are two critical differences between claims

<sup>107</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN 2* (2017).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.*

<sup>111</sup> New York has recently repealed its statute that prevented the disclosure of many such police records. See *Testimony of Alvin Bragg, Co-Director of the New York Law School Racial Justice Project, Regarding the Repeal of New York Civil Rights Law Section 50-a, Before the New York Senate Committee on Codes*, N.Y.L. SCH. RACIAL JUST. PROJECT 1 (Oct. 17, 2019), [https://www.nysenate.gov/sites/default/files/testimonies\\_on\\_policing\\_s3695\\_repeals\\_provisions\\_101719.pdf](https://www.nysenate.gov/sites/default/files/testimonies_on_policing_s3695_repeals_provisions_101719.pdf) [<https://perma.cc/NAV6-ZP3Y>] (highlighting the reasons to repeal the statute); Leonard Greene, *We Are at a Moment of Reckoning: Repeal of 50a Shield Law Gives Measure of Accountability to Families Touched by Police Brutality*, N.Y. DAILY NEWS (June 13, 2020), <https://www.nydailynews.com/new-york/ny-50a-repeal-police-transparency-20200614-p7qodt3gffbcdmz5okiyrhba-story.html> [<https://perma.cc/F2MG-VTX2>] (similar). As a result, the New York Civil Liberties Union has been able to establish a searchable database (“NYPD Misconduct Complaint Database”) that contains 320,000 misconduct complaints dating back to 1985. *NYPD Misconduct Complaint Database*, N.Y. C.L. UNION, <https://www.nyclu.org/en/campaigns/nypd-misconduct-database> [<https://perma.cc/7PDL-5Q2E>].

involving possible racial bias against Black people and claims involving those other kinds of motives. First, any acts giving rise to claims involving those other kinds of motives would usually constitute independent criminal acts—such as extortion, robbery, or sexual harassment—that could be proven in court without the need to establish motive. Second, and more important, none of those other kinds of motives has caused the same kind of everyday, extensive, and sharply-defined patterns of abuses that racial bias has generated. Unlike those other kinds of motives, racial bias has been shown by an overwhelming wealth of evidence as the cause of systemic practices of police harassment and abuse against Black people, especially Black males.

Thus, in cases where defendants raise a qualified immunity defense, the law could serve “efficiency” goals by barring or severely limiting inquiries into most kinds of “motives” while making an exception for cases involving potential or suspected racial bias. At a minimum, such discovery should be allowed—indeed, mandated—in any case where a Black person (or a member of any other minority group known in particular localities to suffer discrimination at the hands of police officers) suffers physical injury or death at the hands of the police and the police do not have a factually unquestionable justification for their behavior in the situation and for their use of force. Further, discovery in such cases should extend not just to the individual officers involved but also to their whole department and special units. Given the social context in which such cases arise, *Harlow*’s ostensibly “neutral” procedural rule is anything but “neutral.” It establishes a severe institutional bias disproportionately disadvantaging Black civil rights claimants.

### C. Summary Judgment: Implicit and Institutional Racial Bias Under Rule 56

There is an extensive literature evaluating summary judgment, much of it sharply critical on both practical and normative grounds,<sup>112</sup> but the

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<sup>112</sup> Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 232 (2011) (noting that today’s summary judgment looks nothing like the “Utopian picture” it was intended as); Burbank, *Vanishing Trials*, *supra* note 8, at 620 (finding that summary judgement vastly grew in importance in the 1970s); Sujia A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007) (arguing that summary judgement is an unconstitutional litigation route because it “fails to preserve a civil litigant’s right to a jury trial under the Seventh Amendment.”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984–85 (2003) (acknowledging the potential dangers that modern summary judgement might pose for Seventh Amendment rights); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) (examining the “costs” against the intended benefits of summary judgement); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender*

procedure has nonetheless been used increasingly since the 1970s<sup>113</sup> and vigorously supported by the Supreme Court since 1986.<sup>114</sup> While its use raises many issues, one of the most obvious is its susceptibility to the influence of implicit and institutional racial bias. Even in relatively simple cases, the broad discretion judges enjoy in handling summary judgment motions allows them to “massage” the facts in deciding how to rule. “Massaging facts occurs when judges who possess the same information use it in different manners,” Professor Suja A. Thomas wrote.<sup>115</sup> Such massaging “can occur in a number of ways,” such as when courts ignore relevant facts or fail to consider how relevant facts can be viewed differently or give rise to conflicting inferences.<sup>116</sup>

To the extent that the standards for granting summary judgment allow courts to “massage” the record, implicit biases can become a controlling masseur. This danger could be especially threatening in highly contentious

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*and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007) (arguing that summary judgment is granted disproportionately in employment discrimination matters). For defenses of summary judgment, see, for example, Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 690 (2012). See also Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J. L. & LIBERTY 173, 207 (2010) (hailing summary judgment as “an invaluable tool for expeditious modern litigation and docket management.”).

<sup>113</sup> For a discussion of the expansion of summary judgment, see Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483 (2010), and Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469 (2009).

<sup>114</sup> In 1986 the Court handed down a “trilogy” of cases that praised the summary judgment procedure and encouraged the lower courts to use it more readily. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Stephen Burbank has questioned the impact of these cases and argued that the expansion in summary judgments began in the 1970s for other reasons. Burbank, *Vanishing Trials*, *supra* note 8, at 620. This claim that has since received considerable support but that has not yet been clearly established. Compare Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 584 (2012) (“The various FJC studies of post-trilogy summary judgment practice have demonstrated that the disposition rates . . . have not increased in statistically significant ways in the aftermath of the trilogy.”), with Gelbach, *supra* note 33, at 1689 (explaining that “given the absence of careful consideration of changes in party behavior, the data we have simply cannot tell us” the impact of the trilogy).

<sup>115</sup> Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2252 (2018).

<sup>116</sup> *Id.*; see also David L. Lee & Jennifer C. Weiss, *Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down*, 57 N.Y.L. SCH. L. REV. 781, 785 (2012) (“[D]ecades of experiences . . . and exposure to decisions from other areas of the law have led plaintiffs’ employment lawyers to believe that the inferences judges would not permit juries to draw in employment cases would be commonplace inferences that judges permit in other areas of the law.”).

and fact intensive Fourth Amendment cases involving claims of excessive force where the standards are particularly “malleable.”<sup>117</sup>

A well-known Supreme Court decision and the famous empirical study it spurred demonstrate the extent to which summary judgment rulings can be highly subjective and even arbitrary. In *Scott v. Harris*,<sup>118</sup> a Black man who was severely injured by a white police officer after a car chase and crash brought suit for damages against the officer.<sup>119</sup> The defense introduced a police videotape of the chase and crash, and on appeal an eight-justice majority on the Supreme Court held that the videotape was dispositive.<sup>120</sup> It ruled that the tape showed conclusively that the plaintiff’s reckless driving created a public danger that justified the police officer in stopping him by forcing his car off the road, and it granted the officer summary judgment dismissing the complaint.<sup>121</sup> In doing so, the Court contradicted the views of the trial judge, three judges on the Eleventh Circuit, and Justice Stevens, whose solo dissent offered a detailed critique of the majority’s interpretation of the tape. Thus, the Court held that there was no “genuine dispute of material fact” even though five of thirteen federal judges—38% of those who saw the tape—thought there was one.

In the wake of the case, three scholars conducted a study of the way 1,350 Americans perceived the tape, confirming the subjective nature of the judgments involved and explaining why thirteen federal judges could split 8 to 5 in deciding what the tape showed.<sup>122</sup> They found that most of the study’s

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<sup>117</sup> See Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195, 222 (2009) (“[C]ourts have, at least occasionally, granted summary judgment in seemingly weak [Fourth Amendment excessive force] cases where strict adherence to the standard would likely result in a different outcome.”).

<sup>118</sup> 550 U.S. 372 (2007). Eight justices joined the majority, two of whom (Justices Ginsburg and Breyer) also wrote separate concurrences.

<sup>119</sup> *Id.* at 374–75.

<sup>120</sup> *Id.* at 378–79.

<sup>121</sup> *Id.* at 379–81. The Court stated that it was “happy to allow the videotape to speak for itself” and attached it to the official record as Exhibit A at page 36 and made it available on the internet at [https://www.supremecourt.gov/media/video/mp4files/scott\\_v\\_harris.mp4](https://www.supremecourt.gov/media/video/mp4files/scott_v_harris.mp4) [<https://perma.cc/5JJ5-RF2P>]. *Scott*, 550 U.S. at 378 n.5. The true “real world” test of the *Scott v. Harris* rule may well come in the future, as more and more videos recorded by civilian bystanders provide vivid evidence of what actually transpired in incidents involving alleged police harassment and abuse. In those cases, under what conditions and to what extent will courts find that those videotapes are also dispositive? See Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES, <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> [<https://perma.cc/D5TQ-SB2B>] (last updated Mar. 5, 2021) (noting that bystander videos often contradict initial official reports of incidents).

<sup>122</sup> Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (“Our subjects didn’t

participants concurred in varying degrees with the majority's conclusion that plaintiff's behavior "posed a deadly risk to the public," but they also found that 45% of their subjects thought that the police chase itself "was not worth the risk it posed to the public."<sup>123</sup> More important, they found that those who agreed and disagreed with the majority's conclusion about the videotape were marked by "various individual characteristics," including their different ages, income and educational levels, marital status, political affiliation, ideological beliefs, cultural values, and (to a slight extent) gender.<sup>124</sup> Hardly surprising, they found that "being African American (as opposed to white) exert[ed] the largest effect across the various response measures."<sup>125</sup>

Two conclusions surely follow. One is that the existence of a "genuine" dispute about "material" facts in the case depended on neither the contents of the videotape nor the formal requirements of Rule 56 but on which of the thirteen federal judges decided the case. The other is that social factors and implicit biases, not the contents of the videotape and not Rule 56, were apparently decisive.

Bearing in mind those findings about implicit racial bias and the socially-shaped perceptions that color individual judgments, a detailed examination of another case is illustrative. A civil rights action involving a Black plaintiff shot by a white police officer, *Tolan v. Cotton* involves troubling questions about the treatment of the officer's motion for summary judgment at both the district and circuit court levels.<sup>126</sup> The lower court decisions in *Tolan* illustrate the potentially dispositive nature of the sweeping discretion that judges enjoy on summary judgment, and they suggest the subtle but nonetheless likely influence of implicit and institutional bias in the law. Fortunately, the Supreme Court ultimately intervened and reversed the lower courts' grant of summary judgment to the officer.<sup>127</sup>

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see things eye to eye. A fairly substantial majority did interpret the facts the way the Court did. But members of various subcommunities did not.").

<sup>123</sup> *Id.* at 864–65.

<sup>124</sup> *Id.* at 867–69.

<sup>125</sup> *Id.* at 867.

<sup>126</sup> 854 F. Supp. 2d 444 (S.D. Tex. 2012), *aff'd* 713 F.3d 299 (5th Cir. 2013). For discussions of the case, see Ed Brunet & John Parry, *Guest Post: Brunet and Parry on Tolan v. Cotton*, CIV. PROC. & FED. CTS. BLOG (May 8, 2014), <http://lawprofessors.typepad.com/civpro/2014/05/guest-post-brunet-and-parry-on-tolan-v-cotton.html> [<https://perma.cc/28DC-YFVR>] (noting that the *Tolan* decision could be seen as merely "correcting a grievous error" or as a way to "embolden courts to identify disputed facts"); Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. 1331, 1345 (2014) (arguing that *Tolan* should be seen as a "simple case involving established precedent").

