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Teaching *Whren* to White Kids

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TEACHING *WHREN* TO WHITE KIDS

M.K.B. Darmer*

This Article addresses issues at the intersection of United States v. Whren and Grutter v. Bollinger at a time when the reality of racial profiling was recently illustrated by the high-profile arrest of a prominent Harvard professor. Given the highly racialized nature of criminal procedure, there is a surprising dearth of writing about the unique problems of teaching issues such as racial profiling in racially homogeneous classrooms. Because African American and other minority students often experience the criminal justice system in radically different ways than do Whites, the lack of minority voices poses a significant barrier to effectively teaching criminal procedure. This Article critiques current law school pedagogical approaches and suggests that we must both re-think academic methods for teaching criminal procedure within the classroom and expose “post-racial” mythologizing outside the classroom.

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INTRODUCTION

The recent ascension of Judge Sonia Sotomayor to the Supreme Court, like the high-profile arrest of Harvard University Professor Henry Louis Gates Jr.,¹ has revived conversations regarding race-consciousness. The latter event has also called attention to the continuing reality of racial profiling. This Article addresses the unique problems of teaching racialized issues of criminal justice in racially homogeneous classrooms. The Supreme Court case *United States v. Whren*² implicitly legitimized racial profiling, and has been roundly condemned by many in the academic community.³ The full force of *Whren*'s insidious impact can be easily overlooked, however, especially by students who themselves have never been victims of racial profiling. When students of color are present and participatory in classrooms, discussions tend to be more rich and nuanced. When minority voices are lacking, classes are impoverished. It is difficult to appreciate the full implications of *Whren* and issues like racial profiling without the benefit of first-hand narratives describing the ways in which police officers frequently interact with minorities. Accordingly, we must re-think the way that criminal procedure is taught, particularly when classrooms are predominantly White.⁴

1. See, e.g., Charles Ogletree, Brief Statement on Behalf of Professor Henry Louis Gates, Jr., E-mail from Charles Ogletree, Jesse Climenko Professor, Harvard Law School, (July 20, 2009) (describing arrest of Harvard colleague at his own home on suspected "breaking and entering charge" even after Professor Gates provided valid university identification bearing his photograph and a driver's license bearing his photo and address) available at <http://www.theroot.com/views/lawyers-statement-arrest-henry-louis-gates-jr>

2. 517 U.S. 806 (1996).

3. See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) and *infra* notes 23–24, 40 and 51 and accompanying text.

4. Because the *Whren* case involved African American defendants, I distinguish herein primarily between the experiences of "Blacks" and "Whites," while recognizing that those terms themselves can be ambiguous. Professor Reggie Oh has pointed out that one can think of whiteness, for example, as a physical, biological, cultural and/or or spatial construct with "physical whiteness" requiring interpretative observation. (Notes from Remarks of Professor Reggie Oh, LatCrit XIII Conference, Seattle, WA, Oct. 2008) (on file with author). It is this "physical whiteness" or "physical blackness" that plays out most often in the context of racial profiling, with police officers making observations and drawing conclusions based on those observations. My borrowing of the term "White privilege" from other scholars, in this context, means the privilege experienced by Anglos or those perceived to be Anglos. It is a privilege that is infrequently experienced by those who are perceived by law enforcement to be Blacks or Latinas/os. See, e.g., Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 345–46 (2003) (noting that "Border Patrol Agents routinely admit that a person's 'Hispanic appearance' contributed to their decision to arrest a person"). Thus, my focus on the experiences of African Americans does not mean to suggest that other minority groups are not also subject to discriminatory treatment at the hands of law enforcement. See generally Johnson, *supra* at 344–45 (detailing experiences of Latinas/os and Asian Americans).

This Article draws on the important work of Professor David A. Harris, which examines the corrosive effects of profiling. David Harris has made a sustained and systemic critique of the pernicious effects of *Whren*. Moreover, his “modest proposal” for greater data collection to effectively expose the extent of racial profiling has had enormously beneficial effects in unmasking the full extent of the problem.⁵

While there is abundant scholarship about *Whren* itself, and many articles about affirmative action in the wake of *Grutter v. Bollinger*,⁶ I focus here specifically on the problem of homogeneity in many criminal procedure classrooms, an issue underdeveloped in existing scholarship.⁷ Perhaps in no other area of the law do Whites and minorities have as vastly different experiences as they do in the context of the criminal justice system. In order to reduce those disparities and improve the system, minority voices are critical to legal education and legal progress.

Following this Introduction, Part I briefly describes some of the ways in which minorities and Whites experience the criminal justice system differently and provides a description of the *Whren* case and the explosion of racial profiling in its aftermath. Part II describes limitations on the ability to effectively teach racially charged issues when minority voices are lacking, as they currently too often are in law schools in the United States. Finally, Part III addresses particular ways in which we may begin to overcome current limitations endemic to modern legal education. I note that my suggestions and conclusions are preliminary, and that I view this piece as an initial step of a broader and more comprehensive project.

PART I: RACE AND THE CRIMINAL JUSTICE SYSTEM

The premise that minorities and Whites in this country experience the criminal justice system in radically different ways should be uncontroversial; and yet, criticism of the Sotomayor nomination illustrates that appeals to race-consciousness remain polarizing.⁸ Despite that controversy, it is well documented that, for example, African Americans are incarcerated at much higher rates than are Whites and are more likely to be

5. See, e.g., David Harris, *The Reality of Racial Disparity in the Criminal Justice System: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 73 (2003).

6. 539 U.S. 306 (2003).

7. I am indebted, however, to the scholarship of Professors Kimberlé Williams Crenshaw, Margalynne J. Armstrong, Stephanie W. Wildman and others with regard to the importance of a race-conscious pedagogy in the classroom, including a pedagogy that recognizes the systemic effects of “white privilege.”

8. See Editorial, *Court Won't Change Much*, DESERET MORNING NEWS, (Salt Lake City, Utah), May 27, 2009 at A10 (“We had hoped that, with the election of President Barack Obama, Americans were beginning to move away from the politics of a divisive type of race consciousness.”).

wrongly convicted,⁹ that there is racial discrimination in capital sentencing,¹⁰ that the 100-1 sentencing disparity between crack cocaine and powder cocaine¹¹ has fallen disproportionately on African Americans,¹² and that in street encounters with police, African Americans and Latinas/os are likely to be treated quite differently than Anglos.¹³

Nor does the election of Barack Obama mean that we now live in a “post-racial” society. While there may be reason to hope that President Obama will be a strong voice of condemnation with regard to the practice of racial profiling,¹⁴ deeply entrenched police practices tend to change slowly. Moreover, as Professor N. Jeremi Duru has written, “[t]he myth of inherent black criminality has remained . . . stubbornly entrenched in American consciousness.”¹⁵ The myth was exploited and personified by the famous “Willie Horton” advertisements during the 1988 Election, featuring “Horton’s dark visage, prominent Afro and unkempt beard”¹⁶

That myth is unlikely to dissolve based on the election of a mixed-race president a mere twenty years after Horton was described as “‘every suburban mother’s greatest fear.’”¹⁷ As Justice Ginsburg recently recog-

9. See Harris, *supra* note 5, at 71–72 (conviction rates); Andrew Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.–C.L. L. REV. 393, 417 and n.171 (2009).

