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(E)racing the Fourth Amendment

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(E)RACING THE FOURTH AMENDMENT

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PROLOGUE: NOTES OF A NATURALIZED SON (OR HOW I BECAME A BLACK AMERICAN)

I remember the very day I became colored.

Zora Neale Hurston[1]

If there were no black people here in this country, it would have been Balkanized . . . . But in becoming an American, from Europe, what one has in common with that other immigrant is contempt for me *— it's nothing else but color . . . . So in that sense, becoming an American is based on an attitude: an exclusion of me.*

Toni Morrison[2]

It's been almost two years since I pledged allegiance to the United States of America — that is to say, became an American citizen. Before that, I was a permanent resident of America and a citizen of the United Kingdom.

Yet, I became a black American long before I acquired American citizenship.[3] Unlike citizenship, black racial naturalization was always available to me, even as I tried to make myself unavailable for that particular Americanization process.[4] Given the negative images of

1. Zora Neale Hurston, *I Love Myself When I am Laughing and then Again When I am Looking Mean and Impressive, in* A ZORA NEALE HURSTON READER (Alice Walker ed., 1979).

2. Toni Morrison, *quoted in* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby — LatCrit Theory and The Sticky Mess of Race*, 85 CAL. L. REV. 1586, 1602 n.59 (1987).

3. Formal citizenship and national membership are not coextensive. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989) (arguing that American jurisprudence has failed to produce civic and political participation that is inclusive of all segments of society, rendering the legal status of citizenship far short of any real sense of national belonging).

4. *Cf.* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944) (discussing racial subordination as a natural part of American society that co-existed with formalistic ideals of equality); *see also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989) (suggesting that racism is fundamental to a permanent part of American society); RICHARD DELGADO, THE COMING RACE WAR (1996) (same).

black Americans on 1970s British television[5] and the intra-racial tensions between blacks in the U.K. and blacks in America, I was not eager, upon my arrival to the United States, to assert a black American identity. My parents had taught me "better" than that.[6]

But I became a black American anyway. Before I freely embraced that identity it was ascribed to me.[7] This ascription is part of a broader social practice wherein all of us are made intelligible via racial categorization.[8] My intelligibility was skin deep. More particularly, it was

5. There is an entire body of literature problematizing the racial nature of 1970s American television. The television films and situation comedies produced during this period are typically referred to as black exploitation productions. For a discussion of the politics of race and Hollywood during the 1970s, see KAREN ROSS, BLACK AND WHITE MEDIA: BLACK IMAGES IN POPULAR FILM AND TELEVISION (1996), and JAMES A. SNEAD, WHITE SCREENS, BLACK IMAGES: HOLLYWOOD FROM THE DARK SIDE (1994). *See also* HOLLYWOOD SHUFFLE (Conquering Unicorn 1987) (employing parody, in a Robert Townsend film, to comment on the ways in which race structures the ways in which blacks are represented on television and in the movies); *A Gallery of Twisted Images: The Black Man Distorted*, EMERGE, Oct. 1995. Of course, the problem of race and television has not gone away. In early 2000, the National Association for the Advancement of Colored People ("NAACP") and other civil rights groups successfully obtained signed commitments from the four major U.S. television networks to increase ethnic diversity in television series. NAACP President Kweisi Mfume had inaugurated a campaign to promote diversity on television in 1999, after the close of a season that was notably lacking in significant characters of color. The major studios agreed to address the issue only after the NAACP threatened boycotts and protests. *See In Face of Threats, Fox and CBS Join Pledge to Promote Diversity*, N.Y. TIMES, Feb. 3, 2000, at A14.

6. For a specific indication of the nature of the conflict between black Americans and black Caribbeans, see MARY WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES (1999); Reuel Rogers, *Afro-Caribbean Immigrants, African Americans, and the Politics of Group Identity*, *in* BLACK AND MULTIRACIAL POLITICS IN AMERICA 15-59 (Yvette M. Alex-Assensoh & Lawrence J. Hanks eds., 2000); and Martin C. Evans, *Making Their Mark: Long Island's Black Immigrants Find Success, Racial Tension*, NEWSDAY, Sept. 18, 2000, at A5 ("Many black immigrants say they are often rejected by black Americans as too eager to adopt 'white' attitudes and not sufficiently militant against anti-black hostility. They say they are also accused of being too willing to take on low-wage jobs and too unappreciative of the sacrifices made by black Americans in the quest for social equality.").

7. One can conceptualize the formation of identity through two hypothetically discrete processes: one based on self-definition and the other based on the identities others ascribe to us. Note, though, that these two conceptions present a false dichotomy, because how we see ourselves is a function of how others see us. *See* JEAN-PAUL SARTRE, THE PHILOSOPHY OF JEAN-PAUL SARTRE 189 (Robert DeNoon Cumming ed., 1965) ("By the mere appearance of the Other, I am put in the position of passing judgment on myself as on an object, for it is as an object that I appear to the Other . . . . I recognize that I *am* as the Other sees me . . . . Thus the Other has not only revealed to me what I was; he has established me in a new type of being which can support new qualifications.").

8. *See generally* Jerry Kang, *Cyber-race*, 113 HARV. L. REV. 1130 (2000) (identifying cyberspace as a locale where the process of racial categorization can be confounded); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that forms of intergroup discrimination are better identified as the result of embedded cognitive processes of racial categorization, rather than discriminatory motives). For further discussions of racial categorization, see CRITICAL RACE THEORY: ESSAYS ON THE SOCIAL CONSTRUCTION AND REPRODUCTION OF "RACE" (E. Nathaniel Gates ed., 1997) and Symposium, *Our Private Obsession, Our Public Sin*, 15 LAW & INEQ. 1 (1997).

linked to the social construction of blackness, a social construction whose phenotypic reach I could not escape.[9] Whether I liked it or not, my everyday social encounters were going to reflect standard racial scripts about black American life.[10]

And in fact they did. I was closely followed or completely ignored when I visited department stores.[11] Women clutched their purses upon

9. Depending on skin tone, some blacks can escape the phenotypic reach of blackness by passing (or trespassing) as whites. For an illuminating narrative about what one might call the racial push-and-pull factors that cause a person to pass, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-12 (discussing the author's grandmother's decision to "present" herself as a white woman). *See also* GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995). This is not to say race is just about phenotype. To the extent that race is socially constructed, race is also about performance. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000).

10. There is a growing awareness about the ways in which gender norms operate to create certain scripts for women — that is, permissible and impermissible ways of *being* a woman. *See* Linda B. Epstein, *What Is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161 (1998) (arguing that sexual harassment should be conceptualized more broadly as gender harassment because workplace discrimination against women cannot be reduced only to incidents of a sexual nature); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997) (describing sexual harassment as a "technology of sexism" that "perpetuates, enforces, and polices a set of gender norms that seek to feminize women"); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) ("[M]any of the most prevalent forms of harassment are actions that are designed to maintain work — particularly the more highly rewarded lines of work — as bastions of masculine competence and authority."); *see also* KATE MILLETT, SEXUAL POLITICS (1970) (presenting a broad critique of constructed gender roles from the arena of literary criticism). Racial norms operate in a similar way by defining the terms upon which people experience their racial identity.

11. For discussions of the racial nature of shopping experiences, see Regina Austin, *"A Nation of Thieves": Securing Black Peoples' Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (1994) (analyzing the perception of black shoppers as "deviants"), and Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127-29 (1987) (recounting the author's experience of a white employee at a New York City store scrutinizing her and then refusing to "buzz" open the shop door, while white shoppers browsed inside). Pervasive discrimination against black consumers has resulted in a number of monetary settlements with retailers. In December 2000, New Jersey-based Children's Place Retail Stores, Inc. settled charges that it assigned employees in its Massachusetts stores to shadow black customers and that the retailer engaged in other "retail racial profiling." *Massachusetts Settles Bias Case With Retailer*, WALL ST. J., Dec. 22, 2000, at A4. In June 2000, insurer American General Corp. agreed to pay more than $215 million to settle claims that it had charged African-American customers higher premiums on life insurance policies. *See* Scot J. Paltrow, *American General to Pay $215 Million Over Premiums Issue*, WALL ST. J., June 22, 2000, at C1. The Adam's Mark luxury hotel chain in March 2000 agreed to pay $8 million to settle claims that it charged black guests higher prices than whites, and that it segregated black customers in less desirable rooms. *See Hotel Chain Settles Race Bias Suits*, CHI. TRIB., Mar. 21, 2000, at 1. A landmark case in this area was a 1994 settlement with Denny's Restaurants, in which the chain agreed to pay $54.4 million to compensate black customers who had been refused service or asked to prepay for meals. One commentator compared the claims against Denny's to "a modern version of the lunch-counter protests of the civil rights movement . . . ." *See* Jeff Leeds, *Denny's Restaurants Settle Bias Suits for $54 Million*, L.A. TIMES, May 25, 1994, at 1.

encountering me in elevators.[12] People crossed the street to avoid me. The seat beside me on the bus was almost always racially available for another black person.[13] Already I wanted to be a black American no more.[14]

But that racial desire was at odds with my racial destiny. There was nothing I could do to prevent myself from increasingly becoming a black American — and more particularly, a black American male.[15]

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12. Such race-based reactions are common in innumerable contexts. In November 1999, African-American actor Danny Glover filed a complaint with the New York City Taxi and Limousine Commission after a cabdriver had refused to allow him to ride in the front passenger seat. Alleging racial discrimination, Glover's complaint noted that earlier the same day in Manhattan, five passenger-less yellow cabs had refused to stop for him, his daughter and her roommate. *See* Monte Williams, *Danny Glover Says Cabbies Discriminated Against Him*, N.Y. TIMES, Nov. 4, 1999, at B8. The complaint of a high-profile actor brought renewed focus to an ongoing controversy: the commonplace allegation that cabdrivers avoid black customers because they assume black people pose a criminal threat. For an analysis of the legal implications of such racial calculations, and of the argument that race-based fears are empirically rational, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994). Armour notes that whites are not alone in their experience of racial fear, recounting the Rev. Jesse Jackson's remarks during a 1993 speech in Chicago in which he decried black-on-black crime. *Id.* at 790. Jackson told his audience, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery — then look around and see somebody white and feel relieved." *Perspectives*, NEWSWEEK, Dec. 13, 1993, at 17.

13. The empty seats next to me demonstrated to me how whites could practice "white flight" on public transportation. For a discussion of the white flight phenomenon, see DAVID J. ARMOR, WHITE FLIGHT, DEMOGRAPHIC TRANSITION, AND THE FUTURE OF SCHOOL DESEGREGATION (1978); William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425 (1979); and Thomas C. Schelling, *The Process of Residential Segregation: Neighborhood Tipping*, *in* RACIAL DISCRIMINATION IN ECONOMIC LIFE 157-84 (Anthony H. Pascal ed., 1972).

14. GEORGE SCHUYLER, BLACK NO MORE (1934).

15. For a particularized discussion of black men's relationship to the law, see Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994) (providing a broad picture of the perilous position black men hold in American society, and the role played by the criminal justice system in creating and reinforcing that peril). *See also* FLOYD D. WEATHERSPOON, AFRICAN-AMERICAN MALES AND THE LAW: CASES AND MATERIALS (1998); *A Symposium on the Impact of the Judicial System on the Status of African-American Males*, 23 CAP. U. L. REV. 1 (1994). Some commentators have characterized black American males as an "endangered species." *See* JEWELLE TAYLOR GIBBS, YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES (1988); Thomas A. Parham & Roderick J. McDavis, *Black Men, an Endangered Species: Who's Really Pulling the Trigger?*, 66 J. COUNS. & DEV. 24 (1987); Bryan Burwell, *Can Black Males Get Off Endangered-Species List?*, USA TODAY, May 1, 1992, at 15A; Sylvester Monroe, *Brothers*, NEWSWEEK, Mar. 23, 1987, at 55. The idea has even made its way into popular culture. *See* Ice Cube (featuring Chuck D.), *Endangered Species (Tales from Darkside)*, on AMERIKKKA'S MOST WANTED (Priority Records 1990). While Parham & McDavis's work is important in providing an indication of the particular ways in which black men experience racism, it is not always sensitive to how gender shapes black women's experiences. *See generally* Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997).

Resistance was futile.[16] The politics of distinction or self-presentation strategies with the intra-racial signification, "I am not really like other black people, I am the new Negro,"[17] was not going to help.[18] Out of racial necessity,[19] my black identity developed one racial interpellation after another.[20] My collective *dis*-eminence was inevitable.[21]

Nor could I count on colorblindness to protect me.[22] That veil of ignorance became only too transparent.[23] Colorblindness, I would come to learn, is precisely what prevents African Americans from becoming black no more. Its racial ideology casts all of us in the ongoing national drama, "An American Dilemma."[24]

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16. *See generally* Regina Austin, *"The Black Community," Its Lawbreakers, and the Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing the politics of distinction).

17. *Cf.* THE NEW NEGRO (Alain Locke ed., 1925).

18. For a discussion of the politics of distinction, see RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997). *See also* Austin, *supra* note 16. For a critique of Kennedy's analysis, see Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (book review).

19. This ascribed black identity is necessary not only to make me readable to others, but also to make others more readable to themselves. My blackness serves to confirm others' whiteness. In her article *Whiteness as Property*, Professor Cheryl Harris traces the construction of the white racial identity within the evolution of the American slavery system, focusing on how that construction depended on the simultaneous creation and definition of the black race. *See* Harris, *supra* note 9, at 1716-18. As American whites become less connected to their ethnic identity — Italian-American, Irish-American, etc. — self-identification based on whiteness alone becomes more of an imperative. *See* Charles A. Gallagher, *White Racial Formation: Into the Twenty-First Century*, *in* CRITICAL WHITE STUDIES 6 (Richard Delgado & Jean Stefancic eds., 1997).

20. The standard cite is to the work of Louis Althusser:

> There are individuals walking along. Somewhere (usually behind them) the hail rings out: "Hey you there!". One individual (nine times out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e., recognizing that "it really is he" who is meant by the hailing. But in reality these things happen without any succession. The existence of ideology and the hailing or interpellation of individual as subjects are one and thus the same thing.

LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 174-75 (Ben Brewster trans., 1971). For a novel application of the theory of interpellation to the concept of citizenship, see Leti Volpp, *The Terrorist and the Citizen*, UCLA L. REV. (2002) (forthcoming).

21. *Cf.* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 133 (1992) (suggesting that "collective eminence" is the sense within a particular community that the community members are "a distinct group and occupy a privileged position within society"). For a useful discussion of the extent to which this theory might help to explain the behavior of law students at elite institutions, see Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998).

22. *Cf.* Neil Gotanda, *A Critique of "Our Constituion is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

23. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE (1975).

24. *Cf.* MYRDAL, *supra* note 4.

Like many black Americans, I developed the ability to cope with, manage, and sometimes even normalize certain micro-aggressive racial encounters.[25] I have come to view them as incidents in the life of a black person, part of the racial mystique of life — the thing that has a name:[26] the colorline.[27] Indeed, today I consider it an aberration every time I manage to escape the normality of interpersonal, everyday racism.[28]

I have not, however, been able to normalize my experiences with the police. They continue to jar me. The very sight of the police in my rear view mirror is unnerving. Far from comforting, this sight of justice (the paradigmatic site for injustice) engenders feelings of vulnerability: How will I be over-policed this time? Do I have my driver's license, insurance, etc.? How am I dressed? Is my UCLA parking sticker visible? Will any of this even matter? Should it?

And what precisely will be my racial exit strategy this time? How will I make the officers comfortable?[29] Should I? Will I have time — the racial opportunity — to demonstrate my respectability? Should I have to? Will they perceive me to be a good or a bad black?

These questions are part of black people's collective consciousness. They are symptomatic of a particular colorline anxiety: a police state of mind.[30] This racial dis-ease is inflicted on black people ostensibly to cure the problem of crime. Its social effect, however, is to make white people feel good about, and comfortable with, their own racial identity and to make black people feel bad about, and uncomfortable with, being black.

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25. *Cf.* HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (1987).

26. *Cf.* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963) (discussing white women's experience with everyday sexism as "the thing that has no name").

27. *See* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 10 (Bantam Classic 1989) (1903) (describing the colorline as "[t]he problem of the twentieth century.").

28. Importantly, everyday racism transcends class. That is, middle and upper class, and not just poor, blacks are vulnerable to racial discrimination. *See* ELIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993). *See generally* JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE CLASS EXPERIENCE (1994).

29. *See* Carbado & Gulati, *supra* note 9, at 1301-04 (discussing racial comforting as a strategy people of color sometimes employ to put whites at ease with the person of color's nonwhite identity).

30. *See* Rohan Preston, *Police State of Mind*, *in* NOT GUILTY: TWELVE BLACK MEN SPEAK OUT ON LAW, JUSTICE AND LIFE 153, 157 (Jabari Asim ed., 2001). Preston asks himself a similar set of questions:

> Bob Marley sang, in "Slave Driver," "Every time I hear the crack of a whip, my blood runs cold." My own blood does not quite turn to mercury when I see a police man in my rear mirror, but I always ask myself: Are my papers in order, have I used my indicator lights, is there anyone around to videotape this, just in case? These encounters transport me to nightmares of police dramas, where I am guilty until proven innocent. I ask a battery of ridiculous questions and try[ ] to keep my blood pressure in check: Did I kill/rape/rob anyone today? What harms have I done to society? Such encounters also take me into history and I hear questions from a slave consciousness; Who owns you? Do you have a pass to be here? Are you legal?

My first racial episode with over-policing occurred only two weeks after I purchased my first car: a $1500 yellow, convertible Triumph Spit Fire. I had been living in America for a year; my brother had been in the States for under a month. It was about nine p.m., and we were on our way to a friend's house.

Our trip was interrupted by the blare of a siren. We were in Inglewood, a predominantly black neighborhood south of Los Angeles; a police car had signaled us to pull over. One officer approached my window; the other stationed himself beside the passenger door. He directed his flashlight into the interior of the car, locating its beam, alternatively, on our faces. The characters: two black boys.[31] The racial stage was set.

"Anything wrong, officers?" I asked, attempting to discern the face behind the flashlight. Neither officer responded. Against my racial script, I inquired again as to whether we had done anything wrong. Again, no response. Instead, one of the officers instructed, "Step outside the car with your hands on your heads." Effectively rehearsing our blackness, we did as he asked. He then told us to sit on the side of the curb. Grudgingly, we complied. Though we were both learning our parts, the racial theater was well underway.[32]

As we sat on the pavement, "racially exposed," our backs to the officers, our feet in the road, I asked a third time whether we had done anything wrong.[33] One officer responded, rather curtly, that I should "shut up and not make any trouble." Perhaps foolishly, I insisted on knowing why we were being stopped. "We have a right to know, don't we? We're not criminals, after all."

Today I might have acted differently, less defiantly. But my strange career with race, at least in America, had only just begun.[34] In other words, I had not yet lived in America long enough to learn the ways of the police,[35] the racial conventions of black and white police encounters, the so-called rules of the game: "Don't move. Don't turn around. Don't give some rookie an excuse to shoot you."[36] No one had ex-

31. *Cf.* RICHARD WRIGHT, BLACK BOY (1945).

32. *Cf.* JUDITH BUTLER, BODIES THAT MATTER (1993); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); BRUCE WILSHIRE, ROLE PLAYING AND IDENTITY (1982).

33. It was not just our race in some abstract sense that was exposed here. More fundamentally, our presumed racial connection to crime was exposed.

34. *Cf.* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed., 1974).

35. *Cf.* LANGSTON HUGHES, THE WAYS OF WHITE FOLKS (1934).