<sup>127</sup> *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam). The Court reversed the Fifth Circuit on the ground that it had misapplied the summary judgment standard. *Id.* at 660. ("By weighing the

Many of the basic facts in *Tolan* are undisputed. In Bellaire, Texas, a middle-class suburb outside of Houston, Officer John C. Edwards of the local police department followed two young Black men, Robbie Tolan (“Robbie”) and his cousin Anthony Cooper, as they drove home from Jack in the Box, a chain fast food restaurant, at two o’clock in the morning on New Year’s Eve, December 31, 2008.<sup>128</sup> After a short drive, Robbie and Cooper turned into a *cul de sac*, parked in front of one of the houses on the street, exited their car, and walked toward the house.<sup>129</sup> Edwards drove past their car toward the end of the *cul de sac*, mistakenly typed in the wrong license plate number on his Mobile Data Terminal (“MDT”), and received a report that the car was stolen.<sup>130</sup> Edwards then called for back-up, turned around and drove back toward the Tolans’ car, pulled up “at a distance” from it, aimed his patrol car’s spotlight at the two young men, got out with drawn gun and shining flashlight in hand, and ordered them to come to him.<sup>131</sup> Both immediately protested, asking Edwards what he was doing and why, and Edwards told them that they were driving a stolen car.<sup>132</sup> By that point, Robbie was on the front porch of the house at the door, and Cooper was behind him in the front

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evidence and reaching factual inferences contrary to [plaintiff’s] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”). Though the Court’s intervention might be heartening, it should not be expected in very many cases. Concurring, Justice Alito noted the unusual nature of the Court’s decision to review a case on such factual grounds. *Id.* at 661 (“[G]ranting review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court’s practice.”).

After remand to the district court, the judge who had originally granted Cotton summary judgment announced that she “thought [she] was right the first time” and refused to recuse herself from hearing the case. The Tolans then settled out of court for \$110,000. *Settlement Reached in Police Shooting of Former MLB Player’s Son*, LEGAL READER (Sept. 18, 2015), <https://www.legalreader.com/settlement-reached-in-police-shooting-of-former-mlb-players-son/> [<https://perma.cc/TLY4-87JG>] [hereinafter *Settlement Reached*].

<sup>128</sup> *Tolan*, 572 U.S. at 651; see also ROBBIE TOLAN & LAWRENCE ROSS, NO JUSTICE: ONE WHITE POLICE OFFICER, ONE BLACK FAMILY, AND HOW ONE BULLET RIPPED US APART 17 (2018) (detailing Tolan and Cooper’s whereabouts prior to arriving at the Tolan household).

<sup>129</sup> *Tolan*, 713 F.3d at 301.

<sup>130</sup> The Tolans’ car was also the same make and approximate year of the car that had been reported stolen. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 302.

yard.<sup>133</sup> Edwards kept his flashlight and gun pointed at both of them and ordered them to lie down.<sup>134</sup>

Almost immediately, Robbie's parents, Bobby Tolan ("Bobby") and Marian Tolan ("Marian"), dressed in their pajamas, came rushing out of the house.<sup>135</sup> Bobby told the two young men to stop protesting, remain silent, and lie down as Edwards had instructed.<sup>136</sup> Both Robbie and Cooper immediately did so.<sup>137</sup> Marian walked around the yard protesting Edwards' actions while Bobby came up to talk to Edwards.<sup>138</sup> Both identified Robbie as their son and Cooper as Robbie's cousin, and they explained that they were the owners of both the house and the car the two young men had been driving.<sup>139</sup> The car, they assured the officer, was not stolen.<sup>140</sup>

A minute and a half after Edwards started the confrontation Sergeant Jeffrey Wayne Cotton arrived on the scene.<sup>141</sup> He spoke with Edwards, decided to take control of the situation, and ordered Marian to stop moving around and stand by the garage.<sup>142</sup> When she failed to comply and continued to protest, he grabbed her, began pushing her up the driveway, and at some disputed point shoved her against the garage door.<sup>143</sup> From the front porch fifteen to twenty feet away, Robbie yelled at Cotton to "[g]et your fucking hands off [her]" and—because he had been lying on the porch with his feet toward the driveway and his head toward the front door—began to turn around and raise up to see what Cotton was doing to his mother.<sup>144</sup> At that point Cotton claimed to be in fear for his safety because Robbie was moving, and his hand was at his waist which was covered by a "hoodie."<sup>145</sup> Thinking that the "hoodie" might hide a gun, Cotton immediately shot at Robbie three

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<sup>133</sup> Robbie was originally not seen by Sergeant Cotton because of his placement on the front porch of the home. *Id.* ("Although Sergeant Cotton did not immediately observe Robbie Tolan, whose form was obscured by a planter on the front porch, Officer Edwards informed Sergeant Cotton that 'the two on the ground had gotten out of a stolen vehicle.'"). *See also* Tolan v. Cotton, 854 F. Supp. 2d 444, 450 (S.D. Tex. 2012) ("Robbie Tolan lay down on the porch of the house . . . [and] Cooper knelt down on the ground, nearer to Officer Edwards.").

<sup>134</sup> *Id.*

<sup>135</sup> Tolan v. Cotton, 572 U.S. 650, 652 (2014).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Tolan, 713 F.3d at 302.

<sup>139</sup> Tolan, 572 U.S. at 652.

<sup>140</sup> *Id.*

<sup>141</sup> Tolan, 713 F.3d at 302.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 303.

<sup>145</sup> *Id.*

times.<sup>146</sup> He hit him once in the chest, nearly killing him and ending his promising young baseball career.<sup>147</sup>

There was no dispute that the Tolans owned both the house and the car that Robbie and Cooper were driving,<sup>148</sup> and there was no dispute that Robbie had no gun and was wholly unarmed.<sup>149</sup>

Subsequently, Cotton was found not guilty on criminal charges, and after that the United States District Court for the Southern District of Texas granted him summary judgment dismissing the Tolans' civil suit.<sup>150</sup> The United States Court of Appeals for the Fifth Circuit affirmed.<sup>151</sup> *Tolan* stands out because it illustrates the kinds of implicit and institutional biases that may infect not just police officers but also the courts. First, the opinions of both lower courts exemplify the way judges have shifted the formal law to allow them, in effect and contrary to the mandate of the law,<sup>152</sup> to weigh the evidence<sup>153</sup> and to discount statements in plaintiffs' sworn affidavits as

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; *Tolan v. Cotton*, 572 U.S. 650, 654 (2014).

<sup>148</sup> *Tolan*, 572 U.S. at 652.

<sup>149</sup> *Tolan*, 713 F.3d at 303.

<sup>150</sup> The civil suit initially involved numerous state and federal claims brought by Bobby, Marian, Robbie, and Cooper against Edwards, Cotton, the city of Bellaire, and others. *Tolan v. Cotton*, 854 F. Supp. 2d 444, 448 (S.D. Tex. 2012). All of the claims were eventually dismissed on stipulation of dismissal without prejudice except for claims by the four plaintiffs against Edwards, Cotton, and the city under 42 U.S.C. § 1983. *Id.* at 448 n.2. Subsequently, Edwards and Cotton moved for summary judgment on qualified immunity grounds, and the circuit court's opinion addressed that motion. *Tolan*, 713 F.3d at 304. The central focus in the action and on the motion was Robbie's claim against Cotton for violating his rights under the Fourth and Fourteenth Amendments, and the discussion that follows focuses on the courts' treatment of that claim.

<sup>151</sup> Only Robbie and Marian pursued the appeal on their section 1983 claims, and they only did so on their claim against Cotton. *Tolan*, 713 F.3d 299, 301, 304 (5th Cir. 2013). A recent study by Reuters of 529 cases decided since 2005 found that the Fifth Circuit was the most favorable circuit court in the U.S. for upholding grants of qualified immunity to police officers, doing so in 64 percent of the excessive force cases it heard. Andrew Chung, Lawrence Hurley, Andrea Januta, Jackie Botts & Jaimi Dowdell, *Shot by Cops, Thwarted by Judges and Geography*, REUTERS (Aug. 25, 2020, 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-variations> [<https://perma.cc/AN6K-XZUS>].

In a separate analysis of 435 district court decisions from 2014 to 2018, the study also found that judges in Texas granted qualified immunity to police in 59 percent of the excessive force cases, while judges in California do so in only 34 percent of such cases. *Id.*

<sup>152</sup> *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[I]t is clear enough from our recent cases that at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter . . . .”). *Accord id.* at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.”).

<sup>153</sup> The district court stated that it would “grant summary judgment in any case where critical evidence is *so weak or tenuous* on an essential fact that it could not support a judgment in favor of the

irrelevant “conclusory allegations.”<sup>154</sup> Similarly, the lower court opinions show how qualified immunity claims have reversed the normal rule that requires the moving party to carry the initial burden of proof. Under the lower court opinions in *Tolan*, an officer who moves for summary judgment on qualified immunity grounds “does not have the burden to establish it.”<sup>155</sup> Instead, it is the plaintiff who carries the burden of negating the assertion of qualified immunity.<sup>156</sup> Those rules combine to essentially reverse the fundamental principle of summary judgment that “the facts and inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party.”<sup>157</sup>

Second, the two opinions reveal the predetermining pro-police nature of the tight zoom-in focus the two courts used to dismiss the relevance of every fact that was unfavorable to the police. The first element of the technique, the district court explained, is the principle that Cotton’s actions were “required to ‘be judged from the perspective of a reasonable officer on the scene.’”<sup>158</sup> That requirement, the Court of Appeals acknowledged up front, “steers the analysis” in Cotton’s favor.<sup>159</sup> The second element is the rubric of “material facts” that the two courts used to ignore virtually everything that happened before the actual shooting.<sup>160</sup> The only “factual information”

nonmovant.” *Tolan*, 854 F. Supp. 2d 444, 426 (S.D. Tex. 2012) (emphasis added) (quoting *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (2005) (internal quotations omitted)).

<sup>154</sup> Even with sworn testimony in the record supporting plaintiff’s contentions, the court can apparently dismiss some or all of it if it characterizes the content as mere “conclusory allegations” or “unsubstantiated assertions.” *Tolan*, 854 F. Supp. 2d at 462 (internal quotations omitted).

<sup>155</sup> *Id.* at 463.

<sup>156</sup> *Id.* (“Plaintiffs must satisfy their burden by negating immunity by specifically identifying evidence that rebuts the Defendants’ presumed entitlement to dismissal based upon qualified immunity.”). *See also id.* (“The plaintiff, bearing the burden of negating the defense, cannot rest on conclusory allegations and assertions, but must demonstrate genuine issues of material fact regarding the reasonableness of the official’s conduct.”). The Fifth Circuit agreed. *See Tolan*, 713 F.3d at 304.

<sup>157</sup> *Tolan*, 854 F. Supp. 2d at 462. The Supreme Court explained that the Fifth Circuit “improperly ‘weigh[ed] the evidence’ and resolved disputed issues in favor of the moving party.” *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citing *Anderson*, 477 U.S. at 249).

<sup>158</sup> *Tolan*, 713 F.3d at 306.