10. See Phyllis Goldfarb, *Pedagogy of the Suppressed: A Class on Race and the Death Penalty*, 31 N.Y.U. REV. L. & SOC. CHANGE 547–48, 550 (2007).

11. See Harris, *supra* note 5, at 72; see also Margalynne J. Armstrong and Stephanie M. Wildman, *A Tribute to Professor John O. Calmore: Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 640 n.15 (2008).

12. See Harris, *supra* note 5, at 72 (“The ‘crack’ form of cocaine was much more commonly possessed by black sellers than by sellers of other races; the powdered form was found much more commonly among whites.”).

13. See *infra* notes 54–59 and accompanying text; see also Taslitz, *supra* note 9, at 419 (noting that “evidence of racial bias in decision making arises at every stage of the criminal process—from arrest, to the setting of bail, to the effectiveness of defense counsel, to guilty pleas outcomes, to sentencing.”); see also *id.* at 425–426 (providing specific examples of different treatment of White and minority defendants) and 434 (“Merely being in courtrooms and prisons where a black offender sees a sea of nearly all black faces must raise suspicions that something is amiss.”).

14. Obama was, of course, critical of the Gates arrest, but tempered his initial criticism of the Cambridge police after coming under heavy criticism himself for his statements about the matter.

15. N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, And The Myth Of The Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1342 (2003–2004).

16. John Tehranian, *Selective Racialization: Middle Eastern Identity and the Faustian Pact with Whiteness*, 40 CONN. L. REV. 1201, 1209 (2008).

17. *Id.* at 1209 (quoting Martin Schram, *The Making of Willie Horton*, THE NEW REPUBLIC, May 28, 1990, at 17); see also Notes, Presentation of Professor Camille A. Nelson, Lat Crit XIII, Oct. 3, 2008 on *Examining our Post-Racial Selves: Obama as Balm for What Ails Us* (disagreeing that election means we live in “post-racial” society) (notes on file with author).

nized in *Grutter*, “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”¹⁸ While the specific practice of racial profiling may decrease under an Obama Administration, it will not disappear. Police officers will doubtless continue to rely on racial assumptions.

A. *The Reality of White Privilege*

Somewhat ironically, I was stopped by a police officer on the way to the LatCrit XIII conference where I planned to discuss racial aspects of traffic stops. I was running late when I noticed flashing lights and a siren unmistakably directed at me. In that moment of being “caught” (I had rolled through at least one stop sign, and was probably also speeding), I felt a pang of alarm as I was jolted out of a reverie by the siren. Yet my alarm was circumscribed, because after all, there were limits to what I would face. I am a suburban, White female driving a newish but relatively inexpensive and small SUV. Cops tend to treat people like me pretty well. Nor has my immediate family suffered from discrimination at the hands of law enforcement. Despite the fact that my spouse is half Latino and my children, one quarter Latina/o, their coloring and physiognomy easily “pass” them as Anglos, and we are routinely waved through border checkpoints. Indeed, the only time I have been detained for any length of time at a border checkpoint was when returning to New York from Canada in the company of a Cuban-American friend in law school.

Thus, despite a slight case of nerves, I was pretty sure of what would happen and, more importantly, what would not happen: I would not be frisked. I would not be pulled out of my car. I would not be asked if I had a weapon. I would not be asked if there were drugs in the car. I would not be asked if I had a criminal record. I would not be treated harshly. My whiteness endows me with benefits that were realized that day. The officer, as expected, treated me politely, gave me a ticket for one offense and a warning for a second, and allowed me to proceed on my way expeditiously. I benefited directly from “White privilege.”

Professors Armstrong and Wildman of Santa Clara Law School address the issue of unacknowledged “White privilege” in their important article, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*.¹⁹ They draw on the work of Peggy McIntosh, who has provided the memorable metaphor of a knapsack in describing that privilege:

18. *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring); see also *id.* at 333–334 (noting that in our society, “race unfortunately still matters”) (majority opinion).

19. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 645–47 (2008).

McIntosh explains that white privilege can be likened to “an invisible package of unearned assets.” The holder of this package remains oblivious to its presence yet can reliably depend on its contents. . . . “White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” White privilege both benefits individuals and maintains systematic subordination of non-Whites.²⁰

It was perhaps only because I had recently heard Professors Armstrong and Wildman speak²¹ that I was consciously aware of the privileged nature of my own encounter with the police on October 2, 2008. Encounters between African American drivers and the police are frequently much more fraught. Moreover, despite widespread condemnation of the practice of “racial profiling,” such profiling occurs every day on our roadways.

B. *The Whren Case*

The Supreme Court case *Whren v. United States*²² is not explicitly about racial profiling,²³ but it insidiously legitimates the practice.²⁴ The facts are uncomplicated. “Youthful” African American occupants of a dark Pathfinder truck with temporary license plates attracted the attention of undercover police officers.²⁵ The Pathfinder remained stopped at a stop sign for more than twenty seconds after the police observed the driver “looking down into the lap of the passenger at his right.”²⁶ When the police executed a U-turn to return to the Pathfinder, the truck “turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’

20. *Id.* at 672 (quoting Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 22, 23 (1995)).

21. They presented their work at the annual Society of American Law Teachers (“SALT”) conference in 2008.

22. *Whren v. United States*, 517 U.S. 806 (1996).

23. See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 370 (2001) (“At first blush, *Whren* would seem to have little to do with issues of race, and in fact the Court decided it in just this way. But on closer examination, we see that the issue of racial discrimination in the way police enforce the law ran through the whole case, and was brought directly to the Court’s attention.”).

24. See I. Bennett Capers, *Canaries, The Fourth Amendment, and the Equality Principle* 33 (Jan. 15, 2009) (unpublished manuscript, draft on file with the author) (in *Whren*, “the Court gave its imprimatur to pretextual stops”).

25. *Whren*, 517 U.S. at 808, 810.

26. *Id.* at 808.

speed.”²⁷ Officers approached the Pathfinder, ostensibly to give the young men a “warning.”²⁸

Undercover officers, however, are not normally in the business of monitoring traffic violations.²⁹ Rather, it appeared that the officers were motivated to issue the warning in order to do an investigation into potentially more interesting matters. Approaching the Pathfinder for the alleged purpose of giving a warning put the officer in a position to see into the vehicle.³⁰ He saw drugs, and arrested the petitioners.³¹

The defendants argued that the stop was pretextual.³² If police conduct in that case were allowed to stand, then the extensive nature of the traffic code would give police officers wide discretion to make stops based on technical violations as a means to investigate crimes for which “no probable cause or even articulable suspicion exists.”³³ Thus, the petitioners argued that probable cause to believe a traffic code violation existed should not alone provide reasonable grounds for a stop under the Fourth Amendment.³⁴ Rather, the test for reasonableness for traffic stops should be “whether a police officer, acting reasonably, would have made the stop for the reason given.”³⁵

The Supreme Court disagreed. It is not the Court’s job, said Justice Scalia, to get inside the head of the police officer.³⁶ Scalia wrote for a unanimous Court. The Court interpreted prior case law to prevent it from accepting the argument that assessing a traffic stop’s “reasonableness” under the Constitution “depends on the actual motivations of the individual officers involved.”³⁷ While the Court agreed that the Constitution prohibits “selective” enforcement of the law based on race, it located the remedy for such practices in the Equal Protection Clause, “not the Fourth Amendment.”³⁸ So long as there was probable cause to believe that even a

27. *Id.*

28. *See id.* at 808–09. The race of the petitioners is not given in the Court’s initial description of the facts in the opening paragraphs, but is provided on page 810.