36. CHRISTOPHER A. DARDEN, IN CONTEMPT 110 (1996). Darden, one of the lead prosecutors in the O.J. Simpson murder trial, employs these rules during encounters with police officers as a survival strategy. *See also* Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 200 (suggesting that the "rules of engagement of black malehood" require that black men "make no quick moves, remove any possibility of danger and never give offense to danger").

plained to me that "if you get pulled over by the police "[n]ever get into a verbal confrontation . . . Never! Comply with the officer. If it means getting down on the ground, then get down on the ground. Comply with *whatever* the officer is asking you to do."[37] It had not occurred to me that my encounter with these officers was potentially life threatening. This was one of my many racial blind spots.[38] Eventually, I would develop my second sight.[39]

The officer discerned that I was not American. Presumably, my accent provided the clue, although my lack of racial etiquette — mouthing off to white police officers in a "high-crime" area[40] in the middle of the night — might have suggested that I was an outsider to the racial dynamics of police encounters.[41] My assertion of my rights, my attempts to maintain my dignity, my confronting authority (each a function of my pre-invisibility blackness)[42] might have signaled that I was not from here and, more importantly, that I had not been racially socialized into, or internalized the racial survival strategy of, performing obedience for the police. From the officer's perspective, we were, in that moment, defiant ones.[43]

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37. KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: WHAT TO DO IF YOU ARE A VICTIM OF RACIAL PROFILING 138 (2000) (suggestions of a black detective) (emphasis added).

38. *Cf.* Barbara Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

39. *See* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 10 (Henry Louis Gater & Terri Hume Oliver eds., 1999) (1903).

40. The characterization of a neighborhood as a "high-crime" area lends law enforcement wider latitude in exercising its search-and-seizure powers — the reputation of the neighborhood forming one phrase of an articulable suspicion. *See* United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984) ("The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely."). For a critique of an overly simplistic reliance on neighborhood reputation in justifying police stops, see Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100-01 (1999) (arguing that the use of neighborhood reputation as a factor for determining reasonable suspicion can undercut the requirement of a *particularized* suspicion, and runs the risk of making every resident of a "high-crime" area "stop-eligible"). *See also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Verses Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975 (1998); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

41. Jim Crow required blacks to perform a kind of racial etiquette for whites. A classic example is the domestic worker who implicitly understands that a racial condition of her employment is that she signal happiness (by, for example, singing or smiling) while performing her work.

42. *Cf.* RALPH ELLISION, INVISIBLE MAN 17-18 (1952) ("In those pre-invisibility days I visualized myself as a Booker T. Washington."). Ellison's notion of pre-invisibility suggests a kind of false consciousness, or at least unawareness, of the realities of race.

43. *Cf.* THE DEFIANT ONES (United Artists 1958).

The officer looked at my brother and me, seemingly puzzled. He needed more information racially to process us, to make sense of what he might have experienced as a moment of racial incongruity. While there was no disjuncture between how we looked and the phenotypic cues for black identity, our performance of blackness could have created a racial indeterminacy problem that had to be fixed.[44] That is, to the extent that the officers harbored an a priori investment in our blackness (that we were criminals or thugs), our English accents might have challenged it.[45] At best, this challenge was partial, however; racial inscription was inevitable. The officer could see—with his "inner eyes"[46] — that we had the souls of black folk.[47] He simply needed to confirm our racial stock so that he could freely trade on our blackness.

"Where are you guys from?"

"The U.K.," my brother responded.

"The what?"

"England."

"England?"

"Yes, England."

"You were born in England?"

"Yes."

"What part?"

"Birmingham."

"Uhmm . . . . " We were strange fruit.[48] Our racial identity had to be grounded.

"Where are your parents from?"

"The West Indies."

We were at last racially intelligible. Our English identity had been dislocated, falsified — or at least buried among our diasporic roots.[49]

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44. *See* PHILLIP BRIAN HARPER, ARE WE NOT MEN?: MASCULINE ANXIETY AND THE PROBLEM OF AFRICAN-AMERICAN IDENTITY 146 (1996) (observing that racial discourse sometimes makes it difficult "to account for the potential disjuncture between physical appearance and designated race"). For a discussion of the extent to which the social meaning or content of a person's racial identity is a function of identity performance, see Carbado & Gulati, *supra* note 9; Gross, *supra* note 9; and Tehranian, *supra* note 9.

45. The American racial map having been drawn so precisely along white/nonwhite lines, any personal attribute that does not fit one's established racial identity (i.e., an accent, a manner of speaking) will regularly produce moments of social surprise or confusion. *See* Kang, *supra* note 8, at 1133 (recounting the author's first meeting with a roommate who had spoken to the author only by telephone and who had made the "default" racial assumption that he was white). For further discussion of the strained social interactions produced by racial ambiguity, see KATYA GIBEL AZOULAY, BLACK, JEWISH AND INTERRACIAL 126-33 (1997).

46. *See* ELLISON, *supra* note 42, at 1 (referring to the "inner eye" as the "eye[ ] with which they look through their physical eyes upon reality").

47. *Cf.* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK, *supra* note 39.

48. BILLIE HOLIDAY, STRANGE FRUIT (Commodore 1939).

"How long has he been in America?" the officer wanted to know, pointing at me.

"About a year," my brother responded.

"Well, tell him that if he doesn't want to find himself in jail, he should shut the fuck up."

The history of racial violence in his words existentially moved us.[50] We were now squarely within a sub-region of the borders of American Blackness. Our rite of passage was almost complete.[51]

My brother nudged me several times with his elbows. "Cool it," he muttered under his breath. The intense look in his eyes inflected his words. "Don't provoke them."

By this time, my brother needn't have said anything. I was beginning to see the white over black racial picture.[52] We had the right to do

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49. Black and Asian English people typically experience what one might call "nationhood displacement." A white person will ask: "Where are you from?" To which the black person might respond, "Birmingham."

"No, I mean where are you really from?"

"Birmingham. Smethwick, Birmingham."

"Yes, alright, but where are your mom and dad from?"

"The Caribbean."

(Sometimes, to determine how racially invested a white English person is in falsifying our national identity, my siblings and I respond to the question about our parents by rendering them English-born as well.)

"Are you going to *go back* to the Caribbean some day?"

"Actually, I have never been."

Blacks and Asians in Britain experience these exchanges all the time. They function to remind us that, to borrow from Paul Gilroy, "there ain't no black in the Union Jack." *See generally* PAUL GILROY, "THERE AIN'T NO BLACK IN THE UNION JACK": THE CULTURAL POLITICS OF RACE AND NATION (1987). Thus my exchange with the officer was a familiar one. The extent to which Asian Americans experience nationhood displacement in the United States was underscored in the case of Wen Ho Lee, the Chinese-American physicist accused of stealing nuclear secrets for China. *See* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) ("The assignment to Wen Ho Lee of a presumption of disloyalty is a well-established marker of foreignness. And foreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Asian Americans."); *see also* Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 82 (2001) (interrogating the heading "American beats out Kwan," on the grounds that it conveys the idea that "*White* American skater, Tara Lipinski, was victorious over the purportedly *non-American* Michelle Kwan") (emphasis added).

50. *Cf.* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed.) (1975).

51. The rite of passage for black people might be described as a journey of pain to an experience of subordination. *Cf.* Anthony Paul Farley, *All Flesh Shall See It Together*, 19 CHICANO-LATINO L. REV. 163, 167 (1998) (characterizing the "middle passage" as an experience within which "[a]ll manner of nations went into the wombs of those . . . terrible ships to be born again 'as blacks' after a transatlantic labor of hate").

52. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

whatever they wanted us to do, a reasonable expectation of uncertainty.[53] With that awareness, I simply sat there. Quietly. My brother did the same. We were in a racial state of rightlessness, effectively outside the reach of the Fourth Amendment.[54] The experience, in other words, was disciplinary. Although I didn't know it at the time, we were one step closer to becoming black Americans.[55] Unwillingly, we were participating in a naturalization ceremony[56] within which our submission to authority reflected and reproduced black racial subjectivity.[57] We were being "pushed" and "pulled" through the racial body of America to be born again.[58] A new motherland awaited us. Eventually we would belong to her.[59] Her racial burden was to make us Naturalized Sons.[60]

Without our consent, one of the officers rummaged through the entire car — no doubt in search of ex post probable cause;[61] the other watched over us. The search yielded nothing. (No drugs.) (No stolen property.) (No weapons.) Ostensibly, we were free to leave.

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53. *Cf.* Katz v. United States, 389 U.S. 347 (1967) (articulating the "reasonable expectation of privacy" test for determining whether a particular governmental activity constitutes a search).

54. *Cf.* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

55. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 457 (1993) (noting that "blackness is largely constituted of the treatment of blacks").

56. I thank Muneer Ahmad for suggesting the employment of this term.

57. I am not suggesting that African Americans accept racial subordination passively. Quite clearly they do not — and historically have not. Indeed, it is difficult to think of protest movements without thinking of African Americans. For treatments of the African-American protest tradition, see AFRICAN AMERICANS AND THE LIVING CONSTITUTION (John Hope Franklin & Genna Rae McNeil eds., 1995); ROBERT COOK, SWEET LAND OF LIBERTY?: THE AFRICAN-AMERICAN STRUGGLE FOR CIVIL RIGHTS IN THE TWENTIETH CENTURY (1998); and EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS (Blackside, Inc. & The Corporation for Public Broadcasting 1986-87). My point is that part of being an African American is knowing when and when not to confront authority. *See generally* DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994).

58. *Cf.* Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman's Patriarchal Bargain*, 21 HARV. WOMEN'S L.J. 1, 4-5 (1998) (discussing the "push" and "pull" factors that explain West Indian immigration to England after World War II).

59. *Cf.* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

60. *Cf.* RICHARD WRIGHT, NATIVE SON (1940).

61. For a discussion of the extent and nature of police perjury, see generally THE CITY OF NEW YORK COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT: ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994); Alan Dershowitz, *The Best Defense*, *in* RONALD J. ALLEN & RICHARD B. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 28-29 (2d ed. 1991); and Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

But what if the search had resulted in the production of incriminating evidence? That is, what if the officers' racial suspicions were confirmed? Would that have rendered their conduct legitimate? Would they thereby become "good" cops? Would that have made us "bad" blacks — blacks who confirm negative stereotypes, blacks who are undeserving of public sympathy, blacks who discredit the race?

One of the officers asked for my driver's license, which I provided. My brother was then asked for his. He explained that he didn't have one because he had been in the country only a few weeks.

"Do you have any identification?"

"No. My passport is at home." We both knew that this was the wrong response.

The officers requested that we stand up, which we did. Pursuant to black letter law, or the law on the street for black people, they forced us against the side of the patrol car. Spread-eagled, they frisked and searched us. (Still no guns.) (Still no drugs.) (Still no stolen property.)

The entire incident lasted approximately twenty minutes. Neither officer provided us with an explanation as to why we were stopped. Nor did either officer apologize. By this time, I understood that we were not in a position to demand the latter, even as I did not understand that, in some sense, the entire event was racially predetermined. The encounter ended when one of the officers muttered through the back of his head, "You're free to go."

"Pardon?"

"I said you can go now."

And that was that. The racial bonding was over (for now).[62] I wanted to say something like, "Are you absolutely certain, Officer? We really don't mind the intrusion, Officer. Do carry on with the search. Honest." But the burden of blackness in that moment rendered those thoughts unspeakable.[63] Thus, I simply watched in silence as they left.

The encounter left us more racially aware and less racially intact. In other words, we were growing into our American profile. Still, the officers did not physically abuse us, we did not "kiss concrete," and we managed to escape jail.[64] Relative to some black and Blue encounters,

62. Typically, racial bonding is described as an antiracist activity. I employ the term here to suggest that often racial groups are bonded under circumstances of violence, coercion, and subordination.

63. The point is not that, were I white, I would have felt completely free to "mouth off" to the officer. Presumably, police encounters have a chilling effect on most peoples' speech. The point is simply that the extent to which one feels chilled likely is a function of race.

64. *See* David Dante Trout, *The Race Industry, Brutality, and the Law of Mothers*, *in* NOT GUILTY, *supra* note 30, at 57 ("I have had a weapon pulled on me only once: I've never kissed concrete.").

and considering my initial racial faux pas — questioning authority/asserting rights — we got off easy.[65]

Subsequent to that experience, I have had several other incidents with the police. In this respect, and like many black people, I am a repeat player. While each racial game bears mention (as part of a broader informal naturalization process that structured the racial terms upon which I became American[66]), I shall recount only one more here. This encounter, too, occurred on my way to American citizenship. And, like the first, it facilitated my (intra)racial integration into black American life.[67]

Two of my brothers and my brother-in-law had just arrived from England. On our way from the airport, we stopped at my sister's apartment, which was in a predominantly white neighborhood. After letting us in, my sister left to perform errands. It was about two o'clock in the afternoon; my brothers wanted some tea. I showed one of them to the kitchen. After about five minutes, we heard the kettle whistling.

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65. *See* Tracey Maclin, *"Black and Blue Encounters" — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 262 (1991) ("The realities of the street, however, make challenging an officer's authority out of the question for a black man."). One reality to which Maclin refers is that minorities are more likely than whites to be subjected to police brutality. According to Bureau of Justice Statistics, Hispanics and African Americans constituted about 50% of the people subjected to police force in 1996, despite representing only one-fifth of the relevant population. The types of force enumerated in the Bureau's report included being hit, pushed, choked, threatened by a flashlight, restrained by a dog, and threatened by a gun. *See* Robert Suro, *Study Says Cops Used Force v. 500,000*, CHI. SUN-TIMES, Nov. 24, 1997, at 21; *see also* David Lester, *Officer Attitudes Toward Police Use of Force*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 180, 183 (William A. Geller & Hans Toch eds., 1996) ("The presumed moral inferiority and the race of suspects leads the police to see them as less than human, thereby justifying brutality."); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 390 (1998) (citing a report by Amnesty International that police brutality victims in New York City are largely minority, and that nearly all victims in cases of death in custody were members of racial minorities); Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1 (reporting that in Los Angeles, "[c]ourt documents from several misconduct cases show that nearly all the victims of maulings by Los Angeles police dogs in the last seven years were black or Hispanic — although whites committed nearly a third of the crimes in which dogs are usually deployed").

66. *Cf.* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); Karen Brodkin Sacks, *How Did Jews Become White Folks?*, *in* CRITICAL WHITE STUDIES, *supra* note 19, at 395.

67. Little attention has been paid to the ways in which black ethnic experiences converge around the issue of police abuse. In this respect it is worth noting that some of the most recent episodes of alleged race-based policing have involved immigrant blacks. These episodes include the March 2000 shooting death of Haitian immigrant Patrick Dorismond in New York City; the February 1999 shooting death of Guinean immigrant Amadou Diallo in New York City; and the August 1997 torture of Haitian immigrant Abner Louima, also in New York City. *See* Robert D. McFadden & Tina Kelley, *Angry Mourners and Police Clash at Funeral of Man Shot by Officer*, N.Y. TIMES, Mar. 26, 2000, at A1; Jane Fritsch, *Four Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 25, 2000, at A1; David Barstow, *Officer, Seeking Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999, at A1. Each of these incidents perform a kind of racial integration wherein immigrant blacks are integrated into the "mainstream" Black American experience.

"Get the kettle, will you." There was no answer. My other brother went to see what was going on. Finally the kettle stopped whistling, but he never returned. My brother-in-law and I were convinced that my brothers were engaged in some sort of prank. "What are they doing in there?" Together, we went into the kitchen. At the door were two police officers. Guns drawn, they instructed us to exit the apartment. With our hands in the air, we did so.

Outside, both of my brothers were pinned against the wall at gunpoint. There were eight officers. Each was visibly edgy, nervous and apprehensive. Passersby comfortably engaged in conspicuous racial consumption.[68] Their eyes were all over our bodies.[69] The racial product was a familiar public spectacle: white law enforcement officers disciplining black men. The currency of their stares purchased for them precisely what it took away from us: race pleasure and a sense of racial comfort and safety.[70] This racial dialectic is a natural part of, and helps to sustain, America's racial economy, an economy within which racial bodies are differentially valued,[71] propertized,[72] and invested with so-

68. For a useful discussion of the relationship among identity formation, consumption, and production, see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, & Desire*, 101 COLUM. L. REV. 181, 188-91 (2001).

69. *See* Marcia Grahn-Farley, *Not for Sale! Race and Gender Identity in Post-colonial Europe*, XVII N.Y.L. SCH. J. HUM. RTS. 271, 289 (2000) (observing that "[t]o look is to touch").

70. For a conceptualization of American racial dynamics as a form of race pleasure, see Anthony Paul Farley, *The Black Body As Fetish Object*, 76 OR. L. REV. 457 (1997).

71. The death penalty debate has brought into full relief the different values attached to white and black life in America. Most famously, the statistical study at issue in *McCleskey v. Kemp* ("the Baldus study") concluded that, in Georgia, the killer of a white victim was much more likely to receive a death sentence than a capital defendant whose victim was nonwhite. *See* McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987); *see also* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH IINDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (echoing the findings of the Baldus study on a national scale).

72. While blackness becomes "propertized," or objectified, in this racial economy, whiteness becomes "propertied," or imbued with rights and privileges that sustain whites' racial identity. *See* Harris, *supra* note 9; *see also* GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998).

cial meaning.[73] No doubt, our policed presence confirmed what the onlooking *racial interpellaters*[74] already "knew": that we were criminals.

The officers wanted to know whether there was anyone else inside. We answered in the negative. "What's going on?" my brother-in-law inquired. The officer responded that they had received a call from a neighbor reporting that several black men had entered an apartment with guns. "Rubbish, we're just coming in from the airport."

"Do you have any drugs?"

"Of course not. Look, this is a mistake." The officers did not believe us. We were trapped inside their racial imagination[75] — the heart of whiteness.[76] (Quite possibly they were as well.) The body of evidence — that is to say, our race — was uncontestable. We were uncovered.[77] At the very least we were race traffickers. Our only escape, then, was to prove that, in a social meaning sense, we were not what, phenotypically, we quite obviously were: black.

"May we look inside the apartment?"

"Sure," my brother in-law "consented."[78] "Whatever it takes to get this over."

Two officers entered the apartment. After about two minutes, they came out shaking their heads, presumably signaling that they were not at a crime scene.[79] In fact, we were not criminals. Based on "bad" in-

73. Although these passersby might disavow any overt expressions of racism, and might object to the clichéd negative stereotype of blacks as criminals, our onlookers were confronted with a racial scene so deeply invested with social meaning that the racial conclusions to be drawn were cognitively inescapable. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 336-39 (1987) (arguing that a multitude of social meanings regarding race is tacitly learned and internalized, and resides in the unconscious); *see also* Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 UMKC L. REV. 695, 697 (1999) ("Under a psycho-social paradigm, the perpetuation of racism occurs at two levels: first through society's acceptance of racist beliefs, and second through the individual's acceptance of racist beliefs. Both of these processes give race its social meaning.").

74. Apologies to Louis Althusser. *See* ALTHUSSER, *supra* note 20.

75. *See generally* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

76. *Cf.* JOSEPH CONRAD, THE HEART OF DARKNESS (1902).

77. *Cf.* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

78. Of course, the officer did not inform my brother that he had a right to refuse consent.

79. This misperception, or assumption, that a group of black men were carrying guns is unfortunately far from an isolated occurrence. According to a report drafted by New York City's Civilian Complaint Review Board, NYPD officers "were more likely to say that they saw a 'suspicious-looking bulge' or a waistband movement indicative of a gun" when they provided their reasons for stopping blacks or Latinas/os, while officers said they detained most white suspects "for being in a high-crime area." Alice McQuillan, *New York Police Use Force More Often to Detain African Americans*, N.Y. DAILY NEWS, Apr. 12, 2001. During the trial of the four New York City police officers who shot and killed unarmed African immigrant Amadou Diallo, the defendant officers testified that they saw Diallo pull a black

formation — but information that was presumed to be good — they had made an "error."[80] "Sometimes these things happen."[81] At least, they were willing to apologize.

"Look, we're really sorry about this, but when we get a call that there are [black] men with guns, we take it quite seriously. Again, we really are sorry for the inconvenience."[82] With that apology, the officers departed. Our privacy had been invaded, we experienced a loss of dignity, and our blackness had been established — once more — as a crime of identity. But that was our law-enforcement cross to bear. In other words, the police were simply doing their job: acting on racial intelligence. And we were simply shouldering our racial burden: disconfirming the assumption that we were criminals. No one was really injured. Presumably, the neighbors felt a little safer.