<sup>159</sup> *Id.* at 306 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

<sup>160</sup> For example, one critical fact in understanding the situation had to do with Robbie’s claim that he turned and started to rise up because Cotton threw his mother against the garage door and when she hit the door there was a loud crashing sound. The district court treated it thusly:

Robbie Tolan, Marian Tolan, Anthony Cooper, and Officer Edwards all testified that Robbie Tolan yelled to Sergeant Cotton after Marian Tolan hit the garage door. Sergeant Cotton testified that Robbie Tolan yelled to him before he pushed Marian Tolan away, and she hit the garage door. Sergeant Cotton testified, “I do not disagree that the noise [of Mrs. Tolan hitting the garage door] happened . . . . I disagree as to when the noise happened.” . . . This disputed fact is not material to the determination of the issue of qualified immunity. It is not disputed that Robbie Tolan shouted at Sergeant Cotton and quickly got up from his prone position and turned his body around.

relevant to the issue of the shooting, the district court insisted, involved “the observations Sergeant Cotton made, which led him to fire.”<sup>161</sup> That “factual information” included essentially only three facts: Cotton heard Robbie shout at him and saw him turning around; Cotton saw Robbie’s hand at his waist covered by the “hoodie” and speculated Robbie might be reaching for a hidden gun,<sup>162</sup> and Cotton feared for his life.<sup>163</sup> With that severely truncated focus on “a very few seconds,”<sup>164</sup> the court easily concluded that “there are no disputes of material fact” about the shooting.<sup>165</sup> Thus, it was able to find Cotton’s shooting “reasonable” and grant him summary judgment.<sup>166</sup> Agreeing that there was no dispute as to any “material facts,” the court of appeals affirmed.<sup>167</sup>

The extreme bias in that tight zoom-in focus is apparent. If a court constricts its consideration only to the exact moment when an officer can claim—offering only the slightest possible self-serving justification—that he feared for his safety, there can be no possible alternative but to find a shooting “reasonable.”<sup>168</sup> Narrowing the relevant context to nothing but the exact

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*Tolan*, 854 F. Supp. 2d at 470 (first alteration in original) (citation omitted).

<sup>161</sup> *Tolan*, 854 F. Supp. 2d at 470.

<sup>162</sup> The district court underscored the determining power of the zoom-in technique, the officer’s perspective, and the selection of “material” facts. *Tolan*, 854 F. Supp. 2d at 475 (“The fact that Robbie Tolan did not reach for his waistband area [as if to draw a weapon] is not material to the determination of whether Sergeant Cotton should be entitled to the defense of qualified immunity. Rather, it is the reasonable officer’s perception of the situation that decides qualified immunity.”).

<sup>163</sup> The appellate court even dismissed the relevance of the location of Robbie’s hands and arms when he turned around. It described the situation as follows:

Fearing Robbie Tolan was reaching towards his waistband for a weapon, Sergeant Cotton drew his pistol and fired three rounds at Robbie Tolan, striking him once in the chest and causing serious internal injury. At the time, Robbie Tolan was wearing a dark zippered jacket, known as a “hoodie”, which was untucked and hung over the top of his trousers, concealing his waistband. A subsequent search revealed Robbie Tolan was unarmed.

*Tolan*, 713 F.3d at 303. It concluded, however, despite Robbie’s statement that he was not reaching toward his waistband, that “whether Robbie Tolan reached into or toward his waistband [did] *not* create a genuine dispute of material fact.” *Id.* at 307 (emphasis in original).

<sup>164</sup> *Tolan*, 854 F. Supp. 2d at 473.

<sup>165</sup> *Id.* at 451.

<sup>166</sup> *Tolan*, 713 F.3d at 308.

<sup>167</sup> *Id.* at 301 (“Because no genuine dispute of material fact exists for whether Sergeant Cotton’s directing deadly force at Robbie Tolan and non-deadly force at Marian Tolan was objectively unreasonable in the light of clearly-established law, the Rule 54(b) judgment in favor of Sergeant Cotton is AFFIRMED.”). While the district court placed its dismissal on the ground that Robbie’s constitutional rights had not been violated, the court of appeals based its judgment on qualified immunity grounds. *Id.*

<sup>168</sup> The Court avoided making a decision on this issue in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), which dismissed the Ninth Circuit’s “provocation rule” but failed to decide what occurs when it is unreasonable conduct on the part of the officer that creates the need for deadly force. Another case recently decided by the U.S. Supreme Court, *City of Tahlequah, Oklahoma v. Bond*, also

moment when an officer perceives a threat and responds, the officer's action could always be judged "reasonable" no matter what preceded it. That rigidly constricted focus excludes everything else that happened, including the prior mistakes, misjudgments, provocations, and abuses of the officers involved. The zoom-in focus essentially predetermines the issue and constitutes a profound institutional bias against all victims of police violence.

Third, and most telling, the lower courts repeatedly drew inferences in favor of the police officers while improperly dismissing the contradictory testimony that the Tolans presented.<sup>169</sup> To begin, the district court accepted the officers' contention that they faced "a dangerous and uncertain scene,"<sup>170</sup> while the appellate court characterized the situation as "chaotic and confusing."<sup>171</sup> The courts adopted those characterizations in spite of the fact that the two "suspects" were lying silently on the ground, complying with Edwards' order and covered by Edwards' gun, while Bobby and Marian—an elderly man and woman in their pajamas—were attempting to identify themselves and the "suspects" and to explain that there had been a mistake and that the car was not stolen.<sup>172</sup> Similarly, both courts accepted Cotton's judgment that he needed to "control" the situation<sup>173</sup> while ignoring plaintiffs' testimony showing that the situation did not need control but rather the most basic exercise of simple decency and common sense. Consequently, both courts ignored the truly decisive fact that everything that followed was the direct result of Edwards' mistakes and misjudgments and Cotton's heedless and aggressive intrusion that transformed an easily corrected police error into a tragic and unnecessary shooting.

The district court also dismissed other specific facts in the record that supported the Tolans. It ignored the contrary testimony of Robbie, Bobby, and Marian when it concluded that Marian "was an individual out of

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presented the issue. No. 20-1668, 2021 WL 4822664 (U.S. Oct. 18, 2021) (per curiam). In a per curiam opinion, the Court continued to give qualified immunity an exceptionally sweeping scope in allowing police use of deadly violence. Reversing the Tenth Circuit, it construed the record favorably toward the police and granted them judgment. *Id.* at \*3. At the same time it explicitly held open the question "whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment." *Id.* at \*2.

<sup>169</sup> As the following material shows, the biased reasoning of the lower courts was far more extensive and insupportable than the relatively narrow grounds the Supreme Court cited in reversing their grant of summary judgment. For the Court's quite limited examination of the way the lower courts treated the record, see *Tolan v. Cotton*, 572 U.S. 650, 654–55 (2014).

<sup>170</sup> *Tolan*, 854 F. Supp. 2d at 469.

<sup>171</sup> *Tolan*, 713 F.3d at 302.

<sup>172</sup> See *supra* notes 135–140 and accompanying text; see also *Tolan*, 854 F. Supp. 2d at 451–52.

<sup>173</sup> See *supra* note 142 and accompanying text; see also *Tolan*, 854 F. Supp. 2d at 469.

control” and asserted—again, flatly contrary to the record—that there was “no dispute” about that.<sup>174</sup> Similarly, it dismissed Marian’s testimony when it accepted Cotton’s version of his treatment of her.<sup>175</sup> Indeed, despite Marian’s contrary testimony about the way Cotton grabbed and pushed her, the court whitewashed Cotton’s behavior by averring that he merely “guided” her to the garage and then, topping that, went so far overboard in Cotton’s favor that it adopted his gentlemanly characterization that he was actually “escorting” her, as if to the prom.<sup>176</sup>

Again, despite contrary testimony from both Robbie and Marian, the court accepted the officers’ version of Robbie’s position at the time of the shooting and declared that he was up in a “vertical position.”<sup>177</sup> Compounding that error, it also suggested that Robbie may well have been preparing to attack Cotton when he turned around and rose up. “He was not yet fully standing up, nor was he moving towards Sergeant Cotton,” the court wrote, “but he was in the process of standing up.”<sup>178</sup> There was no way the court could possibly have known that Robbie intended to stand up, nor that he was “in the process” of doing so. The record contained evidence that he was merely turning around to better see what Cotton was doing to his mother. By improperly inferring from contested testimony that Robbie intended to stand up, the court suggested that Robbie could well have been preparing to attack Cotton, an unwarranted suggestion that lent support to Cotton’s claim that he reasonably feared for his safety.

Further, the district court accepted the officers’ claim that they had to control the situation “so that they [could] safely confirm the identities of unknown persons.”<sup>179</sup> That claim was implausible at best. As for safety, the officers faced no observable threat either from the two “suspects” lying

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<sup>174</sup> *Tolan*, 854 F. Supp. 2d at 469.

<sup>175</sup> *Id.* at 468–70 (citing Sergeant Cotton’s testimony as evidence for the court’s undisputed findings of fact). Compare Cotton’s version to how Robbie later described the situation:

[Cotton] grabbed my mother, a fifty-five-year-old woman, and threw her like a rag doll against the garage door. You should understand that my mother is not a big woman at all. She’s a tiny petite woman, who even in the most warped fantasies couldn’t threaten or harm anyone. So when Cotton grabbed her and flung her to the garage door, it was like he’d lifted her body off the ground.

TOLAN & ROSS, *supra* note 128, at 24.

<sup>176</sup> *Tolan*, 854 F. Supp. 2d at 459, 475.

<sup>177</sup> *Id.* at 470. Edwards stated that Robbie appeared to be charging. *Id.* at 472. Cotton stated that Robbie “was getting up and turning around,” and later that “[h]e was on both feet.” *Id.* at 472, 473. Contradicting their testimony, Robbie testified that he was shot before he could get up. *Id.* at 471. And Marian testified that Robbie was “on his knees” when he was shot. *Id.* at 472.

<sup>178</sup> *Id.* at 473.

<sup>179</sup> *Id.* at 469.

quietly on the ground, covered by Edwards' drawn gun,<sup>180</sup> or from the elderly couple in their pajamas. As for the officers' claim that they merely wanted to "confirm the identities" of everyone, that was exactly what neither of them made the slightest attempt to do. At no point did either Edwards or Cotton take the painfully obvious step of actually listening to Bobby's and Marian's repeated explanations, asking them to produce some form of identification, or—most immediately obvious of all—simply requesting them to produce the car's registration papers.

Further massaging the record in Cotton's favor, the district court implicitly accepted Cotton's version of both the time when he pushed Marian against the garage door and the reason he did so. Robbie testified that he yelled at Cotton only because Cotton had pushed his mother against the garage door with enough force to make "a loud banging sound" when she hit it.<sup>181</sup> Cotton did not deny either the push or the loud banging sound that followed but testified that he only pushed Marian against the door after Robbie yelled at him, not before.<sup>182</sup> Ignoring the significance of the disputed timing of Cotton's shove, the court blandly announced that whether Cotton pushed Marian before or after Robbie yelled was not "material."<sup>183</sup> Then,

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<sup>180</sup> *Tolan v. Cotton*, 713 F.3d 299, 307 (5th Cir. 2013) ("Officer Edwards continually covered Robbie Tolan and Cooper with pistol drawn throughout the sequence of events."); *see also Tolan*, 854 F. Supp. 2d at 459 ("Officer Edwards was still 'covering' Robbie Tolan and Anthony Cooper.").