29. Indeed, District of Columbia police regulations permitted plainclothes police officers in unmarked cars “to enforce traffic laws ‘only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.’” *Id.* at 815 (citing Washington, D.C. Department Policy, Metropolitan Police Department, Washington, D. C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)) (emphasis in original).

30. *See id.* at 808–09.

31. *See id.* at 808.

32. *See id.* at 810–12.

33. *Id.* at 810.

34. *Id.*

35. *Id.* (emphasis added).

36. *See id.* at 813: (“We think [prior] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

37. *Id.* at 813.

38. *Id.*

mere traffic infraction was committed, then the stop was reasonable under the Fourth Amendment.³⁹ In terms of a Fourth Amendment remedy, Justice Scalia's opinion dismissed concerns about race in a "cavalier" manner.⁴⁰

Minor traffic violations are ubiquitous. Indeed, we all commit such infractions almost daily— failing to signal, crossing over a solid line to change lanes, driving a few miles over the speed limit, failing to come to a full stop, talking on our cell phones.⁴¹ If an officer with a racist agenda wants to make a stop, he can find a reason.⁴² Professor Harris has pointed out the following:

The defendants told the Court in no uncertain terms that the government's objective standard would give police almost unlimited discretionary power to stop any driver at any time, and that police would almost certainly use this power to stop minorities, especially African Americans, in numbers well out of proportion to their presence on the road.⁴³

C. *The Far-Reaching Tentacles of Whren*

Later cases have only broadened the implications of *Whren*, exacerbating the burdens on minority citizens. Since *Whren*, the Court has held that it is constitutionally permissible to make an arrest even if someone commits a misdemeanor offense carrying a maximum penalty of a fine.⁴⁴

39. See *id.*

40. Harris, *supra* note 23, at 370.

41. See, e.g., Harris *infra* note 43.

42. See *Whren*, 517 U.S. at 810 (noting contention that because "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation").

43. Harris, *supra* note 23, at 375; see also Harris, *supra* note 5, at 95:

Any veteran police officer will gladly attest that there is no such thing as a perfect driver. Everyone violates *some* aspect of the traffic code in *some* way during *any* short drive, and any of these moving or equipment violations constitutes full probable cause for a stop [after *Whren*]. . . . Police officers have always known that the traffic code is law enforcement's friend. It allows an officer to pull over virtually any driver, almost any time, because everyone breaks the traffic laws. The flawless driver has not been born, and never will be. (emphasis added).

44. See *Atwater v. Lago Vista*, 532 U.S. 318 (2001). *Atwater* was a case involving a small town Texas mother's arrest for a failure to restrain her children with seatbelts. There was no alleged racial motive in that particular case and no indication that the petitioner subjected to the arrest was a member of a minority group. However, the holding in the

It is well-settled that an officer who arrests someone also has the authority to make a full warrantless search of the arrestee's person,⁴⁵ and of the entire passenger compartment of the car (at least if the defendant remains nearby).⁴⁶ Thus, under the Court's Fourth Amendment jurisprudence, an officer can stop anyone who commits any sort of traffic infraction, constitutionally arrest the person regardless of the potential penalty, then conduct a full search of the car and the person. This is an extraordinary license for intrusion for the commitment of a mere traffic infraction.

In its most recent case in this line, *Virginia v. Moore*,⁴⁷ the Court upheld the Fourth Amendment validity of a search, even though it was based upon an arrest that was impermissible under state law. In that case, police arrested a motorist for driving with a suspended license; Virginia state law provided that a summons should be used and did not give the police lawful authority to arrest in such circumstances. Nevertheless, police made an arrest, triggering a "search incident to arrest" that proved fruitful. Because Virginia state law did not provide for the exclusionary rule for evidence obtained unlawfully under state law, the defendant raised a Fourth Amendment claim. He argued that, under the federal Constitution, a valid search incident to arrest must be incident to a *lawful* arrest. The Court, however, in another opinion penned by Justice Scalia, held that the search was not unlawful for Fourth Amendment purposes even though in contravention of state law.

Moore continues the trend of broadening police authority to stop and search any motorist who commits a minor traffic violation. Most often this license goes unexercised. Indeed, it would largely be a waste of time for the police to arrest and search everyone who commits such violations. But some people are routinely searched and otherwise subject to indignities based on minor violations. Those people tend to be Black.⁴⁸

The ability of police officers to make traffic stops without providing race-neutral reasons is sharply different from the requirement that

case has pernicious effects on minority drivers, because it further broadens police authority to make stops and arrests on the roadways.

45. See *United States v. Robinson*, 414 U.S. 218 (1973).

46. See *New York v. Belton*, 453 U.S. 454 (1981); see also *Thornton v. United States*, 541 U.S. 615 (2004) (authorizing police to search the entire passenger compartment of a car when the arrestee was a "recent occupant" of the car); cf. *Arizona v. Gant*, No. 07-542, slip op. at 18 (U.S. Apr. 21, 2009) (search of arrestee's car deemed unreasonable where defendant was handcuffed in back of patrol car and not in a position to reach inside his own car to grab anything).

47. No. 06-1082, slip op. (U.S. Apr. 21, 2009).

48. See David Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 269-70 (1999) ("Talk to almost any black person any place in the country and you will hear accounts of pretextual traffic stops. Some say they have experienced it many times. All of those interviewed—not criminals trying to explain any wrongdoing, but people with good jobs and families—described an experience common to blacks, but almost invisible to whites.").

prosecutors provide race-neutral reasons for challenging minorities when selecting juries.⁴⁹ Under the dictates of equal protection, of course, police officers, no less than prosecutors are forbidden to discriminate based on race.⁵⁰ But the practical effect of *Whren* is that most victims of racial discrimination on the roadways are left without a remedy. Anomalously, the net result of the Court's holding in *Whren* is that a traffic stop later deemed unconstitutional under the Equal Protection Clause can still be deemed "reasonable" under the Fourth Amendment. For an unconstitutional stop to be reasonable under a different provision is a cramped reading of constitutional protections that effectively leaves minority drivers vulnerable to systematic discrimination. Making out an equal protection violation often involves years of study and the amassing and analysis of statistical data.⁵¹ Unfortunately, "[w]hatever else the Fourth Amendment does or used to do, it will no longer serve as a tool to prevent racially biased policing" after *Whren*.⁵²

The academic community has made powerful and sustained arguments about the pernicious effects of *Whren*. As David Harris has argued, "[p]retexual traffic stops aggravate years of accumulated feelings of injustice, resulting in deepening distrust and cynicism by African Americans about police and the entire criminal justice system."⁵³

D. Recent Evidence of Racial Profiling

More than twelve years after *Whren*, evidence is overwhelming that racial profiling permeates police practice. On October 20, 2008, the ACLU of Southern California released a report documenting extensive racial disparities in traffic stops in Los Angeles. The report was prepared by Ian Ayres, an economist and professor at Yale Law School and Yale School of Management and his research assistant, Jonathan Borowsky.⁵⁴

The report was based on more than 700,000 traffic and pedestrian stops by Los Angeles police officers in the one-year period between July

49. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

50. U.S. CONST., amend. XIV; see *Whren*, 517 U.S. at 813 (noting that the "constitutional basis" for objecting to discriminatory application of laws by police is the Equal Protection Clause).