My eyes followed each officer into his car. As they drove off, one of them turned his head to witness the after-spectacle: the four of us (racially) traumatized in the gunned-down position they had left us. Our eyes met for a couple of seconds, and then he looked away. It was over. The racial transaction — routinized social power freely ex-

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object out of his pocket and that they assumed it was a gun. It turned out that Diallo had been holding his wallet. *See* Fritsch, *supra* note 67.

80. It is well established that there is a disproportionately high error rate in cross-racial suspect identifications. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (arguing for discrete analysis of and safeguards against cross-racial identification errors in addressing the general problem of unreliable eyewitness testimony). The initial national response in the 1994 Susan Smith child murder case provided an example of the instant credibility of an accusation against a black assailant. For a discussion of this and other racial themes surrounding the Smith case, see Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith — Spectacles of Our Times*, 35 WASHBURN L.J. 225 (1996). For a further discussion of racial hoaxes such as the Smith case, see KATHERYN K. RUSSELL, THE COLOR OF CRIME 69-93 (1998). In a chapter detailing racial hoaxes, Professor Russell discusses cross-racial allegations by both whites and blacks, but notes that "[t]he public appears to be more willing to believe someone White who says they were victimized by someone black than someone black who says they were victimized by someone White." *Id.* at 83. This explicit link between race and credibility manifested itself in nineteenth century laws that prohibited black participation on juries. In 1879, the U.S. Supreme Court declared such laws unconstitutional in *Strauder v. West Virginia*, 100 U.S. 303 (1879); however, the force of that opinion was neutralized by the adoption of other means to prevent the inclusion of black jurors, such as poll taxes and citizenship tests. In recent years, the credibility and impartiality of black jurors is under attack in the debate over jury nullification. *See* Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL'Y 57 (1997).

81. This episode makes apparent the link between racial profiling and race-based suspect descriptions. *See generally*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine & Discourse*, 48 UCLA L. REV. 1075 (2001).

82. I do not mean to suggest that had the police officer received a call that there were white men with guns, or simply men with guns, entering an apartment, they would not have taken it seriously. Presumably, they would have. The point is that race likely compounded the extent to which the officers, and the person who made the call to the police, perceived us and the situation to be dangerous.

pended upon black bodies — was complete. Another day in the life, for the police and for us.[83]

Simple injustice.[84]

We went inside, drank our tea, and didn't much talk about what had transpired. Perhaps we didn't know how to talk about it. Perhaps we were too shocked. Perhaps we wanted to put the incident behind us — to move on, to start forgetting. Perhaps we needed time to recover our dignity, to repossess our bodies. Perhaps we knew that we were in America. Perhaps we sensed that the encounter portended a racial taste of things to come, and that this experience of everyday social reality for black Americans would become part of our invisible life.[85] Perhaps we understood that we were already black Americans, that our race had naturalized us.[86] Perhaps we knew that this naturalization

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83. *Cf.* IN THE LIFE: A BLACK GAY ANTHOLOGY (Joseph Beam ed., 1986).

84. *Cf.* RICHARD KLUGER, SIMPLE JUSTICE (1976).

85. *Cf.* RALPH ELLISON, INVISIBLE MAN 1 (1947) ("I am an invisible man. . . . I am a man of substance, of flesh and bone, fiber and liquids — and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination — indeed, everything and anything except me."); *see also* E. LYNN HARRIS, INVISIBLE LIFE: A NOVEL (1994).

86. Congress's first naturalization law, passed in 1790, limited citizenship eligibility to "free white persons." Until the element of race was formally eliminated in 1952, the greater part of naturalization litigation was concerned with (re)defining and (dis)proving "whiteness." For a study of the racial prerequisite litigation up to the 1920s, see IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (tracing the shifting definition of legal race from two competing doctrines: genetics rooted in "scientific evidence" of phenotype and sociology evidenced by "common knowledge" of whiteness). An alternative reading of the racial prerequisite cases points to the Court's role in the development of racial performance as the ultimate basis for judging racial identity, reflecting an assimilationist policy in immigration law. *See* Tehranian, *supra* note 9; *see also* Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997) (describing assimilation as the underlying theme for race relations discourse in the United States, and arguing that assimilation theory continues to dominate political discourse and influence public policy). Exclusionary citizenship policies and the Court's role in expanding and mostly contracting the zone of whiteness, Ozawa v. United States, 260 U.S. 178, 198 (1922), reflected the single most important consideration in U.S. immigration policy: the ability of aliens to "quickly merge into the mass of our population and lose the distinctive hallmarks of their . . . origin." United States v. Thind, 261 U.S. 204, 215 (1923). Today, naturalization does not formally depend on race. 8 U.S.C.A § 1422. Race, however, is a stubborn "hallmark of origin" and continues to pose a threat to the underlying assimilationist character of American identity. *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995) (arguing that the current policy on naturalization is eroding the "racial hegemony of white Americans" and precipitating the decline of United States economic and cultural superiority). Current immigration policies continue to have racially restrictive effects, although the restrictions ostensibly are based on political, economic or linguistic considerations. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

was fundamentally about race and place,[87] a project in social positioning that rendered us the racial embodiment of social transgression.

We relayed the incident to my sister. She was furious. "Bloody bastards!" She lodged a complaint with the Beverly Hills Police Department. She called the local paper. She contacted the NAACP. "No, nobody was shot." "No, they were not physically abused." "Yes, I suppose everyone is alright."

Of course, nothing became of her complaints.[88] After all, the police were "protecting and serving." We, like other blacks in America, were the unfortunate but necessary casualties of the war against crime. We were impossible witnesses to police abuse.[89] Eventually, we would learn that within America's racial environment, policed black identity is a natural and national resource.[90] It is the raw material for a nation-building project to make America feel safer — ostensibly for all of us.[91]

I. INTRODUCTION

A growing body of literature contests the racial dimensions of Fourth Amendment law.[92] The central claim this literature advances is that Fourth Amendment jurisprudence is insensitive to, and uncon-

87. The notion of race and place carries with it at least the following two interrelated ideas: (1) that one's social position in society — that is to say, how one lives — should be a function of one's race; and (2) that where one lives should be a function of one's race. For a very useful discussion of the racialization of space and the spatialization of race, see Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

88. A 1999 Associated Press study of Justice Department records found that, between 1992 and 1996, federal prosecutors took no action in 96% of the roughly 2,000 claims of civil rights violations that were referred to them by the Federal Bureau of Investigation or other agencies. Most of the civil rights claims involved allegations of abuse by police or other law enforcement personnel. By comparison, federal attorneys prosecuted 90% of the immigration cases referred to the Justice Department during the same period, and 75% of drug case referrals. *See Complaints of Civil Rights Violations Rarely Prosecuted, Associated Press Study Reveals*, JET, Apr. 5, 1999, at 6.

89. *Cf.* DWIGHT A. MCBRIDE, IMPOSSIBLE WITNESSES: TRUTH, ABOLITIONISM, AND SLAVE TESTIMONY (2001).

90. *Cf.* RALPH ELLISON, SHADOW AND ACT 29 (1964) (noting that blacks often function as "a human 'natural' resource who, so that white men could become more human, was elected to undergo a process of institutionalized dehumanization").

91. *Cf.* Volpp, *supra* note 20 (suggesting that racial profiling against Arab/Muslim Americans is a nation-building project).

92. *See generally* Harris, *supra* note 40; Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Maclin, *supra* note 65; Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

cerned with, the contemporary realities of race.[93] While this body of work is important and illuminating, it can be expanded upon in three important ways. First, virtually none of this literature links the Supreme Court's racial insensitivity in the Fourth Amendment context to racial ideology — that is, commitments about and conceptions of race.[94] Put another way, the race and Fourth Amendment scholarship fails to examine the nexus between the development of Fourth Amendment doctrine on the one hand, and ideological notions about what race is and should be on the other. Part of the project of Critical Race Theory[95] has been to illustrate not only the role courts play in constructing racial identities, but also the relationship between the construction of race in judicial opinions and the production and legitimation of racial inequality.[96] For the most part, scholars writing about race and the Fourth Amendment have not meaningfully engaged this body of work.[97] Thus, they have failed to consider the race-

93. *See* Maclin, *supra* note 65, at 340 (arguing that "[a]lthough the casual reader of the [Supreme] Court's Fourth Amendment opinions would never know it, race matters when measuring the dynamics and legitimacy of certain police-citizen encounters); Thompson, *supra* note 92, at 962 (analyzing a series of Supreme Court decisions to illustrate "the Court's conception of a raceless world of Fourth Amendment jurisprudence: a constructed reality in which most police officers do not act on the basis of considerations of race, the facts underlying a search or seizure can be evaluated without examining the influence of race, and the applicable constitutional mandate is wholly unconcerned with race").

94. Scholars who have interrogated the relationship between racial ideology and the law include Kimberlé Williams Crenshaw and D. Marvin Jones. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Discrimination Law*, 101 HARV. L. REV. 1331, 1376-81 (1988) (tracing the "partial transformation of the functioning of race consciousness that occurred with the transition from Jim Crow to formal equality in race law"); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor and the Racial Self*, 82 GEO. L.J. 437 (1993) (identifying historical narratives that have served to construct racial identities and analyzing how those narratives act to reify racial difference in the law).

95. For a discussion of the genesis and intellectual commitments of Critical Race Theory, see Kimberlé Williams Crenshaw, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii-xxxii (Kimberlé Crenshaw et al. eds., 1995); Richard Delgado, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE xiii-xvi (Richard Delgado ed., 1995); and Adrien Katherine Wing, *Introduction* to CRITICAL RACE FEMINISM: A READER (Adrien Wing ed., 1997). For an indication of the diversity of this literature, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); *see also* Anthony V. Alfieri, *Black and White*, 85 CAL. L. REV. 1647 (1998) (reviewing the two leading critical race theory texts).

96. A now-classic article that articulates this relationship in the context of an analysis of whiteness as property is Harris, *Whiteness as Property*, *supra* note 9. *See also* Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389 (1991); Gotanda, *supra* note 22; Ian F. Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

97. In part, this might be because Critical Race Theorists have not performed a social constructivist critique of Fourth Amendment law. Still, there is a vast literature on the social construction of race that could shape the way in which Fourth Amendment law is discussed. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 63 (1986); Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 SOCIALIST REV. No. 3-4, 37 (1991); Haney Lopez,

constructing role the Court performs in the Fourth Amendment context.[98] An examination of this role could further illuminate the disjuncture between how the Court on the one hand and police on the other make race matter. This illumination would help to highlight the Court's complicity in, and legitimation of, police practices that target people of color.[99]

Second, the literature on race and the Fourth Amendment has not fully examined the ways in which current doctrine affects the everyday lives of people of color. Certainly, the suggestion that suspicion is racialized and that this racialization burdens people of color is not novel. The literature, however, fails to capture the precise nature of this burden. The burden includes, but is not limited to, internalized racial obedience toward, and fear of, the police. Few people have noted that people of color are socialized into engaging in particular kinds of performances *for* the police.[100] They work their identities in response to, and in an attempt to preempt, law enforcement discipline. This identity work takes place in a social atmosphere of fear and loathing.[101] It is intended to signal acquiescence and respectability. This undertheorized part of the interaction between police officers and people of color provides a more complete understanding of the racial costs of current Fourth Amendment law. While the identification of these additional costs may, given the current political culture of the Supreme Court, be insufficient substantively to change existing doctrine, their incorporation into Fourth Amendment discourse could perform an

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supra note 96. For a useful application of the insights of critical race theory to the way in which trials are conducted and understood, see Anthony V. Alfieri, *Race Trials*, 76 TEXAS L. REV. 1293 (1998).

98. Scholars have thoroughly examined the ways that the Supreme Court constructs race in the Fourteenth Amendment context. *See* Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995). However, there has been virtually no discussion of the legal construction of race in the Fourth Amendment context.

99. *Cf.* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983) (identifying legitimation as one of the functions of criminal procedure).

100. For a general discussion of identity performances as a strategy to preempt racism, manage it, or both, see Devon W. Carbado & Mitu Gulati, *Working Identity*, *supra* note 9. *See also* Devon W. Carbado and Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000) (discussing identity performances as a response to institutional norms). For a discussion of how identity performances are employed in the context of police encounters, see *infra* Section II.B.2.

101. *See* RUSSELL, *supra* note 80, at 34 (pointing to "the general fear and loathing that many Black men have of the police").

epistemological function.[102] Specifically, an awareness of the relationship between identity performance and race-based policing could shape how scholars think about Fourth Amendment law and render it more difficult for the Court to ignore or race neutrally construct race.[103]

Finally, the scholarship on race and the Fourth Amendment is underinclusive, focusing primarily on blacks. The point is not that we have a complete understanding of how the Fourth Amendment burdens black people; indeed, part of my aim in this Article is to broaden that understanding. Instead, the point is that to the extent that blackness is but one — albeit significant — racial identity burdened by the Court's formulation of Fourth Amendment doctrine, focusing exclusively on blacks presents a black and white racial picture of this body of law. Lost in this picture is the conception of race-based policing as a multiracial social phenomenon.[104] Such a conception provides scholars with a window through which to broaden both their understanding of race and policing and their critique of the Supreme Court. Indeed, to the extent that race-based policing is perceived to affect only black people, the Supreme Court's indifference to it, and the practice itself, is easier to ignore.[105]

The project of this Article, broadly stated, is to fill these gaps. To do so, it examines Fourth Amendment case law as a jurisprudential site within which the Supreme Court engages in the production of race. What I mean to suggest here is that, in the Fourth Amendment context, the Court both constructs race (that is, produces a particular conception of what race is)[106] and reifies race (that is, conceptualizes race as existing completely outside of or apart from the very legal frameworks within which the Court produces it). My specific aim is to illustrate how the Supreme Court's construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial

102. For many observers, the Court's decision in *Bush v. Gore* shed a harsh light on this political culture; liberal commentators wryly noted the conservative majority's acceptance of the petitioner's Equal Protection argument, given that bloc's past refusals to back Equal Protection claims advanced by racial minorities. For an analysis of the Supreme Court's current political climate, seen through the lens of *Bush v. Gore*, see ALAN DERSHOWITZ, SUPREME INJUSTICE (2001). *See also* RICHARD POSNER, BREAKING THE DEADLOCK (2001). For a detailed account and analysis of the *Bush v. Gore* decision, see Linda Greenhouse, *Bush v. Gore: A Special Report; Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

103. *See infra* Section II.C.2.

104. *See, e.g.*, Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000).

105. Significantly, this Article does not present a complete picture of the racial effects of the Fourth Amendment or of particular kinds of police practices. Although I engage the experiences of Latinas/os, I do not say much about Asian Americans or Native Americans.

106. As I explain more fully below, because race does not exist prior to but is an effect of discourse, any articulation of race is race-constructing.

inequality in the context of policing. In this sense, the Article will delineate the racial world that Fourth Amendment law helps to create and sustain.

The central claim I advance is that the racial effects of the Supreme Court's Fourth Amendment law is a function of the Court's adoption of what I call the perpetrator perspective.[107] Two normative and race-constructing commitments underwrite this perspective: (1) the notion that how people interact with and respond to the police is neither affected by nor mediated through race; and (2) the idea that whether and how the police engage people is not a function of race. As a result of these commitments, the Court conceptualizes race primarily through the *racial* lens of colorblindness. In this sense, the race and Fourth Amendment problem is not *just* a function of the fact that the Court ignores race.[108] It is also, and perhaps more fundamentally, a function of the Court's underlying investment in a particular conception of race: race neutrality or colorblindness.[109]

The Supreme Court's investment in colorblindness reflects a perpetrator perspective in the sense that race becomes doctrinally relevant only to the extent that the presumption of race neutrality and colorblindness can be rebutted by specific evidence that a particular police officer exhibits overtly racist behavior — in other words, is obviously a perpetrator of racism. Put another way, race potentially matters in the Fourth Amendment context only when a case involves a "racially bad" cop.[110] Police officers who cannot be so described are

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107. The phrase "perpetrator perspective" previously was employed by Alan David Freeman to refer to a conception of "racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class." Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978). I use the phrase in the Fourth Amendment context to capture the Supreme Court's active construction of an imaginary, race-less arena in which law enforcement and minorities interact. In this arena, the specter of explicit bigotry serves to mask subtextual bias, and a focus on racist actors serves to blur the experiences of race victims.

108. Some race and the Fourth Amendment scholars have ably demonstrated this problem. *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316-23 (1997) (elucidating the Supreme Court's "general pattern in Fourth Amendment cases of overlooking the special grievances of blacks and other racial minorities"); Thompson, *supra* note 92, at 978 (concluding a detailed analysis of an "array of Supreme Court cases denying or minimizing the role of race in police searches and seizures").

109. One could articulate this problem of seeing race through the lens of colorblindness in terms of racial recognition and de-recognition. *See* Cheryl I. Harris, *Symposium — The Constitution of Equal Citizenship for a Good Society: Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001) (discussing the ways in which the Supreme Court, in the context of Fourteenth Amendment jurisprudence, both recognizes and de-recognizes race).

110. For example, in 1993, the city of Reynoldsburg, Ohio, settled a lawsuit filed by a black man who had claimed that local police officers arrested him because of his race. Several members of the city's police force admitted in depositions that there was a group of offi-

presumed to be "racially good," and their racial interactions with people on the street are presumed to be constitutional.[111]

Significantly, the Supreme Court has not explicitly articulated colorblindness as a guiding principle of Fourth Amendment law. This ideology has to be excavated. Doing so helps to reveal precisely what the perpetrator perspective obscures: the racial allocation of the burdens and benefits of the Fourth Amendment. The material result of this racial allocation is that people of color are burdened more by, and benefit less from, the Fourth Amendment than whites. Consequently, the former are likely to feel less "secure in their persons, homes, papers, and effects" than the latter. Stated differently, people of color are more likely than whites to experience the Fourth Amendment as a technology of surveillance rather than as a constitutional guardian of property, liberty, and privacy.[112] This problem is compounded by the fact that, as a historical matter, people of color have not been the beneficiaries of effective law enforcement.[113] In other words, the privacy losses they experience are not the price they pay for effective crime prevention and detection, but a cost of race. This suggests that people of color are under-protected even as they are over-policed.[114] In effect, from the perspective of many people of color, the Fourth Amendment has been eraced.[115]

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cers in the department who dubbed themselves the "Special Nigger Arrest Team," and who targeted blacks for traffic stops and arrests. *See* Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1.

111. *See* Magee, *supra* note 93 (invoking the experiences of black men with the police to challenge the notion of a "good cop").

112. For a related argument about the maldistribution of Fourth Amendment protections, see William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

113. Typically, Fourth Amendment inquiries (for example, the question of whether there is a search or seizure and the question of whether the search or seizure is reasonable) are framed in terms of balancing. Specifically, the "government's interest" in law enforcement is balanced against "our interest" in privacy. This framing obscures that "our interests" reside on both sides of the balancing. That is, effective law enforcement benefits "us" by helping to create and sustain safe and socially healthy communities. Part of the problem with the interpretation of the Fourth Amendment is that no attention is paid to an uncontestable social reality: people of color experience more privacy losses and less effective law enforcement than whites.

114. Some scholars assert that antiracist efforts that target the criminal justice system often are insufficiently attentive to underenforcement problems. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997). Dan Kahan and Tracey Meares have suggested that a rights-based approach to the criminal process can compound the underenforcement problem and deny communities of color the opportunity to develop creative ways to advance their interest in having effective but non-discriminatory law enforcement. *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); *see also* Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong*, BOSTON REV., Apr./May 1999, at 4.

115. *Cf.* Lani Guinier, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994).

This Article suggests that the Supreme Court should abandon the perpetrator perspective in favor of the victim perspective. Fundamental to this perspective is the idea that, because people of color often experience their race as a crime of identity, and because this experience derives, at least in part, from availability heuristics about race, people of color are always vulnerable to being victims of police abuse. The victim perspective, in other words, is explicitly race-conscious, and not only with respect to people with vulnerable racial identities (that is, potential victims), but also with respect to racial interpolators like the police (that is, potential perpetrators). The victim's perspective, then, is less concerned with whether police officers are racially blameworthy or racially culpable in the "bad cop" sense, and more concerned with the coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons.