<sup>181</sup> *Tolan*, 854 F. Supp. 2d at 469; *accord id.* at 454, 456, 472 (highlighting testimony that there was a banging sound when Marian hit the garage door). The court summarized Robbie's testimony as follows:

Robbie Tolan had continued to turn his head to the left and look backwards to follow what was going on between Sergeant Cotton and Marian Tolan. He had a good view of them. He saw and heard Sergeant Cotton push my mom against the garage door . . . . And it made a loud noise. The sight and sound of his mother being pushed against a metal garage door caused [him] to want to get up from the position that [he was] laying in . . . because [he was] upset about seeing [his] mother being pushed into a garage door.

*Id.* at 452 (alterations in original) (citations and quotation marks omitted).

<sup>182</sup> *Id.* at 469. The district court summarized Cotton's testimony as follows:

"As soon as [he] addressed her, [Sergeant Cotton] holstered [his] weapon and then was trying to gain her compliance." When Marian Tolan would not comply, Sergeant Cotton testified that "I grabbed her right arm, I believe with my right hand, and put my left hand at the small of her back to start escorting her over to the garage door." Marian Tolan was talking as he was escorting her, and soon after he first touched her, "she flipped her arm up trying to flip my—hand off of her and said, 'Get your hands off of me.'" She tried to flip up her right arm, and she turned over her right shoulder to say to him, "Get your hands off me." All the while he was walking her in the direction of and getting closer to the garage door.

Sergeant Cotton testified that he was gripping her arm, "not as hard as I could, but enough to—to gain control of another person." His "intention was certainly not to cause a bruise . . . ." He did not believe that he had caused bruises.

*Id.* at 458–59 (insertions in original) (citations omitted).

<sup>183</sup> *Id.* at 469–70.

the court once again went even further in whitewashing Cotton by implicitly rejecting Robbie's testimony and accepting Cotton's contention that he needed to push Marian into the garage door so he would be free to face the threat he feared after Robbie yelled at him and began to turn around. "Viewed objectively," the court offered, "the force Sergeant Cotton used to push Marian Tolan [against the door] was not excessive to the need, nor unreasonable under the circumstances."<sup>184</sup> The court could have found Cotton's shove "not excessive" and "not unreasonable in the circumstances" only if it found that he had pushed her *after* Robbie yelled at him, not before. Indeed, it could only have made that finding if it accepted Cotton's testimony and rejected Robbie's testimony to the contrary.

Adopting yet another conclusion inconsistent with the record, the district court also accepted Cotton's testimony that his behavior toward Marian was an effort to "calm her."<sup>185</sup> The record established two fatal flaws with that claim. First, both Bobby and Marian testified that she remained "calm" and was merely trying to explain—quite clearly and quite truthfully—that she and her husband owned the house and car, and that the car was not stolen.<sup>186</sup> Thus, when the court accepted Cotton's "calming" claim, it again violated the law of summary judgement because it accepted Cotton's testimony while rejecting the contrary testimony of both Bobby and Marian.

The second fatal flaw is that Cotton's own testimony contradicted his "calming" claim. That testimony showed that he could not possibly have made the slightest effort to "calm" Marian but, instead, mistreated her almost immediately by quickly grabbing her, then pushing her, and finally showing her into the garage door. The critical fact in recognizing the wholly unbelievable nature of Cotton's "calming" claim is the undisputed fact that only a bare 32 seconds elapsed between the moment Cotton arrived on the scene and the moment he shot Robbie.<sup>187</sup> In those fleeting 32 seconds Cotton claimed under oath that he did all of the following:<sup>188</sup>

1. exited his car,

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<sup>184</sup> *Id.* at 470.

<sup>185</sup> *Id.* at 467.

<sup>186</sup> *Compare id.* at 467 ("Marian Tolan was walking around the yard, getting in the way of Officer Edwards's pointed weapon, upset, angry, and loudly protesting. . . . [her] activities warranted Sergeant Cotton's efforts to calm her and put her into a neutral position."), *with* Tolan v. Cotton, 538 F. App'x 374, 377 (5th Cir. 2013) (Daniels, J., dissenting from denial of rehearing en banc) ("[Marian] and her husband testified that she was calm and merely explained to both officers that she and her husband owned the Nissan and house and that Robbie lived there with them . . .").

<sup>187</sup> Tolan v. Cotton, 713 F.3d 299, 303(5th Cir. 2013); *Tolan*, 854 F. Supp. 2d at 456.

<sup>188</sup> The following actions are from the district court's summary of Cotton's and Edwards' testimonies. *Tolan*, 854 F. Supp. 2d at 457–61.

2. drew his gun,
3. moved onto the lawn close enough to Edwards that he touched “him on the shoulder with his shoulder,”<sup>189</sup>
4. asked Edwards what was going on,
5. listened to Edwards tell him “that two of the four people in the front yard came out of the house and two came out of the car,”<sup>190</sup>
6. continued to listen as Edwards told him further that “the two on the ground had gotten out of a stolen vehicle’,”<sup>191</sup>
7. observed Cooper on the ground,
8. observed Robbie on the porch,
9. recognized that both “suspects” were complying with Edwards orders,
10. decided that he needed to “search and handcuff the suspects,”<sup>192</sup>
11. holstered his gun,
12. decided he “needed to get [Marian] controlled,”<sup>193</sup>
13. heard Marian say “That’s our car,”<sup>194</sup>
14. asked Marian—not once, he testified, but “several times”—to move toward the garage door,<sup>195</sup>
15. heard Marian say, “We live here, what are you doing here, you shouldn’t be here, and that that’s our car,”<sup>196</sup>
16. responded to Marian’s statements and actions by telling her to calm down,
17. recognized where he and Marian were and realized that they were not close to the garage,
18. grabbed Marian’s right arm and moved her toward the garage,
19. witnessed Marian push his hands away and say: “Get your hands off of me,”<sup>197</sup>
20. re-grabbed Marian and continued to move her toward the garage door,
21. turned and got a clearer view of Robbie lying on the porch,
22. recognized that Edwards was still covering Robbie and Cooper with his gun,
23. continued to move Marian nearer to the garage door,
24. heard Robbie shout “Get your fucking hands off her,”<sup>198</sup>
25. observed Robbie turning around and getting “halfway up or so,”<sup>199</sup>

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189 *Id.* at 457–58.

190 *Id.* at 460.

191 *Id.* at 458.

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.* at 458 (emphasis added).

196 *Id.*

197 *Id.* at 459.

198 *Id.* at 459.

199 *Id.*

26. observed Robbie’s right hand at his waistband,
27. thought that Robbie “was drawing a weapon from his waistband,”<sup>200</sup>
28. concluded that his safety was in danger,
29. pushed Marian away from him and into the garage door with a loud bang,<sup>201</sup>
30. “took probably at least a step away from her and turned to face” Robbie,<sup>202</sup>
31. drew his holstered weapon, and
32. fired three shots at Robbie.<sup>203</sup>

All those things Cotton claimed to have done in 32 seconds. More, all of those things he claimed to have done while also moving some thirty or forty feet from his patrol car to Edwards’ shoulder, then on to Marian, and—with her objecting to his actions—grabbing and then re-grabbing her, and pushing her all the way up the driveway to the garage. Cotton’s claimed “calming” justification for his treatment of Marian was simply incredible, and the court’s acceptance of it had no reasonable foundation in the record.

As for the court of appeals, it added its own equally troubling moves.<sup>204</sup> It stated that at the moment of the shooting Robbie was “abruptly attempting to approach” Cotton,<sup>205</sup> a statement that was unfounded and inconsistent with most of the record.<sup>206</sup> There was, in fact, no way that it could possibly have known that Robbie was “attempting to approach” Cotton. Its characterization of Robbie’s action doubly violated the rules of summary judgment: it drew an inference in favor of the moving party, and it ignored evidence in the record that supported the non-moving party’s contrary claim.

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<sup>200</sup> *Id.* at 460.

<sup>201</sup> Items numbered 30 and 31 appear *id.* at 474.

<sup>202</sup> *Id.* at 474.

<sup>203</sup> *Id.* at 475.

<sup>204</sup> The Fifth Circuit sitting *en banc* denied a rehearing in the case. Judges Dennis and Graves dissented, challenging the panel’s questionable analysis. *See generally* Tolan v. Cotton, 538 F. App’x 374 (5th Cir. 2013) (Dennis, J., dissenting from denial of rehearing *en banc*).

<sup>205</sup> *Tolan*, 713 F.3d at 308.

<sup>206</sup> The district court claimed, somewhat ambiguously, only that Robbie had reached a “vertical position” but not that he was moving toward Cotton. *Tolan*, 854 F. Supp. 2d at 470. Further, it stated that Robbie was “not running toward” Cotton but only “turning around to face” him. *Id.* at 460. Robbie testified that he was shot before he could get up. *Id.* at 471. Further, Marian testified that Robbie was “on his knees” when he was shot. *Id.* at 472. On the other hand, Cotton testified that Robbie was “on both feet,” *id.* at 460, and Edwards testified that Robbie “looked like he was going to go forward.” *Id.* at 461. Neither Edwards nor Cotton claimed that Robbie was actually moving toward Cotton. When he was shot, Robbie was nowhere near Cotton—he was fifteen to twenty feet away from him. *Tolan*, 713 F.3d at 303. Indeed, Robbie’s blood stains near the front door of the house showed that he had not moved toward Cotton and that, when he was shot, he was still near the door where he had dropped down as instructed. *Tolan*, 538 F. App’x. at 377 (Dennis, J., dissenting from denial of rehearing *en banc*).

The only reason it could have appeared in the court's opinion—an assertion unwarranted by the law and unsupported by the record—was that it seemed to strengthen Cotton's claim of "fear."

Showing even more favoritism toward the officer, the appellate court not only ignored the testimony of both Robbie and Marian that Cotton gave no warning to Robbie before shooting him, but it also tried to justify Cotton's behavior by imagining a wholly unwarranted—indeed contrary to fact—inference in his favor. The court literally made up what can only be termed a storybook "warning by judicial fiat."<sup>207</sup> According to the appellate court:

Robbie Tolan had clear and obvious warning of Officer Edwards' and Sergeant Cotton's believing deadly force might be required under the circumstances: both made clear their belief Robbie Tolan's vehicle was stolen; Sergeant Cotton drew his pistol upon his arriving on the scene; and Officer Edwards continually covered Robbie Tolan and Cooper with pistol drawn throughout the sequence of events.<sup>208</sup>

None of those background facts constituted an actual warning. The appellate court simply and arbitrarily asserted that Robbie should have inferred a warning from selected parts of the context, and it deployed that assertion to proclaim the existence of a justificatory "warning" by the police that did not in fact exist.

Further, the appellate court exhibited the subjectivity involved in its power to root through the record to pick out whatever "facts" it wished to count as relevant and "material." To support summary judgment for Cotton, it highlighted several peripheral facts that seemed useful in buttressing Cotton's claim that he reasonably felt his safety was threatened. "Compounding that threat," it itemized, were certain facts in "the surrounding circumstances: the late hour; recent criminal activity in the area; a dimly-lit front porch; Marian Tolan's refusing order to remain quiet; and the officers' being outnumbered on the scene."<sup>209</sup> From all of the evidence in the record, in other words, the

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<sup>207</sup> See *Tolan*, 713 F.3d at 307 (presenting the facts in clear favor of the officer and against the victim while ignoring the rules of summary judgment). Compare *Petition for Writ of Certiorari*, app E at app.102, app.106, *Tolan v. Cotton*, 572 U.S. 650 (2014) (No. 13-551) (recounting Robbie's testimony that Cotton gave no verbal instructions or warnings before he fired at him and Marian's testimony that Cotton did not give a verbal instruction or warning before firing at Robbie), with *id.* at app.104 (recounting Cotton's testimony that he did verbalize a warning at Robbie by saying, "stop or no").