51. See Harris, *supra* note 23, at 376 n.52 ("For a catalogue of the formidable array of legal obstacles and practical difficulties plaintiffs in such Equal Protection Clause suits would face, see [Tracey] Maclin, [*Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 365] at n.22 [(1998)]." Cf. Harris, *supra* note 23, at 379-381 (discussing statistical analysis done with respect to selective prosecution claim made in New Jersey).

52. Harris, *supra* note 23, at 376.

53. Harris, *supra* note 48, at 268.

54. The ACLU report is available at <http://www.aclu-sc.org/lapdracialprofiling>; see also Ian Ayres, *Racial Profiling and the LAPD*, Op-Ed, L.A. TIMES (Oct. 23, 2008).

2003 and July 2004.⁵⁵ Ayres found that for every 10,000 residents, 4,569 Blacks were stopped. For Whites, only 1,750 were stopped. For Latinas/os, 1,773 were stopped.⁵⁶ Moreover, “[s]topped Blacks are 127% more likely to be frisked—and stopped Latinos are 43% more likely to be frisked—than stopped Whites.”⁵⁷

After the initial stop, police are also likely to treat members of minority groups more harshly, even though such tactics do not appear to be effective in actually uncovering evidence of criminality. Professor Ayres noted the following:

Stopped Blacks are 76% more likely to be searched, and stopped Latinos are 16% more likely to be searched than stopped Whites.

Stopped Blacks are 29% more likely to be arrested, and stopped Latinos are 32% more likely to be arrested than stopped Whites.

... Although stopped Blacks were 127% more likely to be frisked than stopped Whites, they were 42.3% less likely to be found with a weapon after they were frisked, 25% less likely to be found with drugs and 33% less likely to be found with other contraband. We found similar patterns for Latinos.⁵⁸

Not surprisingly based on this data, Professor Ayres concluded that there are “grave concerns that African Americans and Latinos in Los Angeles are ... ‘over-stopped, over-frisked, over-searched and

55. Ayres, *supra* note 54. The report’s author noted that Los Angeles Police Chief William J. Bratton had rejected the study’s finding because of the age of the data (more than four years old at the time of the study’s release). Ayres defended the use of that particular data because the department “ha[d] not released the more recent stop data ... nor ... analyzed the more recent data for racial disparities.” *Id.*

56. Executive Summary, ACLU report, *supra* note 54; cf. Harris, *supra* note 48, at 275–88 (analyzing statistical data for other communities in earlier years). For example, on the New Jersey Turnpike between 1988 and 1991, “73.2% of those stopped and arrested were black, while only 13.5% of the cars on the road had a black driver or passenger.” *Id.* at 279.

57. Ayres, *supra* note 54. The study controlled for “violent crime rates and property crime rates in specific neighborhoods, as well as a host of other variables ...” *Id.*

58. Ayres, *supra* note 54, at 1–2. Moreover:

Not only did we find that African Americans and Latinos were subjected to more stops, frisks, searches and arrests than Whites, we also found that these additional police actions aren’t because of the fact that people of color live in higher-crime areas or because they more often carry drugs or weapons, or any other legitimate reason that we can discern from the rich set of data we examined.

over-arrested.’”⁵⁹ Despite the prevalence of these disturbing police practices, students in the nation’s law schools are sometimes impervious to them.

PART II: THE LIMITATIONS OF THE MODERN CRIMINAL PROCEDURE CLASSROOM

In Part I, I described my own relatively unthreatening encounter with the police on October 2, 2008. JS, an African American student in one of my classes, had a very different experience at the hands of police some months earlier. He *was* made to get out of his car and wait for a prolonged period. He *was* asked if he had a record. He *was* asked if he had a gun. He *was* asked if he had drugs in the car and the officer *did* react with disbelief that he was not a criminal. JS was my student recently in criminal procedure, and he related this story during our discussion of *Whren*.⁶⁰ He was the only Black male in the class. His story was unique in that class and one of only a handful that have made their way into my classrooms in the nine and one-half years I have been teaching.

Indeed, not once do I recall a female African American student sharing a story of racial profiling; perhaps that is because I can count the number of Black women students I have had on two hands. And, while it may be common to assume that the “crime” of “DWB” (Driving While Black) is most often charged to Black men, discussions of racial profiling too frequently ignore the fact that Black women are also its victims. Whether assumed to be “drug mules” at airports or treated rudely on the roadways, Black women are also subjected to racist stereotyping by law enforcement.⁶¹

Real stories from real people who have been victims of racial profiling have an impact on fellow students (and teachers) that provide critical context for cases like *Whren*. But it is all too easy for White students, many from privileged backgrounds,⁶² to overlook or not discern the racialized dimensions of *Whren*.

59. *Id.* at 1.

60. This story is used with his permission.

61. See notes from Latcrit XIII conference (on file with author); see also Johnson, *supra* note 4, at 349 (noting that, at the border, Black women are “more likely to be subject to intrusive searches” than any other group, including the fact that Black female U.S. citizens are nine times more likely than White female citizens to be subject to x-ray searches, despite the fact that they are less than half as likely as White female citizens to be found carrying contraband as a result of those x-ray searches); Harris, *supra* note 48, at 270–271 (detailing experience of Karen Blank, a social worker pulled over based upon mistaken information regarding traffic tickets and placed in “handcuffs so tight that they left ugly red marks on her wrists for several days”).

62. A colleague at my law school described one popular city in our county, Newport Beach, California, as “the former hometown of John Wayne and an oceanside hamlet

Simply reading Scalia's opinion in *Whren* will not give students a true sense of the racialized dynamics lurking beneath its surface. When the Court was forced to confront earlier cases in which it had suggested that police activity was justified because it was *not* based on pretext, Scalia coolly pronounced the following:

[O]nly an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of the law has occurred. In each [prior] case we were addressing the validity of a search conducted in the *absence* of probable cause.⁶³

Under Scalia's reasoning, a finding of "probable cause" regarding any traffic infraction whatever obviates the need for determining an officer's motive. Scalia skimmed over the crucial point made by petitioners that in the context of the traffic code, there will almost always be probable cause to believe that some violation has occurred, leaving minority drivers open to abuse. One can profile with impunity because, in essence, "*Whren* means that police officers can stop any driver, any time they are willing to follow the car for a short distance."⁶⁴

Scalia briefly discussed the traffic code argument at the end of the *Whren* opinion:

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.⁶⁵

Scalia's stated concern that no "principle" would have allowed the Court to find for the petitioners ignores the text of the Fourth Amendment itself—its requirement that no search be "unreasonable" is surely flexible enough to allow consideration of the risk of an officer's abuse of discretion where a labyrinthine code gives him *carte blanche* to stop virtually anyone. Particularly when one considers that the police conduct in

renowned as a bastion of wealth and white conservatism." Tehranian, *supra* note 16, at 1225.