The shift in focus to the victim perspective from the perpetrator perspective is not just rhetorical; it has descriptive, normative, and doctrinal value. As discussed more fully below, the victim perspective provides a more complete understanding of the harms of race-based policing, a more sophisticated sense of the Court's role in legitimizing those harms, and a normative basis for re-interpreting and re-conceptualizing particular Fourth Amendment doctrines.

The argument proceeds as follows. Part II analyzes the Supreme Court's interpretation of the "free to leave" test. This test determines whether, for Fourth Amendment purposes, a particular police activity "seizes" an individual — that is, renders the individual unfree either to leave or to terminate the police encounter. Focusing on *Florida v. Bostick*[116] (which directly implicates blacks) and *INS v. Delgado*[117] (which directly implicates Latinas/os), this Part specifically illustrates how the Supreme Court's seizure analysis relies too heavily on the perpetrator perspective. This overreliance simultaneously creates a racial-avoidance problem (that is, the Supreme Court's willful blindness to uncontestable facts about race and policing) and a racial-construction problem (that is, the Court's ideological representation of defendants and police officers without racial specificity). Identifying these problems helps to illustrate how the Supreme Court doctrinally masks (and not simply ignores) the ways in which race shapes (1) an officer's decision to select a particular individual for questioning, (2) the form and substance of the questioning, and (3) how the subject of the questioning responds. Part II argues that this doctrinal masking legitimizes, even as it obscures, the racial terms upon which police/citizen encounters are transacted.

116. 501 U.S. 429 (1991).

117. 466 U.S. 210 (1984).

Part III shifts the discussion to Fourth Amendment consent doctrine, the body of law that is concerned with determining the circumstances under which a person can be said to have consented to a particular governmental intrusion (e.g., the search of one's clothing or belongings). Broadly speaking, here, too, the project is to demonstrate the racial productivity of this body of law — the ways in which Fourth Amendment law constructs (not simply avoids) and reifies (not simply discovers) race — to implicate more directly the Supreme Court in people of color's experiences with the police. The more specific aim is to demonstrate that the Supreme Court's adjudication of what constitutes a valid consent race neutrally constructs suspects and police officers. This construction renders Latinas/os, for example, just people — a construction that erases their particular racial experiences with, and impressions of, the police. Simultaneously, white police officers become just police officers — a construction that erases their particular racial impressions of, and social interactions with, Latinas/os.

This colorblind production of identities exacerbates and legitimizes Latinas/os' (and other people of color's) racial vulnerability to consent searches. This vulnerability derives from four important social realities. First, given pervasive stereotypes as to the color of crime,[118] police officers may be racially committed to searching Latinas/os' personal effects.[119] Second, should a police officer ask a Latino for permission

118. *See generally* RUSSELL, *supra* note 80 (exploring the various connections between race and crime). Stereotyping results from schematic processing — the way we obtain, retain and organize a life-long database of experiences and information. Stereotypes are "cognitive frameworks consisting of knowledge and beliefs about specific social groups." Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 UMKC L. REV. 695, 706 (1999) (citing ROBERT A. BARON & DONN BYRNE, SOCIAL PSYCHOLOGY: UNDERSTANDING HUMAN INTERACTION 231 (1994)). The empirical evidence produced by social cognition theory raises serious questions about how discrimination is framed in law. If discrimination results from cognitive processes as opposed to intentionally biased decisionmaking, racism's remedy cannot derive from a neutrality approach. As Linda Hamilton Krieger explains, people categorize objects in their environment in a particular way because it proves useful in understanding their environment and predicting future events. It would be difficult to argue credibly that racial, ethnic, or gender distinctions have no utility in understanding American society or negotiating experience within it. Because gender, ethnic, and racial distinctions are often perceptually apparent, and because these categories are made salient by our social and cultural context, we can expect race, ethnic, and gender-based schemas to be implicated in the processing of information about other people. Once activated, the content of a schema will profoundly affect how we interpret a person's subsequent behavior, what about that behavior we remember, and how we use the behavior in judging the person later. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1201 (1995); Lawrence, *supra* note 74 (problematizing intentional and animus-based conceptualizations of racism).

119. The media is frequently pointed to as the most potent mode of reinforcement, if not the original source, of stereotyping African Americans as criminals. Katheryn Russell observes that media focus on the "young black male" has made the image of young African-American men "synonymous with deviance." RUSSELL, *supra* note 80, at 5. The focus is on the fraction of young black men in the criminal justice system rather than the rest, who are not — and little media attention touches on the more than 400,000 young black men in college. *Id.* She also suggests that the stereotype of black men as criminals is reinforced jointly

to search his belongings, pressure exists for that person to say yes.[120] He may believe that, if he says no, the officer's (racial) suspicions will intensify. Central to this thinking could be the perception that, to the extent that this intensification occurs, the officer will prolong the encounter.[121] Third, Latinas/os (especially young Latinas/os in the inner

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by fictional portrayals in TV shows and film, where blacks are predominantly represented as deviant, as well as "reality" police shows and news broadcasts that focus on violent street crime. *Id.* at 2.

In a 1997 study, UCLA researchers found that after viewing television news crime reports, 42% of survey participants recalled having seen a perpetrator, even though no suspect had been mentioned. Of these participants, 66% recalled that the imaginary perpetrator was black. *See* Howard Kurtz, *A Guilty Verdict on Crime, Race Bias; TV Viewers Often Assume Suspects Are Black*, WASH. POST, Apr. 28, 1997, at C1. The same researchers found that over the course of one year, one Los Angeles television station showed or described suspects in 50% of their crime reports. Of those identified suspects, an overwhelming majority, 70%, were minorities — even though the percentage of all crimes actually committed by minorities in Los Angeles County was far smaller. *Id.* at C4; *see also* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (arguing that pre-trial publicity is particularly likely to reinforce the stereotype of the black man as criminal, because newspapers tend to print the race of suspects only if they are not white, and interracial crimes against whites receive more media attention than other crimes). One of the most notable uses (or abuses) of this stereotype in recent years was the attempt by George Bush's 1988 presidential campaign to cast the opponent, Michael Dukakis, as "soft on crime" by repeatedly showing the image of Willie Horton, a black inmate who was convicted of committing two violent crimes while out on furlough. The Bush campaign manager made statements suggesting that choosing Jesse Jackson as a running mate would be the same as choosing Willie Horton, thereby pushing an image that all black men are criminals. Richard Dvorak, *Cracking the Code: "De-coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626-27 (2000).

Latina/o Americans are similarly stereotyped as criminals, particularly in film and the news media. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (explaining that the Latino-as-criminal stereotype is linked to other Latino stereotypes, particularly that of illegal immigrants — who are presumed to be lawbreakers — and that of "machos," who are presumed to be hot-tempered and prone to violence); Ediberto Roman, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37 (2000) (examining the portrayals of Latinos and Latinas in a number of films and observing that in film, if a Latina/o is depicted as a romantic interest, "he or she is much more likely to be a gang member than a physician").

120. The employment of the masculine pronoun here is not intended to suggest that racial profiling, or more broadly, race-based policing, is solely a problem for men. Black women, for example, are particularly vulnerable to racial profiling at airports. *See* Mike Dorning, *Black Women Most Likely Targets of Airport Searches*, CHI. TRIB., Apr. 10, 2000, at 1 (reporting the results of a U.S. General Accounting Office survey that found African-American women were much more likely than other airline passengers to be subjected to strip searches and x-ray exams); *see also* John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46, 46-47 (1999) (recounting the experiences of one African-American woman who was repeatedly strip-searched at Chicago's O'Hare International Airport, and who joined more than 80 other African-American women in a federal lawsuit against the U.S. Customs Service for racial profiling).

121. Of course all people, regardless of race, likely perceive police encounters to be or experience them as coercive. However, the extent of the coercion one experiences likely is a function of race. Because race differentially situates people with respect to the level of suspicion a police officer is likely to have about them, the pressure to respond to police authority likely varies across race.

city) often will have imperfect information about their constitutional rights.[122] Thus, they will not always know that they have a right to refuse consent. Fourth, assuming that police officers know that Latinas/os may be uninformed or apprehensive about exercising their constitutional rights, police officers have an incentive to exploit these vulnerabilities.[123]

Significantly, these interracial dynamics do not turn on whether police officers are "racially bad" in the sense of exhibiting hard racial animus. Cumulatively, they provide a basis for rethinking consent doctrine and, more particularly, the way that doctrine was applied in the central consent doctrine case: *Schneckloth v. Bustamonte*.[124] Together, Parts II and III broaden our understanding of the racial dynamics between people of color and police officers, redescribe the race and Fourth Amendment problem as a function of the Court's racial productivity, and provide a normative basis for articulating alternative doctrinal regimes to constitutionally regulate police conduct.

Part IV focuses on a specific race and policing problem: the Driving While Black/Brown ("DWB") phenomenon. The section defines DWB as an example of racial profiling and employs the perpetrator perspective to explain how the public campaigns against, and the Supreme Court's response to, racial profiling have functioned to manage (rather than solve) this pervasive social problem. The Supreme Court has responded to racial profiling through doctrinal avoidance. It accomplishes this avoidance, in part, by conceptualizing racial profiling as an "attitude" that resides in the minds of "racially bad" police officers (the perpetrator perspective), rather than as a disciplinary practice that police officers deploy and people of color experience (the victim perspective). In effect, the Supreme Court *recognizes* racial profiling — that is, acknowledges that the phenomenon exists — only to *de-recognize* it — that is, to ignore how racial profiling is actually experienced.[125] Part IV exposes this racial recognition/de-recognition dynamic to demonstrate how the Court strategically uses race to achieve a particular doctrinal outcome: that the Fourth Amendment

122. Again, people across races are likely to have imperfect information about their constitutional rights. Here, too, the claim is that some races are more vulnerable to the problem than others. Given the quality of education within inner city communities and this constituency's general lack of social capital, it is reasonable to conclude that black inner city young people are especially likely to be unaware of the protections that the Constitution theoretically affords them.

123. I do not mean to suggest that none of the foregoing dynamics affects white people. The point is that nonwhite identity compounds each.

124. 412 U.S. 218 (1973).

125. *Cf.* Harris, *supra* note 109, at 1758 (describing the Supreme Court's Fourteenth Amendment analyses as "a jurisprudential strategy to recognize or see race (i.e. the racial identities of particular bodies) in order to de-recognize or not see race (i.e. a structural system of group-based privileges and disadvantages produced by socio-historical forces)").

does not reach racial profiling. Demonstrating that this outcome is both ideologically invested and contingent creates a doctrinal space within which to articulate approaches to the Fourth Amendment under which racial profiling would be deemed unconstitutional.

The public's response to racial profiling has been one of condemnation. This condemnation, however, derives not from the idea that racial profiling is per se problematic. Instead, reflecting the perpetrator perspective, it is based on the perception that "racially bad" cops are profiling "racially good" blacks and Latinas/os. Almost every public narrative about racial profiling, including the ones with which this Article begins, involves "respectable" people: lawyers, actors, doctors, teachers, students, etc. The notion is that these people were not supposed to be racially profiled. In other words, in each case, the police officer should have known that he was profiling a "good" (nonstereotypical) person of color. To a considerable extent, this racial mistake is what the public discourse against racial profiling, including the ACLU's campaign, focuses on. This focus does not fundamentally change our norms about race and policing. Indeed, on some level, it confirms if not entrenches our racial suspicions about crime and criminality.

II. RACE AND THE "FREE TO LEAVE" TEST

When a white man faces a black man, especially if the black man is helpless, terrible things are revealed.

James Baldwin[126]

A. *Introduction*

The "free to leave" test — the test the Supreme Court applies to determine whether a particular police activity is a seizure of the person that implicates the Fourth Amendment — constitutes a specific doctrinal site within which the construction of race exploits and exacerbates existing racial inequalities. Two cases in particular bear this out: *Florida v. Bostick* and *INS v. Delgado.* While there is some discussion of *Bostick* in the race and Fourth Amendment literature, *Delgado* is virtually ignored. Moreover, to the extent that scholars engage either of these cases, they pay almost no attention to the race-constructing ideologies that underlie them. The dominant way of understanding *Bostick*, for example, is that it constitutes an instance in

126. JAMES BALDWIN, *The Five Next Time*, *in* THE PRICE OF THE TICKET 333, 355 (1985).

which the Supreme Court ignores race.[127] While not entirely inaccurate, this understanding obscures the racial productivity of *Bostick* — that is, the Court's construction and reification of race in that case. Re-reading *Bostick* and *Delgado* as cases that are actively engaged in constructing race helps to make the point that colorblindness is not in fact race neutral, but instead reflects a particular racial preference that systematically burdens nonwhites.[128] Exposing this preference in the Fourth Amendment context provides a richer description of the racial costs of, and a normative basis to re-shape, current Fourth Amendment doctrine.

B. *A Racial Re-Reading of* Florida v. Bostick

1. *The Racial Facts*

In *Bostick*, two armed Broward County Sheriff officers wearing bright green "raid" jackets boarded a Greyhound bus at Fort Lauderdale. The bus had made a temporary stop on its way from Miami to Atlanta. When the officers entered the bus, the bus driver exited, closing the door behind him. Without suspecting any individual passenger of wrongdoing, the officers approached Terrance Bostick, who was asleep in the back of the bus. One of the officers asked to see Bostick's ticket and a piece of identification. Bostick obliged, providing the officer with a Florida driver's license and a ticket stub, both of which the officer returned to Bostick. The officers then explained that they were narcotics agents and asked for Bostick's permission to search his luggage.[129] Upon searching Bostick's luggage the officers found approximately one pound of cocaine, and they arrested him. Subsequently, Bostick was charged with trafficking in narcotics, and he pleaded no contest.

Writing for the Court, Justice O'Connor "refrain[ed] from deciding whether or not a seizure occurred in this case." She maintained, however, that the facts left "some doubt" that Bostick was seized. In other words, she implicitly suggested that the encounter was consensual; that at all times, Bostick was free to leave. Central to her analysis is the notion that an individual's interaction with the police does not become a

127. *See* Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistc Ignorance, and the Myth of Colorless Individualism in* Florida v. Bostick, 67 TUL. L. REV. 1979, 2028-30 (1993); Maclin, *supra* note 92, at 338-39; Magee, *supra* note 92, at 178-79.

128. Certainly this point has been made with respect to Fourteenth Amendment law. *See, e.g.*, Harris, *supra* note 109, at 1773 (describing the submersion of racial differences in the Supreme Court's Equal Protection jurisprudence as an "approach [that] renders incoherent any alternative vision of racial justice and re-legitimates the existing social order in which myriad forms of racial inequality are legal and white privilege is simply there").

129. There is conflict as to whether the officer informed Bostick that he had the right to refuse consent to the search, and whether Bostick exercised that right. Both of these issues were resolved in favor of the state.

seizure simply because the officer asks that individual a few questions, requests that the individual produce identification, or seeks permission to search the individual's personal effects. "[A]s long as the police do not convey a message that compliance with their request is required,"[130] a seizure has not occurred. Justice O'Connor's opinion invites the conclusion that neither the officers' communication nor their conduct toward Bostick conveyed a message of compulsory compliance.

Fourth Amendment scholars typically advance two arguments to challenge Justice O'Connor's approach. One claim is that "[f]or all practical purposes, the Court's test [for whether a seizure has occurred] erases the inherently coercive nature of *all* police encounters."[131] That is, the Court fails to consider the extent to which police encounters always reflect a show of authority. The second claim is that Justice O'Connor ignores race or, more particularly, the racial nature of police/citizen encounters. While both claims challenge the approach the Court takes in *Bostick*, I focus on the latter. It provides an important opportunity to discuss racial ideology and to re-articulate the racial problem of *Bostick* as deriving from the Court's construction of race through the racial lens of colorblindness. The ideological architecture of this racial construction obscures two significant racial dynamics: (1) the relationship between race and vulnerability to police encounters; and (2) the ways in which race mediates how people respond to such encounters. Discussing the Court's obfuscation of these dynamics in terms of racial construction, which heretofore has not been done, provides another way to deconstruct — expose and delegitimize — the racial structure of current Fourth Amendment law.[132] This delegitimization and deconstruction clears the jurisprudential ground for the construction of alternative doctrinal approaches.[133]

2. *Racial Vulnerability to Police Encounters*

a. The Initial Decision to Stop. Assume that a drug enforcement officer, as in *Bostick*, has been instructed to investigate a particular neighborhood for drug trafficking. This neighborhood is somewhat ra-

130. Florida v. Bostick, 501 U.S. 429, 435 (1991).

131. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 20 (1999).

132. *Cf.* Jones, *supra* note 55, at 445 (noting that the "primary imperative [of Critical Race Theory] is to reveal *how* race is being used against us while hidden in some neutral-looking guise") (emphasis in the original).

133. Part of the project of deconstruction is to demonstrate that a given text is "vulnerable" to multiple interpretations, and that a dominant interpretation acquires legitimacy by obscuring its own contingency and subordinating competing interpretations. These ideas are captured by Jacques Derrida's notion of "différence." *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 231 (1995).

cially integrated — 50% white, 20% black, 20% Latino, 10% Asian American. As the officer walks through the neighborhood, he observes two groups of men, one white, the other black, walking in opposite directions. Although the officer has no objective reason to believe that either group has done anything wrong, he would like, but is not able, to stop both groups of men. Given racial stereotypes as to the color of crime, the officer will likely stop the group of black men. In the absence of other information, the officer's racial default position is likely to reflect the belief that, as between the two groups, there is a greater likelihood that the group of black men is involved in crime. In this sense, the black group is more vulnerable to police encounters than the white group.[134]

As a result of this racial vulnerability, a black man, over the course of his lifetime, is likely to have several encounters with the police. During these encounters, the police may ask him to produce identification, to justify his presence at a particular location, to explain where he is traveling to and from, and to answer questions about whether he uses, distributes, or manufactures drugs. They may well ask him for permission to search his personal belongings. To the extent that these inquiries reside outside of the reach of the Fourth Amendment, police officers have virtually unbridled discretion in deciding which individuals to engage in this way. In the context of my hypothetical, for example, the Fourth Amendment, as it is presently interpreted, does not require the police officer to explain the basis upon which he decided to question the group of black men.[135]

Justice O'Connor's opinion in *Bostick* legitimizes and simultaneously obscures this social reality. The officers in *Bostick* were not constitutionally required to explain why they selected Bostick, who was seated at the back of the bus, for questioning. Nowhere in Justice O'Connor's opinion does she entertain the possibility that Bostick may have been targeted because he is black. In fact, Justice O'Connor does not even mention Bostick's race. Nor does she mention the race of the officers. In this sense, an argument can be made that Justice O'Connor's analysis ignores race. This argument, however, is only par-

134. In at least two ways, an argument can be made that this outcome is rational: (1) the officer is acting on information he honestly believes to be accurate; and (2) the officer's assumptions as to the link between race and crime are empirically accurate. To the extent that this Article is concerned with identifying the racial costs of Fourth Amendment law for people of color (i.e., is victim perspective-centered), the issue as to whether the officer's conduct can be deemed rational (which reflects the perpetrator perspective) need not be resolved. Still, it is important to point out that there is a literature challenging the "rational racism" — that is, the notion that there is an empirical basis for assumptions about the relationship between race and crime. *See generally* RUSSELL, *supra* note 80; COLE, *supra* note 131, Armour, *supra* note 12.

135. Moreover, even to the extent that the encounter triggers the Fourth Amendment and is considered a "stop" — that is, a seizure that falls short of an actual arrest — "articulable suspicion" is sufficient to justify it.

tially correct. That is, while it is fair to say that Justice O'Connor's analysis ignores the fact that Bostick is black and the officers are white, it is more accurate to say that her analysis constructs Bostick and the officers with the racial ideology of colorblindness. In other words, the problem is not that Justice O'Connor does not see race, but rather that she sees race in a particular way. Her decision to see Bostick as a man and not as a black man does not ignore race; it constructs race.