<sup>208</sup> *Tolan*, 713 F.3d at 307.

<sup>209</sup> *Id.*

appellate court selected as relevant and “material” only those that seemed to lend credibility to Cotton’s claim of fear. All else it ignored.<sup>210</sup>

Indeed, the appellate court, like the district court, also highlighted the importance of the darkness of the night, but the two courts did so only to support the position of the police officers. The former noted the “dimly-lit” nature of the front porch, and the latter noted “the poorly lit front yard and driveway.”<sup>211</sup> Further, both courts found it useful to cite Cotton’s statement that he regarded his situation as dangerous because the area of the porch and yard was “dark.”<sup>212</sup> In relying on those “facts,” the courts ignored Bobby’s testimony that the area was reasonably well lit by a gas lamp on the porch and two floodlights shining on the driveway. The scene, Bobby testified, was “not in darkness.”<sup>213</sup>

The courts’ treatment of the darkness issue exemplified another pro-police bias in the law, for both courts passed over it when they casually noted that Edwards had made a mistake in identifying the Tolans’ car as stolen.<sup>214</sup> If darkness was a relevant fact helping Cotton, then it was also a relevant fact magnifying Edwards’ fault in causing all that followed. The darkness of night would have meant that Edwards should have known that he could easily have made a mistake either in initially observing the license number of the Tolans’ car or in entering the number in his MDT. As a consequence, he should have known that he needed to recheck the number and confirm his information. Of course, the law gave the courts a perfect technical reason for ignoring the importance of the darkness as it weighed against the officer: his mistake simply did not count and, consequently, evidence regarding it could not be “material.”

Finally, both lower courts refused even to mention the fact that Marian testified that Cotton had grabbed her and then shoved her against the garage door so forcefully that it caused bruising on her arms and back, and neither mentioned the additional fact that she offered photographic evidence to show the bruising.<sup>215</sup> Worse, the district court again showed its favoritism toward

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<sup>210</sup> The appellate court went out of its way to compliment the district court for “an extremely detailed and well-reasoned opinion,” *id.* at 303, even though it changed the grounds of decision and based its affirmance on a different point of law. *See id.* at 306 (passing over the district court’s holding that Robbie and Marian had not shown a constitutional violation and adopting instead the rationale that Cotton’s behavior was not “objectively unreasonable”).

<sup>211</sup> *Tolan*, 854 F. Supp. 2d at 450; *Tolan*, 713 F.3d at 307.

<sup>212</sup> *Tolan*, 854 F. Supp. 2d at 458, 460, 474; *Tolan*, 713 F.3d at 302.

<sup>213</sup> This violation of the principles of summary judgment was one of the grounds on which the Supreme Court reversed. *Tolan v. Cotton*, 572 U.S. 650, 658 (2014).

<sup>214</sup> *Tolan*, 854 F. Supp. 2d at 450; *Tolan*, 713 F. 3d at 301.

<sup>215</sup> *Tolan*, 572 U.S. at 653.

Cotton by quoting his claim that his intention “was certainly not to cause a bruise” and that he “did not believe that he had caused bruises” while refusing even to note Marian’s contradictory testimony or supporting photographic evidence that Cotton had, in fact, bruised her.<sup>216</sup> Cotton’s statement of “belief” hardly qualified as credible evidence on the issue, while Marian’s specific testimony and supporting photographic evidence surely did. The district court, however, was willing to specifically cite Cotton’s self-serving declaration of his “belief” that he had done no harm while ignoring the contradictory testimonial and physical evidence that he had treated her so roughly that he had in fact bruised her.<sup>217</sup>

The lower courts’ ruthless use of the tight zoom-in technique, their dismissal of the testimony of the Tolans, and their wholesale disregard for most of the things that happened that night were especially ironic in light of the test they applied in exonerating Cotton for the shooting. To the shooting itself, they applied a “totality of the circumstances” test.<sup>218</sup> “The issue,” the district court wrote, was whether “any reasonable officer could have evaluated the totality of the circumstances confronting Sergeant Cotton that early morning and reached the decision that under the law deadly force was permissible.”<sup>219</sup> It then concluded:

Sergeant Cotton misinterpreted Robbie Tolan’s intended actions, but his firing on Robbie Tolan did not violate Robbie Tolan’s constitutional rights because Sergeant Cotton feared for his life and could reasonably have believed the shooting was necessary under the totality of the factual circumstances evidenced by the summary judgment record.<sup>220</sup>

The court of appeals reiterated and reaffirmed that standard.<sup>221</sup> Not surprisingly, Cotton’s testimony had carefully set up the courts’ exonerating

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<sup>216</sup> *Tolan*, 854 F. Supp. 2d at 459. The lower courts presumably dismissed Marian’s evidence of bruising because it was not “material” to the shooting itself, but that does not explain either why the two courts failed even to mention such a critical issue or why the district court recognized Cotton’s denial without acknowledging Marian’s claim and supporting evidence.

<sup>217</sup> The evidence of Marian’s bruising appeared in the judicial opinions only because the Supreme Court twice noted it. *See Tolan*, 572 U.S. at 653, 659 (referring to testimony that supports the assertion that Marian was bruised).

<sup>218</sup> *Tolan*, 854 F. Supp. 2d at 475–76; *see also id.* at 466 (citing *United States v. Michelletti*, 13 F.3d 838, 840 (5th Cir. 1994) and *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 n.5 (5th Cir. 1999)) (describing the requirements for justifying an investigative stop under a totality of the circumstances test).

<sup>219</sup> *Tolan*, 854 F. Supp. 2d at 475–76.

<sup>220</sup> *Id.* at 477.

<sup>221</sup> “To be sure, it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth-Amendment violation. But, that is only half of the equation for second-prong analysis; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene

conclusion perfectly. It was, Cotton testified and the district court readily quoted, the “totality of everything that was happening that put me in fear.”<sup>222</sup>

Unfortunately, neither of the lower courts gave heed to the true “totality of the circumstances” on that fateful night.<sup>223</sup> Rather, they based their holdings on their predetermining zoom-in technique and what was actually a “totality of a few carefully selected pro-police circumstances” that limited “material” facts to those Cotton perceived at the moment of the shooting. That focus allowed Cotton to claim—essentially on his own testimony—that he feared for his life and was thus allowed to shoot a Black man in the chest without legal sanction.<sup>224</sup> To fully realize the implicit and institutional bias in the courts’ use of the predetermining zoom-in technique, it is necessary to itemize the true “totality of [*all of*] the circumstances” that existed that night.<sup>225</sup>

1. At some point after Robbie and Cooper left a restaurant where they had picked up food to take home, Edwards began following them.<sup>226</sup> The officer had no reason to suspect any wrongdoing, nor was there anything suspicious about a car on the road at 2:00 a.m. on New Year’s Eve.<sup>227</sup>

2. Edwards decided to follow the car into the *cul de sac* because he claimed that it made an “abrupt” or “hurried” turn” onto the side street.<sup>228</sup> Such a turn is hardly uncommon, and it constituted no danger or law-breaking in the absence of other nearby cars or pedestrians. Further, even if

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officer without the benefit of retrospection.” *Tolan v. Cotton*, 713 F.3d 299, 307 (5th Cir. 2013) (citation omitted).

<sup>222</sup> *Tolan*, 854 F. Supp. 2d at 460.

<sup>223</sup> *Id.* at 475–76.

<sup>224</sup> Cotton claimed that Robbie’s hands were at his waistband, that he thought Robbie might have a weapon, and that he feared for his life. *Tolan*, 854 F. Supp. 2d at 459, 460, 470, 477. Cotton’s attorney stressed the sufficiency of Cotton’s testimony to warrant summary judgment in his favor. “The Supreme Court has consistently ruled that claims against police need to be considered from the officer’s perspective at the time of the shooting, not with all the information available in hindsight,” he explained. What matters “is what Cotton says he felt at the time of the shooting.” Michael Barajas, *Robbie Tolan’s Police Brutality Case Might be Precedent-Setting—But So What?*, HOUS. PRESS (Sept. 16, 2015, 12:06 PM), <https://www.houstonpress.com/news/robbie-tolan-s-police-brutality-case-might-be-precedent-setting-but-so-what-7769001> [<https://perma.cc/WB4T-HXXT>].

<sup>225</sup> *Tolan*, 854 F. Supp. 2d at 475–76.

<sup>226</sup> Edwards contended that he just happened to notice the Tolan’s car ahead of him on a street. *Tolan*, 854 F. Supp. 2d at 449. Robbie later stated that at some point he “noticed that a Bellaire police car had started following us.” He explained that “Bellaire cops were known for cruising up and down the quiet streets of Bellaire, looking for people who didn’t belong” and “the Bellaire police department had a long history of interpreting that to mean black and brown people.” TOLAN & ROSS, *supra* note 128, at 17.

<sup>227</sup> Robbie later explained the police car had followed his car from the time he and Cooper left a Jack in the Box with food to take home. TOLAN & ROSS, *supra* note 128, at 19.

<sup>228</sup> *Tolan*, 854 F. Supp. 2d at 449, 466 (recounting Edward’s description of the turn as an “abrupt turn” and a “hurried turn”).

Edwards might have suspected possible drunk driving, he witnessed the car being parked and the occupants getting out and leaving it.<sup>229</sup> Thus, he had no reason to suspect future unsafe driving that night.

3. Edwards claimed to be suspicious of the car's occupants because there had been vehicle burglaries and thefts reported in the area.<sup>230</sup> Edwards, however, witnessed the car's occupants exit their vehicle and head not toward some other car but toward the house "as if to enter a residence."<sup>231</sup> Because the two men did not approach any other vehicle as if to burglarize or steal it, Edwards had no reason to suspect that they were readying for such crimes.

4. Then, Edwards decided to pursue another suspicion and find out if the car the two young men were driving had itself been stolen. But, in doing so, he misidentified the car by typing in the wrong license plate number,<sup>232</sup> the fatal error that caused everything that followed.

5. Edwards failed to recheck the license plate number and confirm that the vehicle was stolen. Due to the fact that he was driving past the Tolans' car in darkness while trying simultaneously to maintain control of his moving vehicle, observe the number on the other car's license plate, and keep track of the movements and different locations of two separate "suspects," he should have known that it was quite possible if not likely that he could have made a mistake.<sup>233</sup> After the shooting, other police officers who came on the scene did recheck the license plate and readily ascertained that the Tolans' car was not stolen.<sup>234</sup>

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<sup>229</sup> Robbie stated that he and his cousin "hadn't had anything to drink, and we weren't on any drugs." TOLAN & ROSS, *supra* note 128, at 17.

<sup>230</sup> *Tolan*, 854 F. Supp. 2d at 449, 466 (recounting Edwards's statement that there had been burglaries and thefts in the area); *Tolan v. Cotton*, 713 F.3d 299, 305 (5th Cir. 2013) (recounting Edward's statement that there had been burglaries in the area).

<sup>231</sup> *Tolan*, 854 F. Supp. 2d at 450.