63. *Whren*, 517 U.S. at 811 (emphasis in original).

64. Harris, *supra* note 48, at 311.

65. *Whren*, 517 U.S. at 818.

Whren itself violated internal regulations, that violation could surely have buttressed a finding of “unreasonableness.”

By not fully engaging the petitioners’ arguments, Scalia’s bold and conclusory statements masked the problem of increased racial profiling that was inevitably wrought by the *Whren* opinion. And perhaps because the opinion was unanimous, relatively brief, and purported to resolve an easy case, it attracted little press attention in its immediate aftermath.⁶⁶ It was not immediately plain what the Supreme Court had allowed.

A. Teaching *Whren* in the Mostly White Classroom

The tepid response to *Whren* is often reflected, years later, in White classrooms, despite intervening years of sensitizing to the prevalence of racial profiling and the entry into the lexicon of terms like “driving while Black.” A typical discussion in my mostly-White classroom might demonstrate an exchange such as the following:

Regardless of whether there are minority students in the class, I invariably call on a White student to recite the facts so as not to put anyone “on the spot.”⁶⁷ The student reciting the facts may sound vaguely bored: “Youths in a Pathfinder. U-turn. Car sped away at a high rate of speed. Cops stopped the car. Saw drugs; arrested.” If she recites the law straight from the case, it will sound benign. There is probable cause. There’s a traffic violation. It’s an objective standard.

“What’s really going on here?” I might ask, looking for some passion. To me it seems obvious, but to be fair to the students, I have read the case repeatedly, mined it for all potential clues to underlying motivations, and have read studies and numerous scholarly articles about racial profiling and the pernicious effects of *Whren*. Why should these things jump out at a White student from Orange County, who likely views law enforcement officials as helpful allies?

“It’s a high crime area,” someone might say.

66. Professor Harris notes that *Whren* received “rather perfunctory coverage” in the news media, and even among the large news organizations that covered it, “few highlighted the racial implications of the decision.” Harris, *supra* note 23, at 391.

67. Professor Crenshaw describes the experience of minority “subjectification”:

This is experienced by minority students when, after learning to leave their race at the door, their racial identities are unexpectedly dragged into the classroom by their instructor to illustrate a point or to provide the basis for a command performance of “show and tell.” The eyes of the class are suddenly fixed upon the minority student who is then expected to offer some sort of minority “testimony.”

Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 6 (1988).

“Come on,” I think. “Someone get to the point.”

Finally someone might offer, “They’re African Americans.” And might add, “It could be racist.”

“Right,” I think. “*Could be?* Finally.”

It’s a case about racial profiling, but most White kids don’t understand that. It’s a spare Scalian opinion, claiming the moral high ground, easily dispatching the very real concern for the racial impact of the case. The opinion admits of no self-doubt, betrays no tortured reflection about what the repercussions might be. The racial dimension is quickly dispatched. Thus, while the opinion has been described as a “slap in the face to African Americans and other minority group members who must suffer the indignities of these stops,”⁶⁸ White students, unscathed, often miss its meaning.

Indeed, I thought the significance of *Whren* might be missed in my recent class, before I saw JS’s hand go up. Because he was the only Black man in the room, I confess to a keen awareness of his presence. Yet I dared not look directly at him, for fear that he might read in my glance what could be perceived, perhaps fairly, as an almost voyeuristic hope that he might “have a story.”⁶⁹ My recollection is that he put his hand up and then down again as others were talking, perhaps frustrated that his classmates were largely missing the point. I believe I read his tentative hand as a license to prod, at least gently. “Was there another hand up?”

B. *The Power of Personal Narrative*

JS’s story had an impact. In ways my secondhand stories never could, his first-person account revealed the real problem with *Whren*. JS is an engaging student, seemingly well-liked by his peers. He is voluble, at times, and funny. He told his story in enough detail to make a lasting impression, at least on me. He sounded outraged by the suspicious questions he was asked on the roadside, by the treatment he received, by the officer’s incredulous responses that no, he did not have a record and no, there was not contraband in the car. He revealed that his family was likewise

68. Harris, *supra* note 23, at 376. Harris notes that it is particularly remarkable that the Court “[b]rushed the Fourth Amendment aside [and] . . . did exactly what the defendants warned against: gave law enforcement carte blanche to stop any driver, at any time, with only the none-too-potent threat of a lawsuit to deter racially biased law enforcement in the face of evidence that this was already happening.” *Id.* (footnote omitted; emphasis in original).

69. Cf. Harris, *supra* note 23, at 326 (“It is virtually impossible to find black people who do not feel that they have experienced racial profiling.”).

outraged; calls were made, complaints lodged, legal action contemplated. This was not a small matter in the life of this aspiring lawyer.⁷⁰

Importantly, JS is decidedly *not* Michael A. Whren or James L. Brown, the hapless protagonists/petitioners in the court case. JS, unlike those men, was innocent—at least of anything beyond the myriad traffic infractions many of us commit almost daily.⁷¹ Whren and Brown, on the other hand, were decidedly guilty. There were drugs in the car, after all. That may be why the case does not spark outrage. But the problem, as we know, is that innocents like JS are all too often caught up in the web of stereotyping, aggressive policing, offensive questioning and rude if not abusive treatment that are the frequent hallmarks of African Americans' encounters with the police.

When police racially profile and turn out to be right about their suspicions, however illegitimate, it is tempting for a White person to smugly think: Well of course. Assumptions about Black criminality are deeply culturally engrained.⁷² As David Harris has noted, police chiefs have argued that “allegations” of racial profiling are “nothing more than the excuses of criminals hoping to ‘play the race card’ to escape the consequences of their law breaking . . . even in the face of stories from upstanding black and Latino individuals who had never been charged with anything, but who had been treated at a roadside as if they were criminals.”⁷³

It is one thing to read concerns about racism articulated by the lawyers for the obviously guilty Whren, concerns readily dismissed by Scalia and likely by law students, as well. Whren's lawyers may have pointed out the broader racial implications of a decision that condoned the police behavior in *Whren*, but their immediate concern was getting a guilty client off the hook, a concern that perhaps enables us to view their broader claims regarding social justice with suspicion. Such claims probably carry greater weight if coming from an innocent person; but if that person is an abstraction, the resonance of the claim is limited. When a peer and friend,

70. The fact that JS may have had the resources and support to complain to authorities in the aftermath of his experience did not in any way appear to negate the anger he still felt about the incident. See also Harris, *supra* note 48, at 269–275 (recounting other citizens' experiences with racial profiling, and describing profound reactions of embarrassment and depression). Many victims of racial profiling, of course, may not have the resources, time or inclination to navigate a system for lodging complaints about the practice.