Perhaps it would be helpful to comment more generally on the notion of race as a social construction. Informing this claim is the idea that race does not exist at all antecedently of its invention in culture. Put differently, race does not exist outside of, but is instead the effect of, discourses (in, for example, law, science, and politics).[136] These discourses delineate race as though it were a preexisting fact, ontologically prior to language. As a result, race becomes socially salient, and a particular race consciousness emerges: namely, that race is real and that everyone has one. Under this race consciousness, which transcends ideological orientation, the question is not whether we want race but rather what we want race to mean. That this is the point of departure for much of our contemporary discussions about race signifies the extent to which race is reified. The racial productivity of Fourth Amendment law builds upon the existing consensus that race is real. Fundamental to the Supreme Court's racial productivity is the notion that race is already "out there"; the project is thus to determine what race is.

Justice O'Connor's opinion in *Bostick* engages in this project. This might not be immediately apparent, however, because, in the Fourth Amendment context, Justice O'Connor is not required to articulate explicitly her normative commitments about race. But consider her representation of (1) Bostick as a man sitting in the back of a bus,[137] and (2) the police as two officers who asked a man in the back of a bus a few questions.[138] Keep in mind that these representations exist in a social, legal, and political context within which race is perceived to be real and everyone is presumed to have one. In this sense, race is not absent from Justice O'Connor's representation of Bostick and the police officers; it is obscured. Nor is race ignored; it is given a particular content. In other words, notwithstanding the textual invisibility of Bostick's blackness and the police officers' whiteness in the opinion, both are materially present. Presumably, Justice O'Connor would not say, for example, that the reason she did not mention Bostick's race in

136. *Cf.* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCE (1970).

137. Florida v. Bostick, 501 U.S. 429, 436 (1991).

138. *Id.* at 437.

writing her opinion is because Bostick is not in fact black or because Bostick does not in fact have a race. Nor, presumably, would she offer similar explanations to account for the absence of the police officers' race in the text. The reason whiteness and blackness are not explicitly signified in *Bostick*, the reason Justice O'Connor writes them out of the opinion, has to do with the colorblind social meaning that she attributes to race — namely, that it does not matter. That is, Bostick's race and the race of the police officers are irrelevant.

Unpacking this social meaning is important. Doing so helps to challenge the narrow way in which race consciousness is understood. Typically, we attribute race consciousness to actions or claims that make explicit use of race. The notion is that to the extent that a person is racially conscious, she is not ignoring race. Under this view, had Justice O'Connor described Bostick as a *black* man sitting in the back of the bus, her opinion would have been racially conscious. The absence of this racial description suggests that she is ignoring race. The problem with this argument is that it fails to consider the race consciousness of identity significations that are not explicitly racialized. Describing Bostick as black is no more racially conscious than describing him as a man. Both descriptions send a particular message about race. In the former, that race is relevant. In the latter, that it is not. In both instances, attention is being paid to race. Neither description is race neutral.

One way to make more apparent the racial construction or the race consciousness (that race is irrelevant) of identity representations that do not explicitly reference race is to imagine the following scenario: a crime has been committed and the victim believes that the perpetrator is black. The victim provides this racial information to the police along with other descriptions of the perpetrator (height, weight, clothing, etc.). Stipulate that a police officer stops Bostick, searches him and finds incriminating evidence. Bostick moves to suppress the evidence on the ground that the officer lacked probable cause to arrest him.[139]

If Justice O'Connor were adjudicating the constitutionality of the officer's conduct (asking herself whether the officer had probable cause to believe that Bostick had committed the crime), presumably she would explicitly invoke race. That is, in providing an indication as to the events leading up to, and the nature of, the encounter between Bostick and the police officer, she would somewhere mention the fact that Bostick is black.

The question is: Why would Justice O'Connor reference Bostick's race in an opinion based on my hypothetical but not in the actual case of *Bostick*? The answer relates to the notion that, whereas race is rele-

139. Assume that the "stop" was the functional equivalent of an arrest and that the government's argument as to the legitimacy of the police conduct rests on a search-incident-to-arrest theory. *See* United States v. Robinson, 414 U.S. 218 (1973).

vant in my hypothetical — it is part of a racial description — in the context of the *Bostick* opinion it is not.[140] Of course, this claim can be challenged. With respect to my hypothetical, for example, an argument can be made that race should be irrelevant because race poorly captures an individual's description.[141] It would be more accurate, more relevant, for the police officer to act on information with respect to skin tone, hair texture, and facial features. My aim here, however, is not to decide the question of whether race should be relevant in the context of suspect descriptions. I employ the hypothetical and juxtapose it against *Bostick* to advance the following three claims: (1) we explicitly invoke race when we perceive that race is relevant; (2) we *choose* not to explicitly invoke race when we perceive that race is not (or should not be) relevant; and (3) determinations as to the relevance of race socially construct race.

This is not to say that racial determinations will always be explicit. Indeed in *Bostick*, the determination that race is (or the construction of race as) irrelevant is implicit. Consider again Justice O'Connor's decision to describe Bostick and the police officers without reference to their race. This description is not simply, and could never simply be, an "objective" representation of Bostick and the officers as they exist "out there" in the "real world." Instead, Bostick and the police officers are *necessarily* the ideological effect of Justice O'Connor's color-blind representation.[142] Her text bring them into being.[143] Their color-blind presence in her opinion forwards the notion that race does not (or, at least in the context of *Bostick*, should not) matter.

That Justice O'Connor is of the view that, by and large, race does not and should not matter is clear from her race jurisprudence in the Fourteenth Amendment context. According to Justice O'Connor, "[r]acial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[144] For Justice O'Connor, " 'the individual is important, not his race, his creed, or his color.' "[145] This normative commitment about race, although articulated in a different doctrinal context, helps to ex-

140. For a thoughtful discussion of the extent to which police employment of race-based suspect descriptions are subject to virtually no criticism, see Bank, *supra* note 81.

141. *Id.*

142. *Cf.* MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 129 (1992) (observing that the "formal norm of legal neutrality . . . conceals the ways in which legal rules participate in the construction of [identity differences]").

143. *See* JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1977) (observing that "[t]here is nothing outside of the text").

144. Shaw v. Reno, 509 U.S. 630, 657 (1993).

145. *Id.* at 648 (*quoting* Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).

plain Justice O'Connor's construction of Bostick and the police officers. From Justice O'Connor's perspective, textually referencing their respective racial identities would entrench existing negative racial impressions of — that is, stigmatize — both. The thinking might be that, because of stereotypes, the starting point for conceptualizing an interaction between a black man and a white police officer might be that the former is a criminal and the latter a racist.[146] To disrupt these social meanings, and to prevent the attribution of them to Bostick and the police officers, Justice O'Connor constructs these parties as "individuals."

Again, precisely because Justice O'Connor does not explicitly discuss race in *Bostick*, one cannot say definitively that she constructed Bostick and the police officers to disrupt particular social meanings about race. But uncovering Justice O'Connor's actual intent here is considerably less important than uncovering the ideological racial work her opinion performs. Whether Justice O'Connor in fact intends to connect the conception of race she articulates in the Fourteenth Amendment context with her treatment of race in *Bostick*, the link is there. In the Fourteenth Amendment arena, O'Connor expresses a commitment to individualism — not race.[147] In the Fourth Amendment context, that commitment is realized in her individualistic construction of Bostick and the police officers — that is, her representation of them without explicit racial reference. This representation places Bostick and the police officers in a social context without racial motivation, negative racial meanings, or racial history. This social context may be normatively appealing, but it is not the social context within which Bostick and the officers were situated.

Justice O'Connor's commitment to individualism (not race) obscures the fact that individualism as an ideological concept is itself racializing and thus race-constructing. To appreciate how, assume that Justice O'Connor's construction of Bostick and the police officers as

146. It is unlikely that the person who perceives the police to be racist in such a context would perceive the black man to be criminal. To the extent that the black man is perceived to be criminal, likely the police officer will be perceived to be a "good" cop. And to the extent that the police officer is perceived to be a racist, likely the black man will be perceived as an actual or potential racial victim of police abuse.

147. Cheryl Harris argues that the Supreme Court's commitment to individualism entrenches inequalities among racial groups. *See* Harris, *supra* note 109, at 1765 ("[T]he assertion of colorblindness as [an] equal protection mandate rests upon the contention that the races are formally and legally equal . . . . Indeed, adherents of this view argue that the Constitution commands that the law not see these groups; the law must see only (raceless) individuals."); *see also* Burke Marshall, *In Honor of* Brown v. Board of Education: *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1007 (1984) (arguing that a focus on the individual in the Fourteenth Amendment context is misplaced because "[t]he equal protection clause is not primarily concerned with the protection of individuals against invidious discrimination. On the contrary, it cannot sensibly be interpreted in any other way than . . . in terms of its protection of groups, and of individuals only by reason of their membership in groups").

individuals without races disrupts both the social meaning of Bostick as a criminal and the social meaning of the police as racist cops. This disruption does not eliminate race; Bostick remains black and the police officers remain white. The disruption merely re-defines what blackness vis-à-vis Bostick and whiteness vis-à-vis the police officers signify. Under this redefinition, Bostick becomes a black man without the presumption of criminality and the police become white officers without the presumption of a racist identity. In the abstract, both disruptions might make sense. But in the context of *Bostick*, they obscure that Bostick may have held and acted on a racial presumption that the police officers were racists and the police may have held and acted on a racial presumption that Bostick was a criminal.

b. The Nature of the Interaction After the Stop. Modify the hypothetical with which this Section begins. Recall that the police officer observes two groups of men — one white, one black; that he has no objective reason to believe that either group has done anything wrong; and that he nevertheless would like to stop and question both groups. Assume now that the police officer is able to approach both groups of men and in fact does so. The racial vulnerability problem does not disappear. There is likely to be a racial asymmetry with respect to how the officer comports himself during each encounter. This asymmetry remains because blackness and whiteness are differentially communicative and evidentiary. That is, the officer may still hold stereotypes that blacks are more likely to engage in criminal conduct than whites. This stereotype will inform how the officer "screens" each group — that is, ascertains whether his hunch regarding their respective criminality is more than a hunch. Because of stereotypes, the officer's interaction with the black group may be shaped by a conscious or unconscious racial investment in confirming his suspicions as to the group's criminality. His interaction with the white group is less likely to be racially invested in that way. Instead, the officer's interface with the white group is likely to reflect a desire on the part of the officer either to dispel his suspicions of the group or simply to "check things out." Consequently, the black group is likely to be subjected to more extended and probing screening than the white group. The officer will need more time with and more information from the former. Other things being equal, the officer will likely ask the white group fewer questions and his temperament is likely to be less hostile.[148]

Bostick captures none of the foregoing racial dynamic. In two significant respects, the perpetrator perspective helps to explain why. First, implicit in Justice O'Connor's opinion is the notion that the offi-

148. The point is not to suggest that *every* white/black, police/citizen encounter will reflect the foregoing dynamics. The point instead is that, given what we know about the link between racial stereotypes and overpolicing, there is reason to think that the set of asymmetries I have described likely will obtain in a good number of cases.

cers did not intend to seize Bostick. They simply "walked up to Bostick . . . asked him a few questions, and asked if they could search his bags."[149] Second, her suggestion that Bostick was not seized is based in part on the fact that at no point during the encounter "did the officers threaten Bostick with a gun."[150] While "one officer carried a zipper pouch containing a pistol . . . the gun was [n]ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner."[151] Because Justice O'Connor looks for, but does not find, evidence of police overreaching, or any indication that the officers harbored hostility towards Bostick, she implicitly suggests that the encounter was consensual. Thus, even to the extent that Bostick felt seized — that is to say, he did not feel free to leave or to ignore the officers' questions — the officers are not to be blamed. They did nothing wrong. Their investigation was routine. Therefore, the Fourth Amendment is not implicated.

It makes sense that Justice O'Connor would begin her analysis of the free-to-leave test by examining the officers' conduct.[152] For one thing, the Fourth Amendment is not triggered in the absence of governmental action.[153] For another, there is little doubt that a seizure occurs when an officer's conduct towards a suspect is overtly coercive or violent. If the officers had approached Bostick with their guns drawn or if at any time during the encounter they had physically restrained him, presumably Justice O'Connor would have concluded that Bostick was seized.[154]

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149. Florida v. Bostick, 501 U.S.429, 437 (1991).

150. *Id.* at 432.

151. *Id.*

152. After reciting the facts, Justice O'Connor focuses on "[t]wo facts [that she perceives to be] particularly worth noting. First, the police specifically advised Bostick that he had the right to refuse consent. . . . Second, at no time did the officers threaten Bostick with a gun." *Id.* Her focus on these facts privileges what the officer did and said over how a person in Bostick's position might have responded to either.

153. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921):

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.

154. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980):

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

The Supreme Court's "oft-repeated" definition of what constitutes a seizure of a person within the Fourth Amendment context is the "meaningful interference, however brief, with an individual's freedom of movement." United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984); *see also* Brower v. County of Inyo, 489 U.S. 593 (1989) (finding seizure in the use of a police roadblock to stop the high-speed flight of a car thief); Terry v. Ohio, 392 U.S. 1 (1968)

The absence of overtly coercive police tactics, however, should not end the seizure analysis. To the extent that courts employ the officer's conduct to ascertain whether an individual was seized, they should examine this conduct from "the victim's perspective." By the victim's perspective, I do not mean an inquiry into the perspective of the person who actually experienced the encounter. Such an approach would reduce the free-to-leave test to whether that individual claims she did not feel free to leave. By the victim's perspective I mean a framework under which courts actually (and not merely purport to) analyze the seizure question from the perspective of a person in the defendant's position, "taking into account *all* the circumstances surrounding the encounter."[155]

But what factors should courts take into account when employing this framework? In other words, how particularized or contextual should the seizure inquiry be? In the context of *Bostick*, for example, should the seizure analysis take into account the fact that Bostick was on a bus? Does that fact help to support an argument that Bostick was seized? Certainly Bostick advanced this argument — that his presence on the bus rendered the police interaction more coercive than it would have been had the encounter transpired on the street. Although, as I explain more fully below, Justice O'Connor does not treat this argument as seriously as she might have, she does at least engage it. She acknowledges that Bostick's presence on the bus is one of "the circumstances surrounding the encounter."[156] But she deems this fact, standing alone, insufficient to establish a seizure. According to Justice O'Connor, Bostick's status as a passenger is relevant to, but not dispositive of, whether he was seized.[157]

The more fundamental problem with Justice O'Connor's analysis is that it does not explicitly engage race. Throughout her opinion, race remains unspeakable.[158] A more careful analysis would, at the very

(holding that a seizure occurs when a police officer accosts a person and restrains that person's ability to walk away). The *Terry* Court, finding that a seizure had occurred, added the caveat that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16; *cf.* Michigan v. Chesternut, 486 U.S. 567 (1988) (finding no seizure had occurred when a marked patrol car accelerated to catch up with an individual and then drove alongside the individual for a short distance).

155. *See Mendenhall*, 446 U.S. at 554 (emphasis added) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

156. *Bostick*, 501 U.S. at 437.

157. *Id.* at 439-40.

158. *Cf. id.* at 441 n.1 (Marshall, J., dissenting) ("The basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.").

least, have racialized Bostick's interaction with the officers. Certainly there is Fourth Amendment precedent for doing so.[159] In this sense, even Justice Marshall's dissent, which provides a detailed account "of the elements of coercion associated with a typical bus sweep,"[160] is insufficiently particular. Part of the circumstances of the encounter was race — more particularly, Bostick's race and the race of the police officers. The interaction of black male identity with white male police authority creates a physically confining social situation every bit as real as (and operating independently from) being on a bus. Most, if not all, black people — especially black men — are apprehensive about police encounters. They grow up with racial stories of police abuse — witnessing them as public spectacles in the media, observing them firsthand in their communities, and experiencing them as daily realities. Put another way, race-based policing is part of black people's collective consciousness. Thus, when black people encounter the police, "[t]hey don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them."[161] Yet, Justice O'Connor situates her seizure analysis outside of this racial reality. She removes Bostick and the police officers from a social context in which race is material to a discursive, socially constructed world in which it is not. At no time does Justice O'Connor consider how Bostick, or a man in his racial position, might have experienced two white police officers crowded around him on a bus. She race neutralizes the encounter. Bostick's race, the race of the officers, and the relationship between the two receive no textual engagement in her analysis. Thus, her opinion fails to consider that Bostick may have been the target of a particular racial preference.[162]

Perhaps Justice O'Connor does not discuss the racial dimensions of the encounter for the same reason that she discounts the coercive aspects of police encounters on buses. With respect to the latter, she

159. *See Mendenhall*, 446 U.S. at 558 (suggesting that race is a relevant factor in making a determination as to whether an individual has been seized).

160. *Id.* at 446 (Marshall, J., dissenting). In recounting the details of the encounter Marshall notes that the officers who boarded the bus made an "intimidating 'show of authority' " by displaying their badges and wearing "bright, green 'raid' jackets," with one officer visibly carrying a firearm. *Id.* Marshall recounts that "[o]ne officer stood in front of respondent's seat, partially blocking the narrow aisle through which respondent would have been required to pass to reach the exit of the bus." *Id.* Marshall notes that, from the record, the officers at no point advised Bostick that he was free to end the "interview." *Id.* Although Marshall raises the issue of race in a footnote, *see id.* at 441 n.1, the ways in which race might have affected the particular encounter he describes is notably absent from his dissent.

161. ROBERT L. JOHNSON & DR. STEVEN SIMRING, THE RACE TRAP: SMART STRATEGIES FOR EFFECTIVE RACIAL COMMUNICATION IN BUSINESS AND IN LIFE 127 (2002).

162. *Cf.* Paul Butler, *Affirmative Action and Criminal Law*, 68 U. COLO. L. REV. 841 (1997) (suggesting six proposals for affirmative action in the criminal process to address the extent to which blacks are particularly vulnerable to police investigation and incarceration).

argued that, to the extent that "Bostick's movements were 'confined' . . . this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive."[163] In other words, "Bostick's freedom of movement was restricted by a factor independent of police conduct — *i.e.*, by his being a passenger on a bus."[164] Given this fact, Justice O'Connor's test for whether Bostick was seized is not whether a person in his position would have felt free to leave, but rather whether that person would have felt free to terminate the encounter. The Court's analysis reflects the idea that because Bostick chose to board the Greyhound bus, and because the police had nothing to do with that decision,[165] it is constitutionally permissible for the officers to exploit Bostick's vulnerability as a bus passenger.[166]

A similar argument about police culpability — or the lack thereof — can be made more broadly with respect to race and racial vulnerability. The argument would be that to the extent that Bostick's encounter with the officers reflects a degree of coercion that derived from the black/white racial interaction between Bostick's race and the race of the officers, that coercion existed apart from the conduct of the officers. "[I]t says nothing about whether or not [their] conduct . . . was coercive."[167] The police officers did not make Bostick black. They found him that way.[168] Nor did they make themselves white. Finally, neither officer is to be blamed for black people's general distrust of and apprehensions about the police. They have a right simply to do their jobs without being burdened by contemporary racial realities. Finally, to the extent that police officers, like the officers in *Bostick*, merely exploit or take advantage of (racial) circumstances they did not themselves create, no Fourth Amendment problem exists.

Again, because Justice O'Connor does not explicitly engage race in *Bostick*, one might reasonably raise the question of whether she would embrace the perpetrator conception of race I attribute to her. One way to answer that question is to turn once more to the Fourteenth Amendment context — and more particularly, to Justice O'Connor's

163. *Bostick*, 501 U.S. at 436.

164. *Id.*

165. COLE, *supra* note 131, at 19.

166. To the extent that these encounters do not trigger the Fourth Amendment, the incentives are for police officers to exploit our vulnerabilities as passengers on public transportation. *See id.* at 19-20 (observing that "[t]he consequence of *Florida v. Bostick* is that police are free to engage in dragnet-like searches of buses and trains, in settings where it is extremely difficult for any citizen to refuse to cooperate").

167. *Bostick*, 501 U.S. at 436.