<sup>232</sup> "Unfortunately, when [Edwards] entered the license plate number into the MDT [Mobile Data Terminal] he made a mistake. The actual number of the SUV was 696BGK, but Officer Edwards typed in 695BGK." *Id.*

<sup>233</sup> Getting the license plate wrong was not uncommon, we later found out when we asked a relative who is a cop. Sometimes the cop punching in the license plate is trying to drive and work his dashboard at the same time, and mistakes happen. Because it's so common to get a false hit, most police departments follow a procedure to have their officers double-check the license plate when the car is parked. However, despite parking his police car directly in front of our car, with our license plate clearly in view, as his dash camera would show during future court proceedings, Officer Edward did not re-check the plate.

TOLAN & ROSS, *supra* note 128, at 22–23.

<sup>234</sup> *Tolan*, 854 F. Supp. 2d at 467.

6. Edwards failed to recognize that there was no reason for haste. If the two young men had actually stolen the car they were driving, they would hardly have parked it in front of the house they were planning to enter and where they could easily be found later that night or the next morning.<sup>235</sup>

7. Edwards hastily and unnecessarily decided to intervene. There was no need for immediate action because there was no indication that the two “suspects” were returning to the car and preparing to drive away. Edwards knew exactly where the car was parked and exactly where the two “suspects” were located.

8. After Edwards exited his patrol car, he failed to reasonably question the two “suspects.” He did not ask for their identification, listen to and consider their explanations, or recognize the significance of the fact that neither of them attempted to flee into the night or to make any threatening move toward him. Instead, he kept his flashlight and gun pointed at them and demanded that they stop where they were and get on the ground.<sup>236</sup>

9. Edwards refused to respond respectfully to the nearly immediate appearance of Bobby and Marian or to listen to the explanations they were offering.<sup>237</sup> They were two elderly individuals; they came directly out of the front door of the house the “suspects” were trying to enter; they were dressed in their pajamas; they explained that they were the owners of the house and car; and they identified one of the “suspects” as their son and the other as their nephew. Bobby, moreover, immediately showed his good sense by trying to calm everyone and by effectively de-escalating the situation. He instructed the two “suspects” to shut up and lie down, a direction that the two young men obeyed at once. Then the parents carefully and truthfully informed Edwards that they owned both the house and the car the “suspects” had been driving. Ignoring their explanations, Edward ordered Bobby to get against the truck in the driveway and kicked his feet apart to make him spread eagle.<sup>238</sup>

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<sup>235</sup> TOLAN & ROSS, *supra* note 128, at 19–20. “As I was about to put the key in the door, I heard Officer Edwards.” *Id.* at 19.

<sup>236</sup> *Tolan*, 854 F. Supp. 2d at 450.

<sup>237</sup> When Bobby came out of the house and Edwards turned his flashlight on him, he “instinctively raised his hands to show that he wasn’t a threat.” TOLAN & ROSS, *supra* note 128, at 21.

<sup>238</sup> Robbie later wrote that Edwards had treated Bobby himself as a suspect:

“Spread your arms and get up against the truck!” Officer Edwards yelled at my dad. My father immediately complied. While I was lying flat on the ground, I watched as Officer Edwards pushed my dad against our Chevy Suburban, with his gun right at my father’s head. He kicked at my dad’s feet in order to make him spread eagle.

TOLAN & ROSS, *supra* note 128, at 23.

10. Edwards then misconstrued the protests of Marian. He failed to understand why a mother would be legitimately upset in the circumstances. More important and revealing, he immediately perceived a slight, petite fifty-five-year-old woman in her pajamas as creating a serious threat.<sup>239</sup>

11. Edwards failed to simply ask the parents to get the registration papers for the car and show him evidence that they owned it. That simple request could have obviated everything that followed.

12. When Cotton arrived approximately one and a half minutes after Edwards,<sup>240</sup> he abruptly intervened and made the egregious misjudgment that he needed to aggressively “take control.”<sup>241</sup> With the “suspects” on the ground, Edwards covering them with drawn gun, and an elderly man and woman trying to explain things, the situation was already and quite clearly under control.

13. Cotton refused to take the most obvious and immediately effective actions necessary to resolve the situation clearly, quickly, and peaceably. He did not recheck the license plate, ask the parents for identification, or request Bobby or Marian to produce the car’s registration papers. Although the district court sought to defend Cotton’s actions by claiming that he needed to protect the “integrity” of his investigation,<sup>242</sup> Cotton never began an investigation that needed to be protected.

14. Cotton refused to try to de-escalate the situation. The context was one that cried out for police restraint and respect—a house and neighborhood where an elderly man and woman standing in a front yard in their pajamas at two in the morning and claiming to own the house and the car in question would seem entirely credible and would properly require a respectful and de-escalating response. Cotton disregarded all those facts and virtually immediately began handling the woman.

15. Cotton also misjudged Marian and her behavior. He failed to take account of the fact that a woman claiming to be the mother of one of the “suspects” and the owner of the house and car would have every reason to be upset. Instead of trying to de-escalate matters and deal calmly and

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<sup>239</sup> “My mother is not a big woman at all,” Robbie later wrote. “She’s a tiny petite woman, who even in the most warped fantasies couldn’t threaten or harm anyone.” TOLAN & ROSS, *supra* note 128, at 24.

<sup>240</sup> *Tolan*, 854 F. Supp. 2d at 451.

<sup>241</sup> *Tolan*, 854 F. Supp. 2d at 458. See TOLAN & ROSS, *supra* note 128, at 21–22 (describing the aggressive nature with which the police officer intervened).

<sup>242</sup> *Tolan*, 854 F. Supp. 2d at 467.

reasonably with her protestations, he, like Edwards, could only see this slight, elderly woman in pajamas as a dangerous threat.<sup>243</sup>

16. Cotton mistreated Marian personally and physically. He initiated the use of unnecessary physical force by almost immediately grabbing Marian and pushing her toward the garage door and then shoving her against the garage door so forcefully that her body made “a loud banging sound” when she hit.<sup>244</sup>

17. Cotton made a mistake in perceiving the movement of Robbie’s arms as Robbie attempted to turn around, raise up, and see what Cotton was doing to his mother. Cotton claimed that he thought that Robbie’s movements were part of an effort to get up and attack him,<sup>245</sup> but in the circumstances such an attack would have been exceptionally unlikely.<sup>246</sup> Edwards was covering Robbie with his drawn gun;<sup>247</sup> Robbie was fifteen to twenty feet away from Cotton; and there was no reason to automatically assume that he had a weapon. Most compelling, Cotton should have known that even if Robbie had a gun, he would surely not draw it and shoot for another compelling reason: Cotton was standing next to Robbie’s mother, and Robbie would surely not risk shooting and hitting her.

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<sup>243</sup> *Tolan*, 854 F. Supp. 2d at 458, 460, 467.

<sup>244</sup> *Tolan*, 854 F. Supp. 2d at 469. Cotton did not deny that when Marian hit the garage door it made a loud noise. “I do not disagree that the noise [of Mrs. Tolan hitting the garage door] happened.” *Tolan*, 854 F. Supp. 2d at 470.

<sup>245</sup> As Robbie later described the situation, seeing Cotton throw his mother against the garage door caused him to “snap[]”:

There was something about seeing my mother being abused that instinctively made me want to protect her—protect her in the same way that she wanted to protect me. “Get your fucking hands off my mother!” I shouted as I slowly rose from the ground, my hands and arms still spread wide. I never did stand up, because as I rose to one knee, Sgt. Cotton turned, aimed his .45 down at me, and fired at my chest.

*TOLAN & ROSS*, *supra* note 128, at 24–25.

<sup>246</sup> Such an attack would likely have seemed plausible to Cotton only if he understood that he had grabbed Marian’s arm too roughly, manhandled her in pushing her down the driveway, and thrown her into the garage door with unnecessary force.

<sup>247</sup> *Tolan*, 854 F. Supp. 2d at 459; *Tolan*, 713 F.3d. 299, 307 (5th Cir. 2013).

18. Cotton made the final and irreparable mistake of shooting Robby.<sup>248</sup> He defended his action by claiming that he was in fear of his life.<sup>249</sup> The only evidence of that fear was his own personal testimony, and the justification he claimed for his fear was the direct result of his own heedless, reckless, and abusive behavior.

The true “totality of [*all of*] the circumstances”<sup>250</sup> showed an extended series of police mistakes, failures, misjudgments, provocations, and abuses. Refusing to try to resolve the situation easily and respectfully, Cotton drastically escalated it, transforming an easily corrected misunderstanding into a police-provoked shooting. For the law to hold that an officer can make a “mistake” and still get qualified immunity<sup>251</sup> does not and should not control a case where officers pile mistake upon mistake, misjudgment upon misjudgment, disrespect upon disrespect, and abuse upon abuse to foment an unnecessary confrontation that allows one of them to shoot another person on the officer’s own self-serving claim that, at the very last second, his own needless actions led him to fear for his safety.<sup>252</sup> Both the district and circuit courts rightly referred to the shooting as “tragic,”<sup>253</sup> but both refused to identify the actual cause of the tragedy. They simply exonerated its instigators.

The question of implicit and institutional racial bias haunts the case. As for the police, the officers understandably and predictably denied any racial motivation. Edwards testified that he did not know that the “suspects” were

<sup>248</sup> Robby later recalled the moment of the shooting:

I slumped against the front door and slowly slid down to the ground. “Oh my God, I can see smoke coming from his chest!” my mother screamed, as she saw the damage the bullet had done to my body. “That’s just smoke from the fibers of his clothes,” Sgt. Cotton said, as casually as one would say that he likes ketchup with his fries. He appeared to be unbothered as I sat there dying, although he would say something very different during the trials.

TOLAN & ROSS, *supra* note 128, at 25.

<sup>249</sup> “Sergeant Cotton testified that he fired the shot in self defense because he feared for his life, believing Robby Tolan was pulling a weapon from his waistband area.” 854 F. Supp. 2d at 470.

<sup>250</sup> *Id.* at 475–76.

<sup>251</sup> See, e.g., Saucier v. Katz, 533 U.S. 194, 195 (2001) (“mistaken” belief about facts does not deprive officers of qualified immunity), *overruled on procedural grounds by* Pearson v. Callahan, 555 U.S. 223 (2009); Anderson v. Creighton, 483 U.S. 635, 635 (1987) (police action based on mistake does not bar qualified immunity).

<sup>252</sup> The Court has explained that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application” and “its proper application requires careful attention to the facts and circumstances of each particular case.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). The lower courts did not give “careful attention” to all of the facts of the Tolans’ “particular case” and, until Cotton’s heedless and aggressive actions forced the final confrontation, there was no serious threat to the officers and neither suspect was “actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396.

<sup>253</sup> “Tolan was tragically shot.” *Tolan*, 854 F. Supp. 2d at 449; “It goes without saying that this occurrence was tragic.” *Tolan*, 713 F.3d at 308.

Black when he initially followed them and that he did not know that Robbie was Black until after he had been shot and taken to the hospital.<sup>254</sup> Cotton testified that he did not know the race of either the two “suspects” or of Robbie’s parents when he first arrived on the scene.<sup>255</sup>

Their testimony is obviously off the point. The record shows that both officers knew that they were dealing with African-Americans throughout their confrontation. Edwards testified that he knew Cooper was Black when Cooper was on the ground; he saw Marian as she walked around the yard; and Bobby “came up to talk” to him.<sup>256</sup> Cotton testified that he saw Bobby and Cooper and that he was in close physical contact with Marian.<sup>257</sup> Thus, whatever role race played in the actions of Edwards and Cotton, it was certain that both knew full well at every relevant moment that Cooper and the Tolans were Black.