71. Harris, *supra* note 5, at 95 (noting that drivers violate some aspect of the traffic code on any short drive).

72. Duru, *supra* note 15. See also Taslitz, *supra* note 9, at 414–418 (discussing the problem of stigma connected to mere “proximity” to the criminal justice system).

73. Harris, *supra* note 5, at 75.

however, tells a personal story about how racial profiling has affected him, the resonance is deeper. Personal narrative can be enormously powerful.⁷⁴

Unfortunately, all too often my students do not hear stories like that of JS. When there are only one or two African American students in a class, the chances diminish that those students “have stories” or would be comfortable telling them to a largely-White peer group. Moreover, when the numbers of minorities are small, a lack of critical mass can make participation difficult for the minority students.

C. *The Grutter Decision and the Importance of “Critical Mass”*

In Justice O’Connor’s opinion for the majority in *Grutter v. Bollinger*, which approved the use of race as a “plus factor” in law school admissions, she explicitly noted the importance of achieving a “critical mass” of minority students. Citing to arguments made by the University of Michigan Law School in support of its admissions program, she explained that “[a]s part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’” it sought to “‘enroll a “critical mass” of minority students.’”⁷⁵ Justice O’Connor traced the roots of admissions policies like Michigan Law School’s to the Court’s earlier “landmark” decision in *Bakke*,⁷⁶ in which Justice Powell’s concurring opinion endorsed a “properly devised admission program involving the competitive considerations of race and ethnic origin.”⁷⁷

The later *Grutter* Court found substantial benefits in achieving a “critical mass,” including promoting understanding between the races and breaking down stereotypes. The law school persuasively demonstrated a compelling state interest in securing the “educational benefits of a diverse student body,” satisfying the demands of “strict scrutiny” under an equal

74. The power of narrative was brought home to me in an entirely different context recently. Chapman’s Outlaw group co-sponsored an event entitled, *Proposition 8 Passed: Now What?* It was an unabashed advocacy forum, following on the heels of an earlier, dryer presentation regarding the California Supreme Court’s decision to hear a petition challenging Proposition 8. Two students spoke at the forum, giving the most moving presentations I have ever heard in an academic setting. They gave raw and searing accounts of the impact of Proposition 8 on their personal lives. Following the forum, several students approached their peers and said it was one of the most compelling educational experiences they had had. See also I. Bennett Capers, *Flags*, 49 How. L.J. 121, 121–28 (2004) (example of a compelling personal narrative describing feelings of powerlessness experienced by an African American Assistant United States Attorney who was asked whether he would prefer to go to a restaurant other than one in South Carolina which had been recommended, which was festooned with Confederate flags). I have returned to the Capers article several times since reading it the first time, finding each time that the personal account is evocative and haunting.

75. 539 U.S. at 329.

76. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

77. *Id.* at 320 (Powell, J., concurring).

protection analysis when racial classifications are implicated.⁷⁸ Justice O'Connor noted that "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."⁷⁹

Professor I. Bennett Capers has described critical mass this way:

Critical mass is not simply numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group. It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard. In the Justice Department, a critical mass was what we lacked.⁸⁰

Critical mass is likewise lacking at many law schools, like Chapman. Overall enrollment in the nation's law schools has declined in recent years.⁸¹ According to recent statistics, there were only 9529 Blacks enrolled in ABA-accredited schools in 2006, a decline from 9779 the prior year.⁸² Moreover, census data reflects that, in 2000, minority attorneys comprised only 14.2% of United States lawyers and only 4.4% of law partners despite constituting 37.3% of the general population.⁸³

The problem of underrepresentation of minorities on law school faculties is also acute. Ten years ago, Professor Kimberlé Williams Crenshaw wrote that "[m]inority students across the country have waged a series of protests to draw attention to problems of diversity in the na-

78. *Grutter*, 539 U.S. at 330–333.

79. *Id.* at 333.

80. Capers, *supra* note 74, at 122–23. I. Bennett Capers was my colleague in the United States Attorney's Office in Manhattan from 1995 to 1999. He notes that, when his article *Flags* was written, only four of the approximately 241 lawyers in our former office were African American, "a drop from the usual number of African American prosecutors, which is 7." *Id.* at 121 n.1; see also Deirdre M. Bowen, *Brilliant Disguises: An Empirical Analysis of a Social Experiment Banning Affirmative Action* (forthcoming IND. L.J.) (available on SSRN, <http://ssrn.abstract=1324706>) (defining "critical mass" and explaining its importance).

81. See Lawrence Hurley, *Review of Accreditation Process Urged*, L.A. DAILY L.J. at 1 (Dec. 13, 2007).

82. *Id.*; see also ABA Section on Legal Education: Out of the Box Committee, "Law Schools, Diversity and the Pipeline" 1 (Nov. 2008) ("The legal profession is currently over 90% white and 80% of the law students are white. In contrast, only 70% of the U.S. population is white and the percentage of whites as a proportion of the U.S. population is expected to continue to decrease. However, the proportion of minorities in law schools is not increasing to the same degree as the population—and in some instances the number and percentage of minorities in law school is actually decreasing.") (footnotes omitted).

83. See Charles Calleros, *Patching Leaks in the Diversity Pipeline to Law Schools and the Bar*, 43 CAL. W. L. REV. 131 n.3 (2006).

tion's law schools. . . . [T]he students' bottom line demand is often for the recruitment of more minority faculty and students."⁸⁴ A lack of faculty diversity remains a problem today.⁸⁵

PART III: ENRICHING AN IMPOVERISHED CLASSROOM

Once we accept, as I think we must, that minorities experience the criminal justice system very differently than Whites do, what do we do if the classroom does not include minority voices on either side of the podium? Plainly, we must continue to advocate for greater diversity in law school admissions and appointments. That proposal, of course, suggests the question, "What is meant by diversity?" There are those on both sides of the political divide who find it offensive to define diversity simply in terms of skin color. Moreover, where "affirmative action" is employed, minorities can face stigmatization if perceived as less qualified than White counterparts.⁸⁶

In a paper that generated considerable interest at LatCrit XIII, however, Professor Deirdre Bowen suggested that the termination of many affirmative action programs at various universities has *not* had the presumed effect of removing from minority students a presumption of being less qualified than White counterparts.⁸⁷ Rather, she presented powerful evidence that eliminating affirmative action programs *increases* the stigmatization of minorities, who now appear in fewer numbers, continue to face a presumption that they are less qualified *despite* race-blind admissions, and suffer as a result of a lack of the type of "critical mass" described above.⁸⁸

While I believe that race can be a useful proxy for particular life experiences⁸⁹ in a racialized society, and that the *Grutter* decision was

84. Crenshaw, *supra* note 67, at 1–2.

85. See L. Darnell Weeden, *Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?* 26 BERKELEY J. EMP. & LAB. L. 511, 513–514 (2005) (focusing on lack of faculty diversity at elite institutions).