168. *Cf.* COLE, *supra* note 131, at 19 (suggesting that the *Bostick* Court discounts the coercive nature of bus encounters in part because "[t]he police officer did not make him [Bostick] get on the bus. They merely found him there").

affirmative action jurisprudence. Consider, for example, *City of Richmond v. J.A. Croson*.[169] In that case, the Supreme Court adjudicated the constitutionality of an affirmative action plan that required the building companies to whom the city awarded contracts to "set aside" 30% of their subcontracts for "Minority Business Enterprises."[170] Speaking for the Court, Justice O'Connor invalidated the plan. Central to her opinion is the idea that to the extent an asymmetry exists between black and white access to contracting opportunities within the City of Richmond, current white subcontractors are not culpable.[171] They did not cause that asymmetry. They are not responsible for contemporary "societal discrimination,"[172] nor should they be held racially liable for historical discrimination. They are racially "innocent," and they have "personal rights."[173] They should not be made to suffer — via affirmative action — because of social problems they did not themselves create.[174] They should be able to exploit the racial circumstances in which they find themselves.[175] This is one way to characterize Justice O'Connor's approach to race in the affirmative action context, and this characterization is consistent with the perpetrator-centered conception of race *Bostick* reflects.

Thus far, my aim has been to deconstruct *Bostick*'s racial productivity to provide a more sophisticated understanding of the case: namely, that *Bostick* constructs (and not simply ignores) race to mask

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169. 488 U.S. 469 (1989).

170. *Id.* at 477.

171. *Id.* at 505-06.

172. *Id.* at 503.

173. *Id.* at 493.

174. *Id.* at 505-06 ("The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."). The idea of white racial victims of affirmative action is perhaps most apparent in the context of cases litigating the constitutionality of university admissions programs. *See* Regents of University of California v. Bakke, 438 U.S. 265, 298 (1978) (noting that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making"); Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir. 1996) (" 'Racial preferences appear to "even the score" . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.' " (citation omitted)).

175. According to Justice O'Connor:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Croson, 488 U.S. at 499.

(and not simply avoid) particular racial dynamics. This deconstruction both clears the ground for, and provides a normative foundation to support, alternative doctrinal approaches. Before outlining what those approaches might be, the next section offers a similar critique of *INS v. Delgado*.[176]

To some extent, the racial productivity of *Delgado* is more apparent than the racial productivity of *Bostick*. Yet, *Delgado* is virtually ignored in the race and Fourth Amendment literature, and does not even appear — except as a note — in many criminal procedure casebooks.[177] The marginalization of *Delgado* in Fourth Amendment discourse is particularly troubling given the jurisprudential space *Delgado* occupies in *Bostick*. As several Fourth Amendment scholars have observed, prior to *Bostick*, the test for a seizure had been whether a person felt free to leave the police encounter.[178] Typically, this claim is advanced to suggest that the "otherwise terminate the encounter" language the *Bostick* Court employs to downplay the fact that Bostick was on a bus reflects something of a doctrinal leap. In a formal sense, this argument is right. That is, in *Bostick*, the Court does indeed explicitly modify the seizure inquiry. In a substantive sense, however, *Bostick*'s seizure analysis was not entirely new. On the contrary, it is consistent with and buttressed by the seizure analysis in *Delgado*. In other words, *Delgado*'s seizure analysis, like *Bostick*'s, reflects the perpetrator perspective.

Given the doctrinal connection between *Delgado* and *Bostick*, the failure of scholars meaningfully to engage the former is surprising. Engaging *Delgado* helps to elucidate *Bostick* not only in terms of the doctrine the Court articulates, but also in terms of the racial construc-

176. Part of the aim is to multiracialize our understanding of Fourth Amendment law. The point is not that *Bostick* affects blacks and *INS v. Delgado* affects Latinas/os. While non-Latina/o blacks are less likely than Latinas/os and Asian Americans to experience the specific encounter *Delgado* presents, non-Latina/o and Black Latinas/os across ethnicities are also vulnerable to INS surveys. For a discussion of black identity formation in the context of Latinas/os' culture and politics, see Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1167-71 (2000) (arguing that the suppression of Afro-Latina/o identity within the Latina/o community itself might be one obstacle in the fight against Latinas/os' subordination within the U.S.). *See also* TAINO REVIVAL: CRITICAL PERSPECTIVES ON PUERTO RICAN IDENTITY AND CULTURAL POLITICS 49 (Gabriel Haslip-Viera ed., 1999) (describing some Puerto Ricans' assertion of Taino ancestry in order to deny their African heritage); Devon W. Carbado, *The Ties That Bind*, 19 UCLA CHICANO-LATINO L. REV. 283 (1998) (inquiring as to whether "the 'black' preceding 'Latino' signif[ies] some lesser claim to Latino identity (I've never heard a Latino referred to as a Brown Latino, though I have heard Latinas/os referred to as Brown-skinned)? Doesn't blackness here function as a qualifier, presupposing an identity that is 'just Latina/o?' "). Moreover, the racial reach of *Bostick* transcends black identity. My discussion of *Delgado* will help to illustrate why that is indeed the case.

177. *See* JAMES B. HADDAD ET AL., CRIMINAL PROCEDURE 426, 499 (5th ed. 1998); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 99 (1998).

178. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

tion the Court performs.[179] Moreover, to the extent that race and Fourth Amendment scholars ignore *Delgado*, they further entrench what some scholars refer to as the Black/White Paradigm[180] — that is, an understanding of American racial dynamics in black and white terms.[181] In the Fourth Amendment context, this entrenchment obscures the particular ways in which the Supreme Court's seizure analysis racially burdens Latinas/os. My discussion of *Delgado*, then, is intended (1) to illustrate how *Delgado* facilitated the doctrinal move the *Bostick* Court performs, and (2) to suggest that *Delgado*'s seizure analysis produces a conception of (or racially constructs) Latinas/os as Outsiders — that is, as people whose American identity "citizenship or permanent residency" must be demonstrated.[182] Under the racial pro-

179. For a useful discussion of the extent to which the racial ideology of *Delgado* legitimizes racial profiling, see Kevin R. Johnson, *The Case Against Race in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

180. Juan Perea refers to this tendency as the "Black/White binary paradigm." He defines the paradigm as "the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White," and he asserts that Americans' shared understanding of race is essentially limited to this paradigm. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal" Science of American Racial Thought*, 10 LA RAZA L.J. 127, 133 (1998). For further discussion of the Black/White Paradigm, see Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (criticizing the fact that most discussions of race and the law focus on African-Americans, to the exclusion of non-African American racial minorities); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black-White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47 (1997) (arguing that deconstruction of the Black/White Paradigm is necessary in order to create more sophisticated models, but that a focus must remain on the effects of white supremacy ideology); and Francisco Valdes, *Theorizing 'Outcrit' Theories: Coalitional Method and Comparative Jurisprudential Experience — RaceCrits, QueerCrits, and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (arguing that the Black/White Paradigm reproduces white domination and black subordination and erases all other minorities).

181. Note that scholarship on the Black/White Paradigm is not entirely of one accord. *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. (forthcoming June 2002) (critiquing the problematic ways in which the Black/White Paradigm discourse has been framed); *see also* Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385 (1999) (arguing that positioning all people of color as "black" within the paradigm does not necessarily require the elision of interethnic differences and of the varieties of racism experienced by each minority group).

182. While the notion of an insider presupposes an outsider, it is important to point out that the insider/outsider dichotomy is not a mere binary relationship. Critical Race Theory has done much to account for the complicated matrix of insider/outsider status. *See* Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207 (1996) (discussing the contradictory nature of identity which is at once possessed and imposed); Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical And Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998) (acknowledging differences in positionality within anti-subordination work); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (explaining that a multirelational approach exposes the ways in which positions shift to align with dominant institutions, constantly toggling the power relations within and among social groups). A related point is that one can be an insider in one setting and an outsider in an-

ductivity of *Delgado*, Latinas/os are presumed not to "belong." Because of this presumption, they are vulnerable to governmental inquiries as to whether they in fact "belong."[183] These inquiries reside outside of the constitutional reach of the Fourth Amendment.

C. *A Racial Re-reading of* INS v. Delgado

1. *The Racial Facts*

INS v. Delgado concerned the constitutionality of three so-called factory surveys — the INS practice of entering workplaces, with the employer's consent or with the authorization of a warrant, to question workers about their immigration status.[184] These surveys were conducted without individualized suspicion. That is, in none of the surveys did the INS have an articulable suspicion that any particular worker was undocumented.[185] For two reasons, the Court of Appeals for the Ninth Circuit concluded that these surveys triggered the Fourth Amendment: (1) the surveys effectuated a seizure of the entire workplace, and (2) the individuals whom the INS subjected to questioning as to their immigration status were seized.[186] Writing for the Supreme Court, Justice Rehnquist disagreed on both counts. He began by responding to the claim that the INS survey effectively seized the entire workplace. Below I demonstrate how, via the perpetrator perspective, his response is doctrinally and normatively connected to Justice O'Connor's seizure analysis in *Bostick*. Then, I turn to Justice Rehnquist's argument that the individuals whom the INS questioned were not seized. I examine this claim to demonstrate *Delgado*'s racial

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other. *See* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000) (exploring the extent to which white gays and lesbians are insiders within the gay and lesbian movement and black heterosexuals are insiders within black civil rights movements).

183. For an examination of how Latinos are automatically perceived to be foreigners in American society, see Gloria Sandrino-Glasser, *Los Confudidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 150 (1998). Sandrino-Glasser argues that the homogenization of Latino identity has removed Latinos "from the sphere of the imagined American self identity, and into the arena of 'foreign Other.' " *See also* Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395 (1997); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996); Kwei Yung Lee, *supra* note 119; Roman, *supra* note 119.

184. For a discussion of the nature of these practices, see EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 101-09 (1986). *See also* David K. Chan, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767, 767-68 (1986); Mark Starr et al., *Target: Illegal Aliens*, NEWSWEEK, May 10, 1982, at 45 (describing a *Delgado*-era INS operation dubbed "Project Jobs," a coordinated nationwide sweep of 275 companies that prompted criticism of the INS's "Gestapo-like tactics").

185. 466 U.S. 210, 212 (1984).

186. *Id.* at 214.

productivity: its construction and reification of Latinas/os as presumed Outsiders. This demonstration will provide a more complete racial picture of current Fourth Amendment law as well as a basis to undermine its ideological foundation.

2. *The Workplace Was Not Seized:* Delgado's *Racial Relationship to* Bostick

Justice Rehnquist's holding that the entire workplace was not seized proceeds in three steps, the third of which Justice O'Connor draws heavily on in *Bostick*. He begins with the uncontroversial observation that all personal interactions with the police do not implicate the Fourth Amendment.[187] Next, he suggests that law enforcement questioning of individuals does not, without more, constitute a seizure.[188] Finally, he states that the fact that such questioning occurs in the context of the workplace does not necessarily create a Fourth Amendment event. According to Justice Rehnquist, "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."[189] Thus, to the extent that the employees in *Delgado* did not feel free to leave the workplace, their workplace responsibilities, and not the INS, restricted their freedom of movement.[190]

In *Bostick*, Justice O'Connor cites to and builds on this last argument. According to Justice O'Connor, "[l]ike the workers in [*Delgado*], Bostick's freedom of movement was restricted by a factor independent of police conduct — *i.e.*, by his being a passenger on a bus."[191] Implicit in her argument is the notion that the bus is to Bostick what the workplace is to the employees in *Delgado* — a space that, with or without police presence, is confining. Her analysis replicates *Delgado*'s conduct/context dichotomy. Specifically, she conceptualizes law enforcement conduct apart from the context in which it is being

187. *Id.* at 215.

188. *Id.* at 216.

189. *Id.* at 218.

190. *Id.* In its brief, the government advanced a similar argument:

> Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. At such times the employees presumably were obligated to their employer to be present at their work stations performing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense.

Brief for Petitioners at 22-23, INS v. Delgado, 466 U.S. 210 (1984) (No. 82-1271) (citations omitted).

191. Florida v. Bostick, 501 U.S. 429, 436 (1991).

performed. Moreover, she analyzes social context (e.g., being on a bus) as though it were unaffected by the presence of law enforcement personnel. This conduct/context dichotomy connects *Delgado* to *Bostick* in two significant ways.

First, the dichotomy obscures the agency law enforcement officials exercise to exploit people's sense of confinement (e.g., as bus passengers and factory workers) and focuses on the agency people exercise to restrict their own freedom of movement (e.g., by working in factories and taking public transportation). Second, the conduct/context disaggregation enables both Courts to ignore not only how law enforcement presence alters the nature of a particular social context, but also how the context in which law enforcement officials act shapes how individuals interpret and experience these officials. For example, one of Justice O'Connor's central claims in *Bostick* is that "[t]here is no doubt that if *this same encounter* had taken place before Bostick boarded the bus or in the bus terminal, it would not have risen to the level of a seizure."[192] Reflecting the perpetrator perspective, her thinking seems to be that if the officers had engaged in precisely the *same conduct* in some place other than on a bus, few people would argue that that conduct effectuated a seizure of Bostick.

From the victim perspective, this claim makes little sense; an encounter with a law enforcement officer on the street is not the same as an encounter with that same officer on a bus. In other words, Bostick's encounter with the police officers would not in fact have been the same had it occurred in a bus terminal. Moreover, the difference between these encounters is not simply the difference between a person's sense of confinement, in the absence of police presence, on a bus and in a bus terminal. The difference is also a function of the extent to which police presence alters how a person experiences both settings. That is, a bus with law enforcement presence is different from, and more difficult to negotiate than, a bus without such presence. When, for example, the officers in *Bostick* entered the Greyhound bus, they transformed that already confining space into a more coercive environment. With their presence, and from the perspective of a person in Bostick's position, the bus was no longer simply a bus. It became the site of a particular (and often racialized) government activity: a bus sweep.

The workplace, too, becomes a different place, and a more difficult place to negotiate, with a law enforcement presence. When, for example, the INS officials in *Delgado* entered the factory, the factory was no longer simply a factory. The presence of the INS transformed that

192. *Id.* at 434 (emphasis added).

already confining workplace into a particular (and often racialized) governmental activity: an INS raid.[193]

In sum, *Delgado*'s conceptualization of law enforcement conduct as outside of the context in which people experience it is reproduced in *Bostick*. Thus, although *Delgado* employs the traditional test for a seizure (whether a person feels free to leave the encounter) and *Bostick* modifies it (whether a person feels free to leave or otherwise terminate the encounter), the two cases are, to some meaningful extent, analytically indistinct. The failure of race and Fourth Amendment scholars to discuss *Delgado* makes *Bostick* appear to be more of jurisprudential leap than it is.

3. *The Individuals Whom the INS Questioned Were Not Seized: How* Delgado *Racially Burdens Latinas/os*

Discussing *Delgado* also presents an opportunity to challenge the seizure analysis outside of the black experience.[194] More particularly, *Delgado* demonstrates one of the ways in which Latinas/os are racially burdened by the Supreme Court's conception of what it means to be seized. This racial burden is a function of, and helps to reproduce, the notion of Latinas/os as Outsiders. The racial production of Latinas/os as Outsiders is apparent in Justice Rehnquist's argument that the individuals whom the INS questioned were not seized.

Fundamental to Justice Rehnquist's conclusion (that the individuals whom the INS questioned were not seized) is the notion that "[t]he questioning of each respondent by INS agents seems to have been nothing more than a brief encounter."[195] In other words, "nothing more occurred than that a question was put to them."[196] Specifically, the INS simply inquired as to the workers' place of origin — where

193. It is also important to note that at urban work sites such as the facilities raided in *Delgado*, as opposed to farming or ranching operations, there is a greater likelihood that citizens and legal residents work alongside undocumented workers. *See* HARWOOD, *supra* note 184, at 98.

194. Of course, this is not to say that the black experience is monolithic. Differences of class, gender, sexual orientation, ethnicity, religion, and political commitment within the black community complicate the idea that a black community actually exists. *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (characterizing a unified, identifiable "black community" as "more of an idea, or ideal, than a reality"); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 862 (1999) ("Blacks are not consigned to a superimposed, pre-ordained, uniform, universal, biological identity. We have fluid identities that shift according to the context and that are, at least in part, political and deliberately chosen."). For a discussion of the ways in which essentialism complicates black antiracist politics, see Carbado, *supra* note 182; Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999).

195. INS v. Delgado, 466 U.S. 210, 219 (1984).

196. *Id.* at 220.

they were born, whether they were citizens, whether they had "papers."[197] According to Justice Rehnquist, this "could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory."[198]

In reaching this conclusion, Justice Rehnquist completely discounts the circumstances under which the workers were questioned. More particularly, he considers "each interrogation in isolation as if [the workers] had been questioned by the INS in a setting similar to an encounter between a single police officer and a lone passerby that might occur on a street corner."[199] In fact, the encounter between the workers and the INS in *Delgado* was far more coercive than that. For one thing, there were between twenty and thirty INS agents; several of them guarded the exits while others moved, "in para-military formation,"[200] systematically through the rows of the factory.[201] This workplace occupation lasted between one and two hours. For another, the agents were armed, they carried and displayed handcuffs, and they wore INS badges.[202] Finally, the agents did not inform the workers that they were free to leave.[203] Likely, the workers inferred just the opposite, especially since the INS arrested several of the workers who attempted to exit the factory.[204] As one worker explained, "[t]hey see you leaving and they think I'm guilty."[205]

With the foregoing context in mind, the question is: How are we to interpret Justice Rehnquist's claim that the workers whom the INS questioned were not seized? How are we to understand the jurisprudential violence his opinion performs?[206] Below I attempt to make sense of it. To do so, I uncover the argument's racial ideology: that Latinas/os are presumptively Outsiders. They are, in other words, always at the border. At this location, the INS has "plenary power"[207] to

197. *Id.* at 219-20.

198. *Id.* at 220-21.

199. *Id.* at 229 (Brennan, J., dissenting).

200. Brief for Respondents at 17, INS v. Delgado, 466 U.S. 210 (1984) (No. 82-1271).

201. *Id.* at 3-4.

202. *Id.* at 4.

203. *Delgado*, 466 U.S. at 217.

204. Brief for Respondents at 3-4, 18, *Delgado* (No. 82-1271).

205. *Id.* at 20 (testimony of one of the workers).

206. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (stating that "legal interpretation takes place in a field of pain and death" and noting that "[w]hen interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence") (footnote omitted).

207. The Supreme Court has repeatedly affirmed Congress's "plenary power" over immigration matters. *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'

determine, via intimidating citizenship questioning, the legitimacy of Latinas/os' claim to American belonging.

There are at least four ways to interpret Justice Rehnquist's argument that individuals whom the INS questioned were not seized:

Interpretation 1: All the workers felt free to leave the factory.

Interpretation 2: The workers who were citizens or legal residents of the United States felt free to leave the factory.

Interpretation 3: Any reasonable Latina/o who legally resides in the United States would have felt free to leave the factory.

Interpretation 4: Any reasonable person would have felt free to leave the factory.

None of these interpretations is satisfying. The first two frame the seizure inquiry in subjective terms — whether the individuals who experienced the INS encounter *actually* felt free to leave the factory. As previously suggested, however, the Supreme Court has been clear to point out that the free-to-leave test is not in fact subjective. The third interpretation explicitly racializes the reasonable person. While this racialization renders the seizure analysis more contextual, it is inconsistent with Justice Rehnquist's colorblind opinion. Nowhere in *Delgado* does Justice Rehnquist consider how Latina/o communities — and especially the Latina/o communities from which the workers in *Delgado* were drawn — are likely to perceive and respond to INS authority.