Discussing plaintiffs’ Equal Protection claim, the district court noted that “Plaintiffs have alleged their personal beliefs that race was a factor in the adverse actions taken against them,” but it declared that “such a personal belief, unsubstantiated, cannot support their claim.”<sup>258</sup> Accepting the statements of Edwards and Cotton at face value, it concluded that there was “simply no admissible evidence Plaintiffs can point to that contradicts this testimony.”<sup>259</sup>

Even in the absence of direct evidence of racial bias on the officers’ part, three facts strongly suggest its presence and influence. The first is that Edwards—for reasons he failed to explain—claimed that he somehow just happened to find himself following the Tolans’ car and that, after witnessing it make an “abrupt” turn, followed it into the *cul de sac*. There, he saw two young Black men exit the car in a predominantly white, well-to-do residential suburb.<sup>260</sup> The Tolan’s house was located on a lovely side street with only about a dozen homes on it. Wide grassy areas separated the street from the sidewalk, and large well-tended lawns with many trees along the way

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<sup>254</sup> *Id.* at 461, 465.

<sup>255</sup> *Id.* at 457, 465.

<sup>256</sup> *Id.* at 460, 461.

<sup>257</sup> *Id.* at 457.

<sup>258</sup> *Id.* at 465.

<sup>259</sup> *Id.*

<sup>260</sup>

Bellaire is one of those predominantly white bedroom communities you can find anywhere in America. Adjacent to the city of Houston, with its pesky black and Latino inner-city populations, the Bellaire suburb is a testament to the experience of white flight, with high property values, safe streets, and middle-class stability, whereas the black and brown communities in Houston are equated with ghettos, crime, and slums.

TOLAN & ROSS, *supra* note 128, at 10.

separated the sidewalks from the houses.<sup>261</sup> The Tolans' house itself had an estimated value of approximately half a million dollars.<sup>262</sup> In such a location, little or nothing would ordinarily seem the least bit suspicious—with one glaring exception: the presence of two young Black men in an overwhelmingly white suburb at two in the morning.<sup>263</sup> Whether or not race was involved in Edwards' initial decision to follow Robbie and Cooper, once they exited their car Edwards knew that he was dealing with two African American males in a predominantly white, middle-class neighborhood at a late night hour.<sup>264</sup> For his part, Cotton knew exactly the same thing the moment he got out of his car and saw Cooper and the Tolans.

Second, the Tolan's expensive home located in such a well-to-do middle-class neighborhood presented exactly the kind of setting where any reasonable person would expect that an elderly man and woman coming out of their front door at two in the morning in their pajamas and claiming to own the house would immediately be considered credible and treated with respect. Edwards and Cotton, however, gave Bobby and Marian neither credence nor respect. They peremptorily refused to consider their explanations and assurances, and they failed even to show them the least bit of consideration by asking for their personal identification papers or the car's registration certificate. Instead, Edwards treated Bobby like a suspect, pointing his gun at Bobby's head and forcing him to spread eagle against the truck in the driveway by kicking his feet apart;<sup>265</sup> and Cotton—within seconds of arriving—felt free to repeatedly grab Marian and begin shoving her down the driveway to the garage. The adamant refusal of the officers to treat Bobby and Marian with the slightest degree of respect combined with Cotton's rush to handle Marian physically suggests that the officers regarded the Tolans with wholly unwarranted disdain and distrust—if not instinctive dislike. Their actions intimate nothing so much as the kind of racial bias that

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<sup>261</sup> *Id.* at 10–12.

<sup>262</sup> In 2020 the Tolan's house was valued at between approximately \$470,000 and \$490,000, with one estimate reaching as high as \$550,000 and another coming in at \$835,084. The house may be viewed on Google Maps, and a Google search for the value of the house resulted in the estimates quoted in the text. The first two searches were conducted on June 1, 2020, and the highest value was found on a search conducted on April 11, 2020.

<sup>263</sup> In 2010 only 2.8% of Bellaire's population of 16,907 was Black. U.S. CENSUS BUREAU, *Quick Facts, Bellaire City* (Apr. 1, 2010), <https://www.census.gov/quickfacts/fact/table/bellairecitytexas/PST040219> [<https://perma.cc/EZ3F-P5QT>].

<sup>264</sup> Robbie later explained that “Bellaire cops were known for cruising up and down the quiet streets of Bellaire, looking for people who didn't belong” and “the Bellaire police department had a long history of interpreting that to mean black and brown people.” TOLAN & ROSS, *supra* note 128, at 17.

<sup>265</sup> *Id.* at 23.

social psychologists have repeatedly found in white people and that so often mark the hostile and aggressive attitudes that many police officers show toward Black people.<sup>266</sup>

Third, Cotton excused his shooting by exploiting the racially loaded fact that Robbie was wearing a “hoodie”—a commonly understood term associated with young Black men—to explain why Robbie seemed so dangerous.<sup>267</sup> The “hoodie” justified his fear, Cotton explained, because it covered Robbie’s waistband and could have concealed a weapon.<sup>268</sup> Cotton’s explanation was a classic example of the use of racially-evocative language to associate Black people with danger and violence. The fact that Robbie was wearing a “hoodie” became for Cotton the justification for his fear and the excuse for his instantaneous decision to shoot, a justification that the lower courts readily accepted.<sup>269</sup>

Given those three considerations together with the true “totality of [*all of*] the circumstances,” it seems highly likely that implicit racial bias, if not worse, was at work. Viewed in any plausible light, undisputed testimony established that Edwards initiated a series of provocative and aggravating blunders, while Cotton’s own testimony showed that his actions were reckless, thoughtless, unnecessarily aggressive, antagonistic, and abusive. In context, those qualities suggest strongly that racial stereotypes and preconceptions, explicit or implicit, animated their behavior.

As for the lower courts themselves, it is revealing in the first instance that neither the district court nor the appellate court was willing to pick up in the slightest on the disturbingly obvious racial aspects of the case. To the facts suggesting the likely relevance of race, they tightly shut their eyes. Indeed, the district court attempted to excise the race issue entirely with a revealingly one-sided put-down sentence. Summarizing Bobby’s testimony, it sought to

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<sup>266</sup> See, e.g., EBERHARDT, *supra* note 22 at 103–06 (discussing a study on police officers’ disparate treatment of Black drivers versus white drivers). Even after the shooting the police continued to treat the Tolans badly. TOLAN & ROSS, *supra* note 128, at 26–27, 35. The Bellaire police and mayor immediately told the press that the case involved no racial profiling. *Id.* at 47.

<sup>267</sup> In 2012, for example, when Trayvon Martin, a young Black man, was shot and killed by a private citizen in Florida, he was also wearing a “hoodie.” Katie Rogers, *Ja’Ron Smith’s Balancing Act: A Black Republican Navigates the Trump White House*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/12/us/politics/jaron-smith-trump-white-house.html> [<https://perma.cc/DKE7-45TD>].

<sup>268</sup> *Tolan v. Cotton*, 854 F. Supp. 2d 444, 459–60, 474 (S.D. Tex. 2012); *Tolan v. Cotton*, 713 F. 3d 299, 303 (5th Cir. 2013). As one Black male law professor explained: “I like hoodies but I won’t wear one, and it’s not mainly because of the police. It’s because when I put on a hoodie everybody turns into a neighborhood watch person.” BUTLER, *supra* note 107, at 10.

<sup>269</sup> Cotton testified as follows: “It appeared that [Robbie] was drawing a weapon from his waistband . . . . Oh, I don’t know that I could see his hand specifically. I could see where his hand was, but, you know, his clothing was probably covering the hand.” *Tolan*, 854 F. Supp. 2d at 474.

repudiate any racial claims with absolutely preclusive effect by stating that Bobby “agreed that he had ‘no facts’ that lead him to believe that the race of anybody involved had anything to do with shooting.”<sup>270</sup> Then, at the end of the sentence, it tacked on a brief, dismissive throwaway clause: “but he has his opinion.”<sup>271</sup> The “no facts” part of the sentence was comprehensive, and it banished the race issue from the case entirely; the tag-on clause registered nothing but an implication that Bobby himself might be the one who held some groundless racial bias, in his case a bias against white police officers. Apparently, unless Edwards and Cotton had shouted vicious racial slurs so that all could hear—especially if a tape recorder or video camera had recorded their words—there could never have been a cognizable race issue in the case.

For his part, Robbie’s opinion was quite clear. As he later wrote:

[I]f you were a person of color, then normal didn’t matter. You could still be considered a suspect in the eyes of the Bellaire police. You didn’t belong, no matter how much you thought you did. It didn’t matter if you stayed out of trouble, paid your taxes, or scored touchdowns for Bellaire High School. If you were black or brown in Bellaire, Texas, you’d better have your papers ready to show to the Bellaire police, or things could turn ugly. I learned how ugly on December 31, 2008.<sup>272</sup>

Even if the refusal of the two lower courts to address the racial context of the case was justified by the absence of specifically race-related “material” facts, their formal reasoning nonetheless suggested the presence of implicit and institutional bias.<sup>273</sup> Whether that bias was simply to favor the police in every conceivable way, or whether it was something more specifically racial, is unknown. In any event, their consistently pro-police reasoning, designing selection of “material” facts, dismissal of the non-moving party’s testimony, one-sided interpretation of the record, evocative choice of descriptive language, and the appellate court’s manufacture of a non-existent “warning,” all seemed consistently slanted, distinctly un-neutral, and at some points arbitrary if not worse. Their reasoning clearly violated the legal principles that are supposed to control motions for summary judgment, and all of those

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<sup>270</sup> *Tolan*, 854 F. Supp. 2d at 457.

<sup>271</sup> *Id.* at 457.

<sup>272</sup> TOLAN & ROSS, *supra* note 128, at 16. “After my shooting incident occurred, a reporter from the *Houston Chronicle* decided to interview some of the 150 black residents of Bellaire and ask them about their experience with the Bellaire police. There was a litany of racial profiling complaints.” *Id.* at 15.

<sup>273</sup> After the Supreme Court’s reversal, the trial judge, like the two officers, made an off-the-point declaration, stating that she “has never expressed a personal bias or prejudice against Robert R. Tolan or in favor of Jeffrey Cotton.” *Settlement Reached*, *supra* note 127.

violations favored the police. Whatever it was that informed the two courts' understanding of the record and animated their reasoning, institutional and implicit bias of one kind or another was surely at work.

#### IV. TWO CONCLUSIONS

##### A. *The Law in the Supreme Court*

In spite of its commitment to fairness, neutrality, and justice, American procedural law in its application is hardly immune from the influences of the nation's long racial history and ingrained cultural biases. *Allen*, *Harlow*, and *Tolan* all reveal that disturbing truth in varying ways. In *Allen* the racial bias in the Court's reasoning was likely entirely unconscious, and in *Harlow* the racial consequences of its ruling may have been far from the Court's mind. In *Tolan*, conversely, there may have been a glimmer of recognition. In their different ways, however, all reflected the persistence of racial bias in the American legal system and its presence in the application of its "neutral" and "colorblind" procedural rules.