86. See *Grutter*, 539 U.S. at 372 (Thomas, J. dissenting); see generally CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2008) (raising concerns about stigmatization); cf. Weeden, *supra* note 85, at 514 ("In my opinion, true intellectual diversity is a color blind educational benefit and it should never be confused with the race-based intellectual diversity theory approved in *Grutter*."). I benefited greatly by the insightful comments of Professor Weeden at the LatCrit XIII conference.

87. See Bowen *supra* note 80; see also Notes, Lat Crit XIII Conference (Bowen Presentation, Oct. 3, 2008) (on file with author) (hereinafter *Notes of Bowen Presentation*).

88. See generally Bowen, *supra* note 80. She notes that "[u]nder-represented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states." *Id.* at 3; see also *Notes of Bowen Presentation, supra* note 87.

89. It is, of course, an imperfect proxy. Not all members of particular minority groups share the same life experiences, and some White individuals face significant

well-reasoned,⁹⁰ there is room for a more focused approach to admissions and hiring that addresses a desire for a greater range of perspectives. It would surely be legitimate to make the following statement to potential hires or admits: “We as an institution are committed to diversity in a broad sense. We are interested in knowing how your own unique background or experiences will contribute to diversity.” For potential admits, an explanation could be written in the context of an application essay.

Where diversity goals remains unrealized, I think we must ensure that our classes are not narrowly focused on hierarchical perspectives, with the status quo accepted as an inevitable “given.” We can borrow, for example, from the suggestions that Professor Goldfarb has made about the importance of “contextualizing” case law. This might be done with *Whren*, for example, by studying that case alongside Scalia’s later opinion in *Moore*, and pointing out that in both contexts, Scalia noted that police ignored procedures forbidding arrests and yet found no Fourth Amendment violation. A desire to unfetter police from regulatory constraints while the police themselves enforce labyrinthine codes seems to animate Scalian jurisprudence in this area.

Scalia’s protestations notwithstanding, an elegantly simple principle that could have guided a finding of unreasonableness in the *Whren* case was the fact that police officers violated internal regulations forbidding plain clothes officers from making traffic stops. The notion implicit in *Whren* that its holding was preordained and that no alternative would have made plausible sense of Fourth Amendment doctrine is preposterous. As Professor Goldfarb argues, case law must be read contextually in order to expose underlying motivations and assumptions.⁹¹ Moreover, “[t]his approach is especially promising when used to examine cases concerning American criminal justice because the methodology can be directed toward highlighting the attitudes found within mainstream legal culture for inflicting state violence on the disempowered.”⁹²

A. *The Limits of the Case Method in Criminal Procedure*

On a more long-term basis, I think that we must reconsider the way we teach Criminal Procedure. The case method, while conventional, serves to reinforce stereotypes. When the race of a defendant is identified

hardships based upon socioeconomic and other factors. Moreover, some members of minority groups have not faced the sorts of problems identified in this Article. *But see* Harris, *supra* note 23, at 326 (“It is virtually impossible to find black people who do not feel that they have experienced racial profiling.”). Given the continued relevance of race as a predictor of certain experiences, having a “critical mass” of minorities increases the chances that someone in a given classroom will have had an experience of racial profiling.

90. *But see* Weeden, *supra* note 85, at 514 (criticizing *Grueter*).

91. *See* Goldfarb, *supra* note 10, at 549.

92. *Id.*

in our cases, it is almost always a minority identification. Cases like *Whren* itself are about Black men being caught doing crimes. Indeed, virtually all of those actors who are identified as Black in our criminal procedure casebooks are criminals; Latinos are similarly frequently identified as criminals. Leading criminal procedure cases include *Miranda v. Arizona*, where petitioner Miranda, who was found guilty after trial of kidnapping and rape, is identified as an “indigent Mexican defendant” and a “seriously disturbed individual with pronounced sexual fantasies”; petitioner Stewart is identified as “an indigent Los Angeles Negro who had dropped out of school in the sixth grade.”⁹³ In *Florida v. J.L.*, J.L. is identified as one of three “black males” who was “‘hanging out’” at a bus stop where he was carrying a concealed firearm without a license.⁹⁴

There are other examples, including those in which the guilt of the defendants is in question and yet race is identified in some negative way. In some historic cases, courts use terminology that is pejorative and/or paternalistic, as in *Brown v. Mississippi* where a 1930s judge referred to the defendants as “ignorant negroes.”⁹⁵ *Brown* is a case where it is plain that racist Southern attitudes contributed to the torture of Black defendants. (A deputy sheriff in the case is quoted as saying that the defendants were whipped, “‘but not too much for a negro.’”)⁹⁶ In such cases, as in *Whren* itself, where the defendants were victims of racism, the defendants’ race is plainly relevant. Likewise, in *Florida v. J.L.*, where the court analyzes an anonymous tip that includes the race of the suspect, race is relevant to the court’s analysis.

On the other hand, when we consider the rarity of a court’s identification of a White defendant as being White, it is plain that those criminals or criminal defendants identified in our cases (and thus our case books) as having a racial or ethnic identity are usually minorities. Particularly in classrooms where the vast majority of students are White, this tends to exacerbate an existing problem. Minority voices are absent, and the identified minorities in the room are simply the subjects of criminal cases.

In his essay, *Transparency and Participation in Criminal Procedure*, Professor Stephanos Bibas posits that there is an “enduring tension between self-interested insiders and excluded outsiders” in the criminal justice system.⁹⁷ Bibas identifies as “insiders” judges, police and prosecutors.⁹⁸

93. JEROLD H. ISRAEL, YALE KAMISAR, WAYNE R. LAFAVE AND NANCY J. KING, *CRIMINAL PROCEDURE AND THE CONSTITUTION* 356 (2008) (hereinafter “CRIMINAL PROCEDURE”) (quoting *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)).

94. *Florida v. J.L.*, 529 U.S. 266, 268 (2000).

95. *Brown v. Mississippi*, 297 U.S. 278, 281 (1936).

96. *Brown*, 297 U.S. at 284.

97. 81 N.Y.U. L. REV. 911, 913 (2006).

98. *Id.* at 912.

Those “insiders,” however, occupying positions of relative prestige and power, are rarely, if ever, identified by race. In such instances, those actors may be imbued by our students with a presumption of “whiteness.”⁹⁹ This reinforces the notion that the role played by minorities in the system is that of criminal defendant and outsider.

Of course, as pointed out in Part I, minority defendants are indeed over-represented in the criminal justice system. But because there are many White defendants who are virtually never identified as White in the cases themselves, case books present an even more imbalanced picture than the criminal justice system itself. This may serve to foster stereotypes and contribute to a vicious cycle.

Admittedly, identifying this problem is much easier than offering a meaningful solution. Should casebook authors search records to make an effort to identify White defendants in cases where courts themselves do not identify them? In some high profile cases, such identifying data may be readily available, but surely not in many. On the other hand, stripping out references to minority identifications in many cases would dilute arguments made by defendants themselves where racially charged interactions between police and defendants are alleged. Even where defendants do not make arguments about race, “whitewashing” any court’s reference to a defendant’s race or ethnic background is potentially problematic for another reason: it may not allow students themselves to critically analyze whether subtle issues of race influenced a court’s decision in some way.