One might conclude, then, that the fourth interpretation captures Justice Rehnquist's seizure analysis. This interpretation — whether any reasonable person would have felt free to leave the factory — delineates the reasonable person without racial/ethnic specificity. It is, in other words, race neutral, or at least ostensibly so. While Justice Rehnquist may want us to believe (or may himself think) that he is applying a race neutral standard, in fact he is not.[208] To begin with, the

'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (citations omitted)). This power has allowed the INS to engage in practices that are arguably racially discriminatory. While court rulings have barred INS officers from instigating interrogations based on a suspect's foreign appearance or accent, these rulings do not prohibit INS operatives from using such factors to determine whom *not* to interrogate. For example, one commentator who accompanied INS agents during a workplace raid witnessed the agents interrogate a number of Haitian and Central American workers, but then saw them pass by a group of workers at the same location who appeared to be of European origin. Although the observer explained that such "negative sorting" might be the result of constraints on INS resources rather than bias, it would be impossible to deny the racial component of such starkly disparate treatment. *See* HARWOOD, *supra* note 184, at 109. On a more esoteric note, the racialized nature of INS practices is illustrated by the fact that one of the agency's largest endeavors to expel undocumented workers during the mid-1950s was formally dubbed "Operation Wetback." *See supra* at 5.

208. Indeed, as I explain more fully below, there is no race neutral position from which to apply the free-to-leave test.

"any reasonable person" category presumably includes Latinas/os. Latinas/os and non-Latinas/os, however, are likely to perceive the INS in different ways. Whether or not Latinas/os are documented, they are, on the whole, more likely than non-Latinas/os to be apprehensive about encounters with the INS.[209] Given the difference between how Latinas/os and non-Latinas/os are likely to respond to INS authority, Justice Rehnquist's unmodified reasonable-person approach is fictional. Specifically, it creates the misimpression that there is a neutral identity position from which to ask the seizure question. In other words, that Justice Rehnquist does not explicitly frame the seizure inquiry in terms of identity does not mean that, with respect to identity, his analysis is neutral. Because of the multiplicity of ways in which racial identity is given meaning in our society, there is no exit from race, only stated or unstated racial preferences. To the extent that Latinas/os and non-Latinas/os are likely to perceive or respond differently to INS authority, framing the seizure analysis without identity specificity is tantamount to framing it from a non-Latina/o perspective. In this sense, Justice Rehnquist's analysis is not race neutral. On the contrary, it reflects an unstated racial preference for non-Latina/o identity.

Even under a non-Latina/o framing, however, Justice Rehnquist's application of the free-to-leave test is, as Justice Brennan suggests, "striking . . . [in] its studied air of unreality."[210] Given the facts of *Delgado*, it is hard to believe that many people would have felt free to disregard the INS or to leave the factory. I have taught *Delgado* to more than three hundred students, most of them non-Latinas/os.[211]

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209. *See* Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245, 257 (1997):

> Nor does any published account [of an INS raid] ever explore the impact of a raid on the lives of the people caught without legal papers or of the failure of the INS to come up with nondiscriminatory methods of enforcement. . . . [N]ever does an account of an INS raid consider the possibility that the INS's approach to apprehending workers, with its heavy focus on the Mexican population and on people with brown skin, smacks of blatant human rights abuses when the consequences of getting caught are to send a worker off to be detained and deported without due process or time to contact the family he or she is leaving behind.

210. INS v. Delgado, 466 U.S. 210, 226 (1984) (Brennan, J., dissenting).

211. This has been one of the many difficulties of teaching at a public institution without affirmative action. In 1995, the University of California adopted a pair of admissions policies, dubbed SP1 and SP2, that effectively banned affirmative action. This ban was in effect codified a year later when California voters approved a statewide ballot measure, Proposition 209, that prohibited affirmative action programs in all state agencies. After the adoption of SP1 and SP2 and the passage of Proposition 209, the percentage of black and Latina/o applicants admitted to the UC system dropped precipitously, and the number of black and Latina/o applicants also declined. While the number of black and Latina/o students in the UC system has increased in recent years, the enrollment of such students at the system's most selective campuses, UCLA and Berkeley, remains below 1995 levels. In May 2001, the UC regents voted unanimously to repeal SP1 and SP2, but because Proposition 209 will continue to enforce the ban on affirmative action, the vote was seen largely as a symbolic gesture. *See* Rebecca Trounson & Jill Leovy, *UC Ends Affirmative Action Ban*, L.A. TIMES, May 17, 2001, at B1; *see also* Laura E. Gómez, *Personal Perspective: Loss of UC Diversity*

Not one has said he or she would have felt free to leave the factory or to ignore the INS. To be sure, this is not hard empirical evidence (even as law students tend to disagree about everything). Still, the observation does suggest that, even under a non-Latina/o framing of the seizure inquiry, Justice Rehnquist's conclusion that the individuals whom the INS questioned were not seized is "rooted . . . in fantasy."[212]

The question, then, is why Justice Rehnquist would have engaged in this fantasy. To the extent that he was invested in legitimizing the conduct of the INS, at least one other doctrinal route was available to him. He could have invoked *United States v. Martinez-Fuerte*.[213] At issue in that case was whether "a vehicle may be stopped at a fixed [immigration] checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens."[214] The Court answered the question in the affirmative. In reaching this conclusion, the Court assumed that the motorists who passed through the checkpoint were seized.[215] It balanced the nature of that seizure, however, against the government's interest in regulating immigration and concluded that "[w]hile the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited."[216]

One could apply the reasoning of *Martinez-Fuerte* to *Delgado*. The argument would be that illegal immigration is a growing and costly problem in the United States;[217] that the government's interest in ad-

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Means Lost Opportunity for Law Students, L.A. TIMES, Sept. 24, 2000, at M3 (exploring the educational costs of the elimination of affirmative action).

212. *Delgado*, 466 U.S. at 229 (Brennan, J., dissenting).

213. 428 U.S. 543 (1976); *see also* JOHNSON & SIMRING, *supra* note 161, at 696 (observing that "*Martinez-Fuerte* effectively permits a racist Border Patrol Officer to stop all persons of Mexican ancestry").

214. *Martinez-Fuerte*, 428 U.S. at 545.

215. *Id.* at 546 n.1.

216. *Id.* at 557.

217. Analysis of recently released data from the 2000 census has suggested that there are possibly eleven million or more undocumented immigrants currently residing in the U.S., a population nearly twice the size of previous official estimates. *See* Aaron Zitner, *Immigrant Tally Doubles in Census*, L.A. TIMES, Mar. 10, 2001, at A1. According to the data, about 40% of undocumented immigrants live in California. *Id.* It was in California in 1994 that an overwhelming majority of voters passed Proposition 187, a ballot initiative that sought to cut off public services to undocumented persons. At that time, when the state economy was mired in recession, officials estimated that 100,000 immigrants entered the state illegally every year, and that such immigrants cost state taxpayers $3.6 billion in public services annually. State courts invalidated many of Proposition 187's provisions, and California's economy has prospered in recent years, but opposition to "illegal immigration" remains strong in the state. Paul Maslin, a pollster for Governor Gray Davis, said in March 2001 that California voters' negative feelings about undocumented immigrants had not changed, and that Proposition 187 would pass again if it came up for another vote. *See* George Skelton, *Capitol Journal: Mexican President Enters Eye of the Immigration Storm*, L.A. TIMES, Mar. 22, 2001, at A3; *see also* Ruben J. Garcia, *The Racial Politics of Proposition 187*, *in* THE LATINO/A CONDITION 118 (Richard Delgado & Jean Stefancic eds., 1998).

dressing this problem is high; that workplace surveys are an effective and efficient means to mitigate if not solve it; and that the manner in which these surveys were conducted did not unnecessarily or unreasonably burden the Fourth Amendment interests of the workers. Justice Rehnquist could have argued that while the workers whom the INS questioned were seized, the conduct of the INS was constitutionally legitimate because the seizure was reasonable. This is precisely how Justice Powell, who authored *Martinez-Fuerte*, decided *Delgado* in his concurrence.[218] Moreover, this was one of the arguments the government advanced on appeal.[219] Why would Justice Rehnquist take another doctrinal path? What, in terms of racial ideology, is at stake?

One answer relates to the racial idea that Latinas/os should render themselves available for INS surveillance, especially to the extent that they occupy places where undocumented workers are likely to be present.[220] This racial expectation could reflect at least three interrelated arguments. First, that in the absence of intrusive INS surveillance of the sort reflected in *Delgado*, the INS would have a difficult time separating the legal from the illegal.[221] Second, Latinas/os can help America manage this difficulty by rebutting the presumption that they are undocumented — that is, by proving their American identity. Third, reasonable Latinas/os would be willing if not eager to shoulder this racial burden. As the government implicitly argued, reasonable Latinas/os should have understood that they were required to do nothing more than answer a few questions about their immigration

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218. *See* INS v. Delgado, 466 U.S. 210, 221-24 (1984) (Powell, J., concurring).

219. According to the government,

> [e]ven if the stationing of agents at factory exits is in some technical sense a 'seizure' of the entire work force, that seizure is nevertheless 'reasonable' under the Fourth Amendment. . . . [T]he governmental interests that support the practice of stationing agents at factory exits during a survey substantially outweigh the minimal intrusion, if any, that this practice entails on employees' Fourth Amendment interests. By focusing on businesses that employ significant numbers of illegal aliens, factory surveys are by far the most effective means of apprehending illegal aliens who have eluded the Border Patrol.

Brief for Petitioners at 16, *Delgado* (No. 82-1271).

220. *See id.* at 3 (observing that "[i]n the experience of the Immigration and Naturalization Service, high concentrations of illegal aliens are likely to be found in factories that employ large numbers of unskilled or semi-skilled workers").

221. Historically, U.S. immigration authorities have not attached much significance to this difficulty. *See* Garcia, *supra* note 217, at 119 ("By 1946 [after the large influx of Mexican workers that came to the U.S. in the Bracero contract-labor program], it became impossible to separate Mexican Americans from deportable Mexicans. Thus, in 1954, over one million people were deported under 'Operation Wetback.' Many United States citizens were mistakenly 'repatriated' to Mexico, including individuals who looked Mexican but had never even been to that country."). Such indiscriminate treatment of a racial minority recalls the U.S. military's justification for the internment of all Americans of Japanese ancestry in the western U.S. during World War II. The military argued, and the Supreme Court agreed, that a broad internment was necessary because "it was impossible to bring about an immediate segregation of the disloyal from the loyal." Korematsu v. United States, 323 U.S. 214, 219 (1944).

status and to "produce their alien registration papers."[222] They "*should have* understood that the INS agents at the exits were positioned to stop *only illegal aliens* from leaving."[223]

To the extent that one accepts any of the foregoing arguments, one is likely to conclude that the Latinas/os in *Delgado* were unreasonable or that it was unreasonable for them to challenge the INS survey. It is this racialized notion of reasonableness that butresses Justice Rehnquist's conclusion that the factory workers whom the INS questioned were not seized.[224] That is, while his seizure analysis purports to be about how a reasonable person would feel under the facts of *Delgado*, it is really about what reasonable Latinas/os should be prepared to tolerate and internalize. The analysis, in other words, is disciplinary.[225] Under *Delgado*, Latinas/os are presumptively Outsiders.[226] Quite literally on the borders of American identity, part of their racial duty is to demonstrate that they "belong."[227]

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222. Brief for Petitioners at 24 n.16, *Delgado* (No. 82-1271) (arguing that "[a]t most, respondents were asked one or two questions about their immigration status and, where appropriate, were asked to produce their alien registration papers").

223. *Id.* at 23 (emphasis added).

224. Of course, I cannot get inside Justice Rehnquist's head. In other words, there is no uncontroversial way to know what he is thinking outside of what his opinion facially argues. What I am suggesting is that, quite apart from what Justice Rehnquist subjectively thinks, one has a better understanding of his application of the free-to-leave test with my normative interpretation in mind.

225. Alan Hunt and Gary Wickman provide the following account of disciplinary power:

> Discipline, rather than being constituted by 'minor offenses,' is characteristically associated with 'norms,' that is, with 'standards' that the subject of a discipline come to internalize or manifest in behavior, for example, standards of tidiness, punctuality, respectfulness, etc. These standards of proper conduct put into place a mode of regulation characterized by interventions designed to correct deviations and to secure compliance and conformity. . . . It is through the repetition of normative requirements that the 'normal' is constructed and thus discipline results in the securing of normalization by embedding a pattern of norms disseminated throughout daily life and secured through surveillance.

ALAN HUNT & GARY WICKMAN, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 49-50 (1994); *see also* Michel Foucault, *The Subject and Power, Afterward* to MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 221 (Hubert L. Dreyfus & Paul Rabinow eds., 1982) (suggesting that disciplinary power "structure[s] the possible field of action of others").

226. As Delgado argued:

> [I]nnocuous conduct does not become suspect merely because the person observed is nonwhite. Yet that is precisely what occurs during these raids. Every Latin is suspected of being an undocumented alien due to his or her race. Members of a distinct minority characterized by immutable traits are singled out because they are suspected to be illegal aliens. As a result, innocent members of the class suffer an impairment of their privacy (a loss not suffered by members of the White or black community) because the standard applied fails to distinguish in any meaningful way between the guilty and the innocent.

Brief for Respondents at 43, *Delgado* (No. 82-1271).

227. U.S. immigration law requires that a permanent resident "shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card." 8 U.S.C. § 1304(e) (2000). If an INS agent can articulate a reason-

D. *Integrating Race into the Seizure Analysis*

Thus far, I have argued that both *Bostick* and *Delgado* are better understood as cases not just about racial indifference or racial avoidance but also about racial construction. That is, the problem in *Bostick* and *Delgado* is not just that the Court in both cases ignores race, but that it constructs race in a particular way. My aim has been to describe and delegitimize the nature of these racial constructions by exposing the race consciousness, or the ideological racial preferences, upon which they are based. Implicit in this project is the idea that the Court can do better. The question to which I now turn is: Precisely how? Asked more specifically, given the free-to-leave test, can the Supreme Court or lower courts meaningfully engage race? The short answer is yes. Below, I lay out three doctrinal approaches courts might take to do exactly that: a per se approach, a rebuttable presumption approach, and a totality of the circumstances approach. Informed by the victim perspective, each approach is explicitly race conscious in a manner that is sensitive to the coercive ways in which race structures police/citizen encounters. As a caveat, I should be careful to point out that I do not present these approaches as fully-worked-up theories. They should be viewed as conceptual starting points.

The Per Se Approach. Under the per se approach, any interaction between a black person and the police would constitute a seizure, unless the officer advises that person that she is under no obligation to talk to the officer. To the extent that the officer provides such a warning and performs no overt acts of coercion, and if the suspect chooses to interact with the officer, the per se rule would work the other way — that is, the encounter would be deemed consensual.

The Rebuttable Presumption Approach. Under this approach, the presumption would be that black/police encounters are seizures. This presumption could, but would not necessarily, be rebutted by evidence that, among other things, the officer informed the suspect of his constitutional rights. For example, the fact that a police officer informs a suspect of his constitutional rights would not mitigate the coercive nature of an encounter in which the officer also has his gun drawn and pointed at the suspect. In the absence, however, of overtly coercive conduct on the part of the police officer — and if the officer informs the suspect of her constitutional rights — the presumption would be that the encounter was consensual.

The Totality of the Circumstances Approach. The totality of the circumstances approach adds race to the list of factors courts should consider in determining whether a particular police activity seizes an individual. Under this framework, the inquiry would be whether, under

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able suspicion of a person's alienage, the agent can detain the person and demand that the person produce the required documentation.

the facts of a given case, a person with the suspect's racial identity, and considering the racial identity of the police officers, would have felt free to leave or otherwise terminate the encounter.[228]

Each of these approaches can be challenged. For one thing, to the extent that they focus on blacks to the exclusion of other racial minorities, they are underinclusive. They create the impression that race-based policing burdens only black people. Of course, this is not the case. Racial policing burdens other nonwhites as well.[229]

But even if these approaches are racially rearticulated so that they are triggered by interactions between the police and people of color, each approach still has its difficulties. To begin with, one might object to their explicit race-conscious orientation. Specifically, one could argue that each approach legitimizes a constitutional regime under which people of color have "special" Fourth Amendment standing.[230]

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228. In effect, this is the standard the Supreme Court articulated in *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (suggesting that the defendant's identity as "a female and a Negro" "were not irrelevant" to the question of whether she was seized).

229. *See* COMMITTEE AGAINST ANTI-ASIAN VIOLENCE, POLICE VIOLENCE IN NEW YORK CITY'S ASIAN AMERICAN COMMUNITIES, 1986-1995 4-11 (1996) (observing that while blacks and Latinas/os are the most common targets of police misconduct, reports of police violence against Asian Americans increase annually). In 1995, over 75% of the reported victims of police brutality in New York City were blacks, Latinas/os or Asian Americans, with the starkest racial disparity found among custodial deaths and shootings. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 11 (1996). Special Commission reports in the Los Angeles area also have reported a pattern of "racially biased treatment of African American, Hispanic, Asian-American and other minorit[ies]" by law enforcement officers. THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT: A REPORT BY SPECIAL COUNSEL JAMES G. KOLTS & STAFF 299 (1992). The racially biased treatment that minorities face includes "disrespectful and abusive language, employing unnecessarily intrusive practices . . . and engaging in use of excessive force." REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 70 (1991). For Latinas/os and Asian Americans, the burden of racist police practices are compounded by anti-immigrant biases. *See* Gotanda, *supra* note 49, at 1694 ("The assignment to Wen Ho Lee of a presumption of disloyalty is a well-established marker of foreignness. And foreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Asian Americans."). Real and perceived cultural differences add specific dangers to police encounters for Asian Americans. In the context of police interrogations, Asian Americans are perceived to be more acquiescent and less likely to unequivocally end the encounter; for many Asian Americans, withholding consent from an authority figure is contrary to cultural norms. Adam Geoffrey Finger, *How Do You Get a Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under* Miranda v. Arizona, 79 MARQ. L. REV. 1041, 1061 (1996). Other factors particular to immigrant/police encounters that significantly determine police (mis)conduct are limited English proficiency or heavily accented English. ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 75-77 (1998).

230. This argument would have the least force with respect to the totality of the circumstances approach. This approach does not, at the level of doctrine, specify any particular racial identity. It simply provides that the inquiry be conducted from the perspective of a person in the suspect racial position, regardless of what that person's race is. Thus, a court would take into account the fact that a suspect is white just as it would take into account the fact that a suspect is Latino. How the suspect's race would shape the inquiry would turn on the other (racial) facts of the encounter. Still, even this approach could be problematized depending on one's conceptualization of strict scrutiny, and more particularly if one is of the

The argument would be that because under each approach people of color would have an easier time than whites demonstrating they were seized, each approach functions as a racial preference — that is, as Fourth Amendment affirmative action. In the absence of a compelling justification, this preferential treatment or reverse discrimination is unconstitutional.[231]

There are several responses to this argument. First, the argument assumes that the application of the free-to-leave test does not already reflect a racial preference. If we assume, for example, that nonwhite people are more vulnerable to being stopped by the police than whites, more likely than whites to feel apprehensive about such encounters, and less likely than whites to know and feel empowered to exercise their constitutional rights, ignoring this racial disparity privileges whites.[232] It prefers their racial position vis-à-vis police interactions to the racial position of nonwhites. In this respect, it bears reiterating that there is no race neutral position from which to conduct the "reasonable person under the circumstances" inquiry. Put another way, there is no reasonable person who is racially unsituated. Thus, for example, the fact that the *Bostick* Court fails to engage race does not mean that the opinion is raceless or even that it is race neutral. To avoid explicitly invoking race is to invoke it in a particular way. Race avoidance conveys the idea that race does not matter, and masks the ways in which it actually does.

But with respect to how people experience law enforcement officials — which is (or should be) what the free-to-leave test is all about — race does matter. More specifically, whiteness and non-whiteness matter differently. To the extent that the application of the free-to-leave test avoids this racial difference, masks it, or both, it legitimizes racial asymmetries in people's vulnerability to and perceptions of police authority. In other words, eliding the ways in which race structures

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view that strict scrutiny is triggered any time a particular policy makes *any* racial classification. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring) (rejecting a distinction between "benign" and "invidious" racial discrimination, and applying strict scrutiny in review of a federal program designed to aid minority-owned businesses); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (also rejecting the benign/invidious distinction); Regents of University of California v. Bakke, 438 U.S. 265, 295 n.34 (1978) (same).

231. *See Croson*, 488 U.S. at 493 (describing an affirmative action program in the rhetoric of white reverse-discrimination, noting that the plan "denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking"); Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996) (referring to an affirmative action admissions program as a system of "racial preferences").