However unconscious the racial assumptions and unintended the racial consequences of the first two cases, it is worth noting that both exhibited the same distinctive characteristic that revealed their shared social and cultural genesis. Each showed a special concern for ostensibly "innocent" people—in civil rights cases almost invariably white—who might somehow be harmed or disadvantaged by the claims of Black plaintiffs. *Allen* criticized the relief that the Black parents sought by noting that it could harm innocent, non-discriminating white people,<sup>274</sup> while *Harlow* defended its new immunity test on the ground that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty."<sup>275</sup> Both cases illustrated the fact that beginning in the 1970s, members of the Court began revealing a preference for protecting white people whom they conceived of as "innocent" over Black people who were asserting constitutional injuries.<sup>276</sup> To the same point, the post-Nixon Court frequently emphasized the importance of barring "frivolous" and "insubstantial" claims, but it consistently passed over the equal importance of eliminating "frivolous" and "insubstantial" defenses. Virtually never, for example, did it mention the acute threats to justice caused by such social and institutional forces as the

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<sup>274</sup> See text *supra* at notes 60–61.

<sup>275</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

<sup>276</sup> See, e.g., sources cited in Section III.A, *supra*.

“blue wall of silence” with its attendant deceptions and cover-ups.<sup>277</sup> Its orientation had distinctively disparate racial consequences, none of which favored Black people.

*Tolan* stands apart from *Allen* and *Harlow* and suggests different conclusions. Five seem warranted. The first one is obvious. On the facts, the Court corrected a serious and obvious misapplication of the law of summary judgment.

Second, the Court’s decision highlighted the largely uncabined discretion that courts enjoy in ruling on motions for summary judgment. It demonstrated the troubling truth that different individuals view “facts” differently in terms of whether they are “material” and whether they create “genuine disputes.” Further, it demonstrated the acute danger in motions for summary judgment that judicial discretion may allow implicit and institutional racial biases to influence or control the results. The Court’s decision in *Tolan* should serve as a serious caution to lower courts when they consider those motions.

Third, the Court’s opinion failed to address the underlying substantive legal question that *Tolan* raised so dramatically. When police actions lead to the injury or death of those whom the officers are sworn to protect, just how many mistakes, misjudgments, provocations, and abuses can they pile on top of one another and still avoid civil or criminal liability? By authorizing the courts to focus only on a final, split-second act of police violence, the law allows the courts to refuse to consider whether and how the police themselves may have caused needless injuries and deaths. The law should not preclude accountability so sweepingly for those it authorizes to carry a badge, a truncheon, and a gun and certainly not in cases like *Tolan* where the true “totality of *all of the circumstances*” points so clearly not only to serial and egregious police faults but also to the likely influence of racial bias.

Fourth, the Supreme Court’s opinion—focusing narrowly on four specific fact disputes but passing over the wider range of ways in which the lower courts misapplied the law and improperly favored the police—illustrates how “the law” generally finds ways to avoid addressing the issue of

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<sup>277</sup> Barry Wright, *Civilianising the ‘Blue Code’? An Examination of Attitudes to Misconduct in the Police Extended Family*, 12 INT’L J. POLICE SCI & MGMT. 339 (2010); Thomas Nolan, *Behind the Blue Wall of Silence: Essay*, SAGE J., <https://doi.org/10.1177/1097184X09334700> (2009); Jerome Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RSCH. 7 (2002); Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1997-1998); THE CITY OF NEW YORK, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT (1994).

racial bias or hides it behind a facade of technical and abstract reasoning. Absent stark and weighty evidence on point, courts are loath to consider the possible impact of racial bias because it so often presents an exceptionally difficult issue to prove. As a consequence, the law either ignores those issues completely or tries to deal with them obliquely under the cover of social generalities and legal formalities. As understandable and perhaps even largely necessary as that practice may be, it means that the law leaves much open space for implicit and institutional racial biases to operate.

Finally, and as a ray of hope, the Court's action may possibly reveal a dawning, if still faint and inchoate, recognition of the role that racial bias plays in the actions of police officers and, even more important, the role it may play in the decisions of the courts themselves. Further, it may also suggest that some of the Court's members might be willing to take some small steps—even if indirect and covered by legal formalisms—in an effort to reduce its baneful effects. If so, qualifying the causal reasoning in *Allen*, modifying *Harlow* at least in civil rights actions by Black people, and scrutinizing more rigorously grants of summary judgment for police officers would be perfect places to start.

In *Tolan*, the NAACP submitted an amicus brief that called the Court's attention to the existence and possible influence of implicit racial bias.<sup>278</sup> The legal errors the lower courts made, the brief argued, were “particularly problematic where, as here, indicia of racial bias taint the underlying facts.” More specifically, the brief noted that “the Court of Appeals did not consider the influence of subconscious stereotypes, falsely associating race with criminality, aggression, and violence.”<sup>279</sup> It spent seven pages explaining how and why “the facts suggest that unconscious bias may have influenced the actions” of Edwards and Cotton,<sup>280</sup> and it cited a number of legal analyses and psychological studies to show the importance of implicit racial bias and how it influences human behavior. The brief then urged courts to “scrutinize for signs of implicit bias where, as here, the evidence prompts ‘suspicion’ that official decisionmaking was influenced by ‘impermissible assumptions’ or ‘invidious stereotypes’.”<sup>281</sup> It concluded specifically that “Sergeant Cotton's

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<sup>278</sup> Brief for NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae Supporting Petitioner, at 4, 19–25, *Tolan v. Cotton*, 572 U.S. 650 (2014) (No. 13-551).

<sup>279</sup> *Id.* at 4.

<sup>280</sup> *Id.* at 19.

<sup>281</sup> *Id.* at 24 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 464–65 (1985) (Marshall, J., concurring in part and dissenting in part)).

evaluation of the scene, prompting the use of lethal force in asserted self-defense, may have been shaped by the implicit biases just described.”<sup>282</sup>

One could speculate that *Tolan* was a case where an amicus brief might have played a pivotal role in a Supreme Court decision.<sup>283</sup> Implicit and institutional racial biases surely seem the most likely explanations for all that happened that night in the Tolans’ front yard, and it seems reasonable to speculate that the NAACP’s stress on the role of implicit racial bias may have lurked behind the decision of the justices to reverse.<sup>284</sup> It is hard to fathom the abuse and violence that occurred in the case or the way the lower courts exercised their discretion without considering the likely presence of implicit and institutional racial bias.

Ultimately, then, *Tolan*, may offer some hope of change. Its reversal of the summary judgment for the officers suggests that the Court might have inched toward a recognition of the pervasive influence of implicit and institutional racial bias and the intrinsic danger of judicial discretion in summary judgment.<sup>285</sup> The four narrow and specific grounds it cited for reversing the lower courts may have been merely the technical legal tools it found serviceable in seeking to reign in a far more insidious legal practice and a far more destructive social wrong.

### B. *The Law in the Real World*

The real world significance of *Tolan v. Cotton*, however, seems far less promising.

After the Court’s remand, the Fifth Circuit sent the case back to the district court and to the same trial judge who had dismissed it initially. In a subsequent proceeding the judge denied Robbie’s efforts to put on additional witnesses to testify about his beckoning major league baseball career and the

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<sup>282</sup> *Id.* at 24.

<sup>283</sup> On the influence of amicus briefs in the Supreme Court, see generally Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC. REV. 917 (2015).

<sup>284</sup> The Court noted, abstractly but nonetheless pointedly, that “witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases.” That fact, it continued, was part of the “reason that genuine disputes are generally resolved by juries in our adversarial system.” *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (per curiam). Then it ruled: “By weighing the evidence and reaching factual inferences contrary to *Tolan*’s competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.” *Id.*

<sup>285</sup> Conversely, the concurring opinion of Justice Alito, joined by Justice Scalia, suggested the contrary. It argued that cases like *Tolan*, in which the lower courts “invoked the correct standard,” were “utterly routine” and should not burden the Court’s docket. *Id.* at 661 (Alito, J., concurring).

losses he suffered as a result of the shooting. Then the judge refused to recuse herself and denied Robbie's motion to compel her removal. Recognizing the highly unfavorable situation they faced, the Tolans finally surrendered. They accepted the city's offer to pay Robbie \$110,000 while refusing to admit any wrongdoing whatsoever.<sup>286</sup>

The Tolan family was crushed. Robbie went through a long recovery period of "constant excruciating pain," saw his promising baseball career destroyed, and was finally forced by the long physical and legal ordeal to reluctantly accept a settlement that he knew was unjust.<sup>287</sup> Marian grew increasingly angry and frustrated because she had been committed to "holding the police responsible for what they did," and Robbie's decision to settle led to a distressing conflict between the two.<sup>288</sup> "So our relationship suffered," Robbie wrote with anguish.<sup>289</sup> For his part, Bobby agonized over the police intrusion and what had happened to his son that night until, a week and a half after the shooting, he was rushed to a hospital for double bypass surgery.<sup>290</sup> The family was compelled to give up its home to pay all the legal fees, and Bobby, a former well-known major league baseball player, was reduced in his old age to driving a car for Uber in order to support his family.<sup>291</sup>

Marian captured the family's agony. "Though I still have my son, I've had to watch his dreams and part of his spirit die," she grieved. "We've given up so much as a family for a chance at justice, a chance at peace, a chance at being whole again." The law allowed the Tolans none of those things. "This," Marian lamented, "has been a horrific experience."<sup>292</sup>

Sergeant Cotton fared well. He was not reprimanded but rewarded. The Bellaire Police Department promoted him to lieutenant.<sup>293</sup>

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<sup>286</sup> Barajas, *supra* note 224; *Settlement Reached*, *supra* note 127.

<sup>287</sup> TOLAN & ROSS, *supra* note 128, at 44, 224–26. "I lost my career. And I got nothing. Nothing. Not even an apology." *Id.* at 231.

<sup>288</sup> *Id.* at 224–26. "We wouldn't get a settlement that sent a message to the world that you can't just shoot black people when you want and get away with it." *Id.* at 226.

<sup>289</sup> *Id.* at 225.

<sup>290</sup> *Id.* at 223; Darcel Rocket, "Aren't You That Guy That Got Shot?": *Victim Talks About Life After a Police-Involved Shooting*, CHI. TRIB. (Feb. 10, 2018), <http://chicagotribune.com/lifestyles/sc-fam-robbie-tolan-no-justice-0227-story.html> [<https://perma.cc/6B8F-75YJ>].

<sup>291</sup> TOLAN & ROSS, *supra* note 128, at 224. "My father," Robbie wrote, "embodied the hero who did his best to hold on as his son struggled to find justice, with no guarantee that he'd find it." *Id.* at 224.

<sup>292</sup> *Settlement Reached*, *supra* note 127.

<sup>293</sup> Barajas, *supra* note 224; TOLAN & ROSS, *supra* note 128, at 231.

The trial judge continued to sit on the United States District Court for the Southern District of Texas and in 2018 took senior status, a position she continues to hold. When Robbie had attempted to have her removed from the case after the remand, she denied his motion and proclaimed that she “has never expressed a personal bias or prejudice against Robert B. Tolan or in favor of Jeffrey Cotton.”<sup>294</sup> Then, she announced that she was “very tempted to grant” Cotton’s motion for summary judgment once again and to do so for the very same reasons she had granted his summary judgment motion three years earlier. “I have a lot of faith in my [original] opinion,” she boasted to the courtroom, and “I thought it was right the first time.”<sup>295</sup>

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<sup>294</sup> *Settlement Reached*, *supra* note 127.

<sup>295</sup> Barajas, *supra* note 224; *Settlement Reached*, *supra* note 127.