

BOOK REVIEW SYMPOSIUM

SEEING RACISM IN REAL TIME

Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain.
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I am delighted to have the opportunity to write this commentary inspired by Linda McClain's wonderful book, *Who's the Bigot?: Learning from Conflicts over Marriage and Civil Rights Law*. It is particularly valuable for the way it centers the place of religious thought in exploring the idea of bigotry in American law and political culture, particularly with its focus on marriage. I was struck by how the book is framed with the idea of examining the puzzles of bigotry: bigotry and motive, bigotry and reasonableness, bigotry and time, and bigot as a distinct type versus the bigot in all our brains. Thinking about these framing puzzles and reflecting upon where we are today, I have three general observations.

First, the issue of the bigot as a distinct type versus the bigot in all our brains is an area that is perhaps most closely related to my own work on implicit bias and my arguments about how problematic it has been over the past decades to elevate it into a sort of master narrative for talking about issues of racial justice.¹ For example, think about the incident at a Philadelphia Starbucks a couple of years ago, when two Black men came in and sat down without ordering anything. When approached by the manager, they informed her that they were waiting for a third person and would not be ordering anything at that time. The manager called the police and had the men arrested. A video of the arrest led to a widespread public outcry.² Starbucks, to its credit, subsequently shut down all its stores for an afternoon of implicit bias training.³ Starbucks's CEO, Kevin Johnson, released a video containing a public apology, with the now all-too-common refrain: "This is not who we are."⁴

The problem is that what happened in the Starbucks was not implicit bias: it was racism. Implicit bias, as a psychological concept, involves reflexive attitudes and responses beyond conscious awareness or control. There was nothing reflexive going on in this incident. The manager saw these Black men come in, she went up and spoke with them, she went back to her station, she called the police, and she watched them being hauled off in handcuffs. There was nothing implicit or unconscious

1 Jonathan Kahn, *Race on the Brain: What Implicit Bias Gets Wrong about the Struggle for Racial Justice*, (New York: Columbia University Press, 2017).

2 Kelly McCleary and Amir Vera, "A Video of Black Men Being Arrested at Starbucks. Three Very Different Reactions," CNN, April 15, 2018, <https://www.cnn.com/2018/04/14/us/philadelphia-police-starbucks-arrests/index.html>.

3 "Starbucks to Close All Stores Nationwide for Racial-Bias Education on May 29," Starbucks (website), April 17, 2018, <https://stories.starbucks.com/press/2018/starbucks-to-close-stores-nationwide-for-racial-bias-education-may-29/>.

4 "Beyond May 29: Lessons from Starbucks Anti-bias Training—And What's Next," Starbucks (website), July 2, 2018, <https://stories.starbucks.com/stories/2018/beyond-may-29-lessons-from-starbucks-anti-bias-training-and-whats-next/>.

going on but what seems to be a series of deliberate acts. Just because she may not have recognized it as a racist act in the moment does not mean it was not one.

In the aftermath of the recent election and the storming of the US Capitol on January 6 by a mob of authoritarian white supremacists who were incited, aided, and abetted by numerous politicians and pundits in positions of great power and influence, we need to revisit the tired old disclaimer of “this is not who we are.” If “we” is to be taken as a sizeable portion of the nation (or even simply a sizeable portion of Starbucks employees) then it must be admitted that this is precisely who “we” are and who we have been for a very long time. Some of us, perhaps even a majority of us, wish this were not the case. But denial is not going to help us address the problem. And neither, unfortunately, is implicit bias training, no matter how well intentioned. What is needed is clarity and accountability. That is, this is not just about bias, it is about power.

What I want to do here is simply make an observation, perhaps in the form of proposing a useful heuristic for thinking in a general way about the issue of “who we are.” Think about the difference between telling a lie and being a liar. Everybody tells lies from time to time. But not everyone is a liar. A liar is someone for whom lying is a way of being in the world: it is a habit, a reflex, a mode of engagement. At what point does someone cross the line from telling the occasional lie to being a liar? It is hard to say. But perhaps, like Justice Potter Stewart’s reflection on pornography, we know it when we see it. This, too, goes to McClain’s discussion of time and context in assessing the nature of bigotry.

I think racism can be thought of similarly, at least when we are speaking about individuals. Anyone in a position of racial privilege is capable of committing a racist act or making a racist statement. I do not believe that necessarily makes them a racist. But nor do I believe that that means we should not call those acts racist. In this context, nuance is difficult, but it is important to try to be attentive to how the line between saying racist things and being a flat out racist can be crossed.

Second, I think McClain’s attention to the temporal aspect of bigotry is critical. It is striking and important that early in the book she quotes Justice Anthony Kennedy in the case of *Obergefell v. Hodges*: “The nature of injustice is that we may not see it in our own time” (17).⁵ Identifying racism in real time is, indeed, the challenge of the moment. Nobody ever thinks they are a bigot.

Speaking on the floor of the US Senate in the 1830s John C. Calhoun expounded upon the many blessings that slavery conferred upon those who were forcibly abducted from their homelands in Africa.⁶ In this frame, slavery itself was not a bad thing, even though many abolitionists of the time, not to mention the enslaved people themselves, were keenly aware that it was evil. In 1883, a mere thirteen years after the ratification of the Fifteenth Amendment, Justice Joseph P. Bradley in the Civil Rights Cases radically weakened the Reconstruction Amendments, declaring, “When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.”⁷ The urge here to leave concerns for racial justice behind, to characterize them as transcended by the passage of time, is powerful.