Perhaps as a preliminary step it would be useful for casebook authors or professors in class to point out, in introductory pages or sessions, the fact that courts and the media—particularly in the past—have been much more likely to identify a defendant by race or ethnic background when the defendant is a member of a racial minority. Challenging students to be mindful of racial identifications in cases and to ask whether the identification of race is relevant may enable students to themselves more critically assess the racialized nature of criminal justice. As Professor Andrew Taslitz has recently pointed out, “even subconsciously racially tinged cumulative media coverage—such as showing more Blacks in ‘perp’ walks; broadcasting Black faces in connection with violent crimes, white faces for non-violent ones; covering the causes of ‘ghetto’ and racial

99. See Devon W. Carbodo & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1180 (2008) (“[A] line of research in social psychology suggests that in the absence of an indication that a person is not white, the default presumption is that the person is white.”). Cf. Tehranian, *supra* note 16, at 1218–1222 (noting that the process of “selective racialization” means that those of ambiguous race, such as Middle Easterners in American society, are treated as “white” so long as they do not transgress societal norms but are racialized as “others” as soon as they become “transgressive”).

gang violence—can help to associate racial group membership with the worst of crimes.”¹⁰⁰

At the same time, a court’s failure to mention race where race may be relevant poses problems as well. In *Terry v. Ohio*, the Court failed to mention that John Terry was Black, despite the police officer’s description of Terry and his companion as “two Negroes.”¹⁰¹ While the Court in *Terry* went so far as to acknowledge that its holding permitting stops and frisks based upon “reasonable suspicion” might well impact minority communities more dramatically than others, its failure to acknowledge that Terry himself may have been “racially profiled” fails to fully acknowledge the problem.¹⁰²

We should also consider moving beyond a narrow “case law” method to an approach that provides richer context to our classrooms for a critical study of criminal justice. Casebooks could be more balanced if they included not only cases where defendants are inevitably guilty, but also newspaper articles and studies on racial profiling, studies demonstrating the disproportionate rate of wrongful convictions among minorities¹⁰³ and articles regarding police searches and shootings of innocents. When we make it more plain that police tactics profoundly influence the innocent as well as the guilty, a robust interpretation of constitutional rights is more palatable.

Furthermore, one could easily preface the teaching of *Whren* with a law review article such as Professor Duru’s *Myth of The Bestial Black Man*,¹⁰⁴ which powerfully exposes underlying racism in our criminal justice system. One could follow *Whren* with excerpts from David Harris’s powerful indictments of the case and an analysis of the ACLU data discussed in Part I.

In the all-White or mostly-White classroom, moreover, more must be done to make clear to White students that they see the system through a lens of privilege. As Professors Armstrong and Wildman have persuasively argued, “[i]dentifying and understanding whiteness should be an essential component of legal education.”¹⁰⁵ Without conscious awareness, students and faculty alike too easily fall into an acceptance of the

100. Taslitz, *supra* note 9, at 438.

101. Capers, *supra* note 24, at n. 182 (citing Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN’S LAW. REV. 727, 729 (1998)).

102. For a critical discussion of *Terry*, see Capers, *supra* note 24, at 37–39. As Professor Capers puts it, “[i]f the Fourth Amendment itself has a poisonous tree, its name is *Terry v. Ohio*.”

103. See Taslitz, *supra* note 9, at 417 and n.171 (addressing studies regarding wrongful conviction rates including wrongful convictions based on wrongful identifications and false confessions).

104. Duru, *supra* note 72.

105. Armstrong & Wildman, *supra* note 19, at 635. I should note that I benefited greatly from hearing a version of this paper presented in person at the annual SALT conference in San Francisco in 2008.

prevailing power dynamic. More insidiously, they do not recognize that they are the beneficiaries of privilege:

Within this community of whiteness, the academy replicates itself as a predominately white institution serving predominately white interests. This replication impacts how students study law, and it further reproduces itself as they enter the legal profession. Legal educators must name and talk about whiteness to identify this cycle and move toward more inclusive practices.¹⁰⁶

B. *Exposing the “Post-Racial” Myth Outside the Classroom*

Moving beyond the four walls of our classrooms, we must continue to resist the force of “post-racial” mythologizing, particularly in our academic communities. Some academics might argue that legitimate diversity means only diversity of “viewpoint” because society is, or should be, color-blind and oblivious to distinctions of race, ethnic background, gender and sexual orientation.

Wishful thinking aside, we do not live in a “post-racial” society, as the October 20, 2008¹⁰⁷ study regarding police encounters strikingly revealed. Achieving greater social justice may require further exposing racial disparities, not covering them up. Professors Armstrong and Wildman persuasively demonstrate the endemic nature of White privilege, and particularly where our faculties as well as our student bodies are dominantly White, we must engage that reality.

In the realm of politics, post-racial mythologizing can be particularly insidious.¹⁰⁸ Ballot initiatives, for example, that propose limits on gathering statistical data regarding the race of those stopped for traffic stops, can be made to sound benign and indeed progressive. However, as David Harris has powerfully demonstrated, the “You can’t prove it” defense can be readily deployed when statistical data is unavailable.¹⁰⁹ A claim that we live in a post-racial society and therefore do not need such data collection often masks a desire to make pernicious practices unprovable.

CONCLUSION

Racial profiling exists, but too many students at our largely White legal institutions do not fully appreciate it. The *Whren* case itself never uses the term; it takes much more than study of that court’s opinion to

106. *Id.* at 658.

107. *See supra* notes 54–59 and accompanying text.

108. *See Harris, supra* note 5, at 93–94 (discussing claims that racial profiling is a “myth”).

109. *Id.* at 75.

appreciate the realities of the practice. Today's law students are tomorrow's lawyers, judges, legislators and even presidents. Rather than teaching in a way that reinforces White privilege and racialized stereotyping, we must strive to expose the ugly side of criminal justice. Exposure can take many forms: from creating an environment that permits victims of racist practices to tell their stories to ensuring that stories get told and that context is provided even when the best storytellers are absent.

Beyond creating classrooms that lend themselves to questioning the assumptions and hierarchies that undergird much case law, we may need to radically re-think the way some courses are taught. The revered "case method" gives a cramped view of the multiplicity of factors governing our criminal justice system and may be peculiarly inappropriate in the context of teaching constitutional criminal procedure. Stories about invasive searches of innocents can round out review of cases where defendants are invariably guilty. Scholarly articles can expose underlying racist assumptions and can illuminate practices such as racial profiling.

The brute force of reductive Scalian analysis notwithstanding, the *Whren* decision did not flow inevitably from the words of the Fourth Amendment; indeed, it is counter to most intuitive norms of what is "reasonable." Where malleable terms like "reasonable" are at issue, judges enjoy great freedom to impose value judgments and policy preferences. By contextualizing cases and the judicial decision making process, and by moving beyond that relatively narrow sphere to consider the broader workaday street justice reality, we arm and embolden our students to critique and change, and not just accept, a deeply flawed and racialized criminal justice system.