This theme winds through the 1896 majority opinion in *Plessy v. Ferguson*, in which the Court declared that if “the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . it is not by reason of anything found in the act, but solely because the colored race

5 Quoting *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

6 John C. Calhoun, “Speech on the Reception of Abolition Petitions, February, 1837,” in *Speeches of John C. Calhoun* (New York: Harper and Brothers, 1843), 222–26, at 224.

7 Civil Rights Cases, 109 U.S. 3, 25 (1883).

chooses to put that construction upon it.”⁸ Justice Brown here was saying, in effect, that separate but equal was not the slavery of Calhoun’s America, nor did it confer any badge of servitude upon the Black race, so there was nothing wrong with it.

In 1957, three years after *Brown v. Board of Education* overturned Plessy, the white citizens of Levittown, Pennsylvania, could protest the integration of their community, stating that they held no animus toward Black people; merely they thought it best that they have an equal opportunity to form their own separate communities. And, so, they declared, “We, the citizens and homeowners of Levittown, Pennsylvania, protest the mixing of Negroes in our previously all-white community. As moral, religious and law-abiding citizens, we feel that we are unprejudiced and undiscriminating in our wish to keep our community a closed community. In as much as having equal rights, the Negroes have an equal opportunity to build their own community of equal value and beauty without intermingling in our community.”⁹

In this statement, the white citizens of Levittown formally acknowledged the equal rights of African Americans, believing that this absolved their sentiments of any taint of racism. They embraced ideologies of equal opportunity and “separate but equal” in the same breath. Always there is the explicit disavowal of racism. But an explicit disavowal does not mean that explicit racism itself is not present.

And in 2013, we had Chief Justice Roberts in *Shelby County v. Holder* gutting the Voting Rights Act on the rationale that since 1965 “things have changed dramatically.”¹⁰ Perhaps this was a little longer than the thirteen years identified by Justice Bradley back in 1883 but the sentiment resonates. Enough already with this racial justice stuff, racism is a thing of the past. Let’s move on!

Roberts’s conclusion is particularly striking not simply for the way it dismisses the ongoing significance of the historical legacy of the past fifty-year struggle for voting rights but also, as Reva Siegel notes, for the way Roberts’s opinion “effaces the history of the Civil War and the Second Reconstruction.”¹¹ I would perhaps modify that to characterize Justice Roberts’ treatment of history not as “effacement” but as “dismissal.” He simply does not deem it relevant to current practices. As Patricia Williams noted, “the Roberts majority is prone to an extreme ahistoricism. In *Shelby County v. Holder*, Roberts threw out the oversight provisions of the Voting Rights Act based on an apparent commitment to live entirely in the ‘present’—a present entirely disconnected from reality.”¹²

It is hard to identify injustice in one’s own time. It is especially hard if one dismisses history as irrelevant. So much of our understanding of this history is about seeing and perception. What are we able to see in our own time and how do we respond to it?

This brings me to my third observation, which concerns the events of the summer of 2020 and the response to the killing of George Floyd in Minneapolis—in particular the response of white people. Many commentators were struck by the multiracial character of the protests across the nation—especially in comparison to earlier similar protests. Thinking about this in relation to the questions of morality and animus that McClain explores with such subtlety and nuance in relation to conflicts over marriage law led me to ask: What in popular perceptions of such incidents had

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

9 David Kushner, *Levittown: Two Families, One Tycoon, and the Fight for Civil Rights in America’s Legendary Suburb* (New York: Walker, 2009), 112.

10 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 531 (2013).

11 Reva B. Siegel, “Foreword: Equality Divided,” *Harvard Law Review* 127, no. 1 (2013): 1–94, at 71.

12 Patricia J. Williams, “The Roberts Court’s Civil Rights Denialism,” *The Nation*, July 2, 2013, <http://www.thenation.com/article/175087/roberts-courts-civil-rights-denialism#>.

changed, particularly in terms of Justice Kennedy's admonition about the difficulty of seeing injustice in our own time? Of course, what Justice Kennedy should have said, is that it is hard for those who are perpetrating or complicit in injustice to identify it in their own time. It has rarely been difficult for those being subjected to repressive power to see it for what it is.

And so, in thinking about "seeing" the injustice, my thoughts naturally turned to the power of the infamous video of the killing of George Floyd. What is it that white people saw in this video that they did not see in the myriad other horrific videos we have been confronted with over the past decade? I think one thing they saw was Officer Derek Chauvin staring brazenly, enduringly, and persistently into the lens of the camera. I call this the gaze of complicity. What I mean by this is that if you were a white person watching this video, he was staring at YOU, inviting you to become complicit in his act of murder.

Not to respond, not to reject his invitation, not to protest, would make you complicit. It forced people in real time to confront the difference between having certain racist sentiments, having sometimes said racist things, and being a racist. Accepting Officer Chauvin's invitation would not be like crossing over to the other side of the street when you see a Black male teenager walking toward you. It would not be like assuming the Black person at the reception was serving staff rather than a guest or making fun of what you perceive to be a "funny" Black person's name. It would be more akin to being one of the people a century ago who had their picture taken in front of a lynching. And so, many white people marched alongside so many BIPOC¹³ people.

Where does this leave us? These basic observations certainly do not help us get at the heart of larger structural and systemic aspects of racial injustice in this country. I think they do, however, give us a window on the dynamics of animus and morality that McClain explores in her book. They give us a sense of what sorts of events, or contexts, or framings can help us build deeper understandings of the particular manifestations of injustice in real time and an appreciation of our complicity—or not—in maintaining them. The question, perhaps, is not only "who's the bigot?," but at what point do we cross the line between being someone who, like all humans, is flawed and sometimes acts in bigoted ways or holds bigoted beliefs, into being someone who is or should be defined by our bigotry as a bigot and accordingly held to account.

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¹³ Black, Indigenous, and People of Color.