232. Of course, each of these are empirical claims, the most controversial of which is the notion that whites are more familiar with their constitutional rights than nonwhites.

how people interact with and respond to the police leaves people of color in a worse constitutional position than whites.

A second response to the argument that the approaches I have suggested reflect a racial preference relates to the way in which the "under the circumstances" component of the free-to-leave test is currently interpreted. In effect, the free-to-leave test is a "totality of the circumstances" inquiry, under which everything is potentially relevant to, and no one thing is necessarily dispositive of, whether a law enforcement officer's interaction with an individual effects a seizure.[233] Focusing on everything but race is tantamount to discrimination based on race. That is, if race is potentially relevant to, but ignored in the application of, the free-to-leave test, people who are especially vulnerable to police encounters because of their race are systematically disadvantaged in comparison to people who are not.

Third, even to the extent that each approach is conceptualized as racial preference, each need not be rejected. Accepting the racial preference argument as a starting point, there are two ways to proceed. First, one could eliminate the preference but not eliminate the thrust of the approach. With respect to the first approach, for example, this would mean that all encounters with the police — irrespective of the racial identity of the parties involved — would be deemed a seizure unless the police placed the individual on notice as to her constitutional rights. Second, one could maintain the preference and attempt to justify it via a compelling state interest analysis. The notion would be that given the high incidence of police abuse within communities of color and the empirical evidence suggesting that some racial identities are presumed to be criminal while others are not,[234] racial preferences in the context of the Fourth Amendment are appropriate. This latter approach is less doctrinally viable than the first. In the context of Fourteenth Amendment jurisprudence, the Supreme Court has made it clear that "generalized" or "societal" discrimination is insufficient to support affirmative action, that race-based remedial efforts need to be supported by "identified" discrimination.[235] Presumably, the Court

233. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (describing the "totality of the circumstances test" as "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs").

234. *See supra* note 148.

235. *See, e.g.*, *Croson*, 488 U.S. at 499 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."); *Bakke*, 438 U.S. at 309 n.44 ("Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.").

would take the same doctrinal position with respect to Fourth Amendment law.

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The preceding discussion centers on the free-to-leave test. Part III shifts the analysis to consent doctrine. Here, too, the aim is to illustrate the racial productivity of Fourth Amendment law. The point of departure for the discussion is *Bostick*. The issue in *Bostick* was not just whether Bostick was seized but, assuming that he was not, whether his consent to the officers' request for permission to search his belongings was voluntary. In addition to providing a richer account of how Fourth Amendment consent law implicates race, my discussion of that doctrine will shed new light on, and provide a new basis to critique, the case that has become foundational to consent law jurisprudence, *Schneckloth v. Bustamonte*.[236]

III. (E)RACING CONSENT SEARCHES

We wear the mask that grin and lies,
It hides our cheeks and shades our eyes, —
This debt we pay to human guile;
With torn and bleeding hearts we smile...
Paul Laurence Dunbar[237]

A. *Introduction*

Central to the Supreme Court's Fourth Amendment consent jurisprudence is the notion that people should be free to forego certain constitutional protections. More specifically for our purposes, people should be free to decide whether and to what extent to subject themselves to governmental intrusions. But how do we know when a person has consented? Asked differently, what counts as a valid consent? Consider again *Bostick*. Recall that one of the arguments Bostick advanced to challenge the search of his luggage is that he did not consent to the search. Why, he asked, would a person who knows he is in possession of narcotics consent to a search of his belongings? Assuming that a reasonable person in possession of drugs would be disinclined to consent to the search of his belongings, there are at least three ways to interpret the officers' claim in *Bostick* that they requested and were granted permission to search Bostick's luggage.

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236. 412 U.S. 218 (1973).

237. Paul Laurence Dunbar, *We Wear the Mask*, *in* AMERICAN NEGRO POETRY 14 (Arna Bontemps ed., 1963).

First, one could interpret this claim to be untruthful. Under this interpretation, either the police officers did not request permission to search Bostick's luggage or if they did, Bostick said no. Second, one could interpret the officers' claim as truthful. Here, the conclusion would be that to the extent Bostick granted the officers permission to search his luggage, his consent was a function of the officers' coercion. Fundamental to this interpretation would be the idea that, given the disincentives for Bostick to agree to the search of his belongings, an inference can be made that the officers coerced him into doing so. In other words, Bostick may have said yes, but only because he was compelled to; his consent was involuntary. A final way to interpret the officers' claim would be to assume that the officers neither lied about Bostick's consent nor coerced him into consenting. This interpretation could reflect the belief that if Bostick said yes to the search (considering again the consequences that would likely flow from that consent — arrest, prosecution, and incarceration), it was likely because he did not know he had a right to say no. Put another way, Bostick may have consented because he thought he must. In this sense, Bostick's consent was not only involuntary, but also uninformed.

While each of the foregoing interpretations has a certain amount of intuitive appeal, none is strong enough, given the current status of Fourth Amendment consent jurisprudence, to support an argument that the search of Bostick's luggage was unconstitutional. Below, I offer two reasons why this is so. One reason relates to the manner in which Justice O'Connor deploys the rhetoric of innocence ostensibly to illuminate who, for Fourth Amendment purposes, the "reasonable person" is — or, more properly, who the reasonable person is not. The second reason relates to what I have been calling the perpetrator perspective. In the context of consent searches, the perpetrator perspective focuses on what police officers do rather than on what suspects know. The claim is that because people are differentially situated by race with respect to their knowledge of their constitutional rights and their perceived freedom to assert those rights, they are also differentially vulnerable to consent searches.

B. *Innocence, Consent, and the Fourth Amendment: Revisiting* Bostick

To some extent, each of the preceding interpretations of the officer's claim, that he requested and was granted permission to search Bostick's luggage, focuses on the disincentives a person in possession of drugs has to consent to such a search. These disincentives suggest that (1) Bostick did not consent, (2) he was coerced into consenting, or (3) he did not know that he could refuse consent. In *Bostick*, Justice O'Connor implicitly argues that it is constitutionally impermissible to consider the disincentives that Bostick, a person in possession of

drugs, had to assent to the search of his belongings. According to Justice O'Connor, the reasonable person standard presupposes an innocent person. Her argument seems to be that, to the extent that a person is in possession of drugs, he is not innocent. Stated more directly, he is factually guilty. Accordingly, such a person may not use the fact of his guilt (possessing drugs) to vitiate his consent[238] or to deny that he consented.[239]

1. *Challenging Justice O'Connor's Notion of Innocence*

Justice O'Connor's notion of innocence ignores the fact that courts give content to our Fourth Amendment rights in the context of cases where the defendant is attempting to suppress incriminating evidence — that is, where the defendant is not innocent. "Innocent people" — the people who are not in possession of illegal or incriminating evidence but whose Fourth Amendment rights the police violate — typically do not bring Fourth Amendment claims.[240] And even when they do, their chances of winning are quite slim. Thus, for the most part, courts determine the constraints the Fourth Amendment imposes on police investigative practices in the context of cases involving "guilty" people. If Bostick had not been in possession of drugs, the case would not have been litigated and the Supreme Court would not have had an opportunity to address the constitutionality of the conduct of the officers.

This is not to say that the notion of innocence has no place in Fourth Amendment jurisprudence.[241] The most commonly invoked rationale for the exclusionary rule is deterrence. The argument is that police are less likely to engage in unconstitutional searches and seizures if they know that evidence acquired in violation of a person's

238. Here, the defendant's argument would be: "Given the punitive consequences of being caught with drugs, I would have consented to the search of my belongings only under duress or if I did not know I had the right to refuse consent."

239. Here, the defendant's argument would be: "Given the punitive consequences of being caught with drugs, I would not have consented to the search of my belongings."

240. In the early 1990s, in the aftermath of the Rodney King beating incident, the NAACP held a series of hearings in cities across the nation to discuss police conduct in minority communities. CHARLES OGLETREE ET AL., BEYOND THE RODNEY KING STORY 4-9 (1995). Based on those hearings, the NAACP concluded that many minority citizens with valid grievances do not file formal complaints against police officers. *Id.* at 52-65. According to witnesses who testified at the hearings, such citizens often are actively discouraged from filing complaints against the police, and many fear police reprisal. *Id.* at 52, 55. Others are uninformed about complaint procedures, which are often poorly publicized, or are skeptical that such complaints will be taken seriously. *Id.* at 54-55, 60-67. For a useful and more general discussion of the difficulties of prosecuting race trials, see Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000).

241. *See generally* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996) (exploring the different ways in which the notion of innocence figures in Fourth Amendment law and scholarship).

constitutional rights will be inadmissible at trial. This deterrent effect, the argument goes, benefits innocent people. It creates a disincentive for the police to search or seize individuals without prior justification. Under the exclusionary rule, if an officer unreasonably searches an individual, she assumes the risk that the person whom she has searched has incriminating evidence, which, as the product of an unreasonable search, would be inadmissible at trial. To the extent that there is an incentive for police officers to avoid this risk, the theory is that people who have done nothing wrong — innocent people — will be less vulnerable to governmental encroachments on their privacy. This is not the sense in which Justice O'Connor employs the rhetoric of innocence. Her notion of innocence turns the Fourth Amendment on its head. Her deployment of the term draws our attention away from what the officers in *Bostick* did — boarded a bus without any suspicion of drug activity and targeted Bostick for questioning — and focuses it on what Bostick had — drugs.

It is interesting to juxtapose Justice O'Connor's focus on drugs with the attention she gives to Bostick's race. Recall that Justice O'Connor does not explicitly invoke the fact that Bostick is black, and thus she avoids having to address whether Bostick was targeted, at least in part, because of his race. As previously suggested, this avoidance strategy sends two interrelated messages: (1) that Bostick was not racially vulnerable to the encounter he experienced, and (2) that the officers were not motivated by race; they were simply doing their job. A similar discursive strategy is at work in the attention Justice O'Connor gives to the fact that Bostick was in possession of drugs. That is, her focus on drugs sends a message both about Bostick (that he is a criminal) and about the police (the officers got it right; their suspicions were in fact confirmed). In this way, the *Bostick* opinion does not problematize the ex ante (racial) suspicions the officers might have harbored about Bostick; instead, it problematizes the ex post (racial) fact that Bostick was in possession of drugs. One can read Justice O'Connor's opinion to suggest that the problem with Bostick's drug possession is not simply that the drugs took away his innocence and thus his doctrinal standing to frame the consent inquiry from a person in his position. The drugs also took away his racial innocence and thus his racial standing to assert that he was the victim of race-based policing.[242]

That Justice O'Connor's notion of innocence is linked to presumptions about the criminality of particular identities is revealed in her dissent in a recent Supreme Court decision, *Atwater v. City of Lago Vista*.[243] In that case, a woman, Gail Atwater, was arrested and trans-

242. As I explain more fully in Part IV, for the most part, racial profiling is problematized only to the extent that the victim of the profile is perceived to be innocent.

243. 532 U.S. 318 (2001).

ported to the stationhouse for failing to wear her seat belt, failing to fasten her children in seat belts, and failing to provide her driver's license and proof of insurance.[244] The specific constitutional question the case presents is whether the arrest was unreasonable.[245] Atwater argued that it was.[246] Her claim was that a simple misdemeanor crime could not serve as a predicate for a full custodial arrest.[247] The Supreme Court disagreed,[248] and Justice O'Connor dissented.[249]

What is especially revealing about Justice O'Connor's dissent is the way in which she constructs the encounter and the parties involved — particularly Atwater and her children. Notwithstanding that Atwater committed a crime — several, in fact — she remains, throughout Justice O'Connor's dissent, innocent. While Atwater's innocence is clearly a function of the specific crimes she committed (again, they were all misdemeanors), it is also a function of her identity as a (white) mother.[250] Consider the following passages from Justice O'Connor's dissent:

> Officer Turek handcuffed Ms. Atwater with her hands behind her back, placed her in the police car, and drove her to the police station. Ironically, Turek did not secure Atwater in a seat belt for the drive. At the station, Atwater was forced to remove her shoes, relinquish her possessions, and wait in a holding cell for about an hour. A judge finally informed Atwater of her rights and the charges against her, and released her when she posted bond. Atwater returned to the scene of the arrest, only to find that her car had been towed. . . .

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244. *Id.* at 324.

245. *Id.*

246. *Id.* at 345-46.

247. *Id.* at 346.

248. The majority, after an extensive historical review, rejected Atwater's claim that " 'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace.' " *Id.* at 327. The Court also declined to adopt a "modern arrest rule," suggested by Atwater, which would bar custodial arrests for offenses that, upon conviction, could not result in incarceration. *Id.*

249. *Id.* at 360 (O'Connor, J., dissenting).

250. For a discussion of the devaluation of black motherhood in comparison to white motherhood, see Harris, *supra* note 80, at 251 arguing:

> [that the] dichotomy of Good Mother and Bad Mother continues to be racialized. . . . [T]o the extent that white mothers diverge from the normative construct of the Good Mother — that is, the further away from conforming with demands of patriarchy either in marital status, behavior, class status, or sexual behavior, the more likely they will be seen as more like black women and therefore Bad Mothers.

See also LAURA E. GOMEZ, MISCONCEIVING MOTHER (1997) (exploring how racialized images of motherhood are implicated in the prosecutions of mothers who give birth to so-called "crack babies"); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER, SOC. POL'Y & L. 1, 6 (1993) ("In America, the image of the black mother has always diverged from, and often contradicted, the image of the white mother.").

> [T]he decision to arrest Atwater was nothing short of counterproductive. Atwater's children witnessed Officer Turek yell at their mother and threaten to take them into custody. Ultimately, they were forced to leave her behind with Turek, knowing that she was being taken to jail. Understandably, the 3-year-old-boy was 'very, very, very, traumatized.' After the incident, he had to see a child psychologist regularly, who reported that the boy 'felt very guilty that he couldn't stop this horrible thing . . . he was powerless to help his mother or sister. Both of Atwater's children are now terrified at the sight of any police car. According to Atwater, the arrest 'just never leaves us. It's a conversation we have every other day, once a week, and it's — it raises its head constantly in our lives.'[251]

The fundamental idea the above passages convey is that Atwater and her children were not supposed to experience that kind of encounter. That is, they were not supposed to be traumatized by, or become terrified of, the police. Their family life should not be burdened by an emotionally draining "conversation every other day, once a week" about a police interaction. Officer Turek should not have humiliated Atwater. Nor should he have rendered the family a public spectacle. Implicit in Justice O'Connor's concern for Atwater is the notion that Turek's treatment of Atwater sent a public message about Atwater — that she is a criminal. But neither the misdemeanors Atwater committed nor her identity as a white mother invited or justified the dissemination of that message.[252]

Significantly, it is precisely because Atwater's encounter is situated in a context within which neither blackness nor drugs are a part of the case that Justice O'Connor is authorized explicitly to engage race. Toward the end of her dissent, Justice O'Connor writes: "[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."[253] This concern for racial profiling is completely absent from Justice O'Connor's opinion in *Bostick*. Nowhere in *Bostick* does she address whether and to what extent "bus

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251. 532 U.S. at 324, 370 (citations omitted).

252. The analysis raises the question of whether and to what extent Justice O'Connor's discourse about the case would have been different if Atwater had been black. One response might be that the facts of *Atwater* could neatly fit into political narratives about black women as irresponsible mothers. Under this view, Justice O'Connor would not have objected so vociferously, if at all, to Officer Turek's conduct. Nor would she have discussed racial profiling. *See* Part IV *infra* (suggesting that racial profile narrative requires "good" blacks). Another, perhaps more plausible response is that while Justice O'Connor's critique of Turek's conduct likely would have been more restrained, she would nevertheless have discussed racial profiling. Under this view, ideologies about black motherhood would limit but not completely undermine Atwater's ability to function as an icon of victimization. The notion would be that while the facts of *Atwater* would allow for the construction of Atwater as a careless mother (i.e., a mother who does not buckle her kids in seat belts), likely the facts would not support the construction of her as a really bad mother (i.e., a mother who exposes her children to drugs).

253. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

sweeps" might provide police officers with an investigative means to racially harass individuals. The question is: Why not? That is, what explains the difference between the space race occupies in O'Connor's majority opinion in *Bostick* and the space it occupies in her dissent in *Atwater*? Why would Justice O'Connor evidence a concern for race-based policing in the latter but not the former? One answer is that in *Atwater*, but not in *Bostick*, she can discuss the problem of racial policing without making a racial victim out of a "guilty" person and racial villains out of "good" police officers.[254] Put differently, because Bostick's drug possession took away his racial and criminal innocence, he could not, in the context of Justice O'Connor's opinion, function as an icon of racial victimization. Thus, we have no idea whether his experience on the bus was racially traumatic; whether it will "raise its head constantly in [his] life"; whether, because of that experience, he will become less trusting of, and more terrified around, the police. We learn simply that Bostick was not innocent. From that, the opinion invites us to conclude that he was not a victim of racism.

Justice O'Connor's concern for Atwater and her investment in problematizing Officer Turek's conduct is even more curious if we consider her dissent in *Tennessee v. Garner*.[255] In Garner, a police officer, Officer Hymon, shot and killed a black teenager who was fleeing the scene of a burglary.[256] Although the Supreme Court discussed neither the race of the victim nor the nexus between one's race and one's vulnerability to excessive force,[257] it concluded that the "seizure" of Garner was unreasonable. According to the Court, even if an officer has probable cause to seize an individual, he "may not always do so by killing him."[258] The Court reasoned that Officer Hymon "could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his action on any basis other than to prevent an escape."[259] Justice O'Connor dissented.[260] She balanced the interest differently, concluding "that [the] use of deadly force as a last resort to apprehend a criminal suspect

254. It would be interesting to know how Justice O'Connor would have responded to the case had Atwater been in possession of drugs. Presumably, her doctrinal bottom line would not change. The question is whether the discourse about Atwater, her children, and Officer Turek would.

255. 471 U.S. 1 (1985).

256. The officer who shot Garner was also black. Brief for Appellee-Respondent at 101 n.52, Tennessee v. Garner, 471 U.S. 1 (1985) (No. 83-1035).

257. *But see* Brief for Appellee Repondent at 23-26, Garner, (No. 83-1035) (presenting statistical evidence to demonstrate the nexus between the race of the victim and the deployment of excessive/deadly force).

258. *Garner*, 471 U.S. at 9.

259. *Id.* at 21.

260. *Id.* at 22-33 (1985) (O'Connor, J., dissenting).

fleeing from the scene of a nighttime burglary is not unreasonable."[261] Analogizing Justice O'Connor's *Garner* dissent to her *Atwater* dissent is revealing. One way to articulate the comparisons would be to say that, for Justice O'Connor, Atwater's (a white woman's) arrest for violating the law is more problematic than Garner's (a black man's) death for fleeing the scene of what the officer merely presumed to be a burglary. Significantly, I am not suggesting that Justice O'Connor is engaging in a racial project. I simply mean to highlight the racial ideology undergirding her jurisprudence: neither Bostick nor Garner is innocent. Atwater, however, is.

2. *Assuming the Doctrinal Legitimacy of Justice O'Connor's Notion of Innocence*

Taking as a starting point the notion that Bostick was not in fact innocent and assuming that the "reasonable person" consent inquiry should be conducted from the perspective of an innocent person do not require us to ignore a point with which most people would probably agree: there were no meaningful incentives for Bostick to consent to the search of his luggage. On the contrary, there were strong disincentives. These disincentives are relevant to, though certainly not dispositive of, whether Bostick consented to the officers' request for permission to search his bag.

With these disincentives in mind, the consent search analysis might begin by asking whether the nature of the police officers' conduct compelled Bostick to say yes to their request for permission to search his belongings. There are reasons to answer this question in the affirmative.[262] Because the officers neither wielded a gun at Bostick nor physically restrained him in any way, however, the coercive nature of the encounter might not be immediately apparent. The difficult question, then, is this: How does one demonstrate police coercion in the absence of clear evidence of police overreaching? The short answer is that it depends on the facts of the case. In the context of *Bostick*, one way to give content to the coercion would be to assume that Bostick consented to the officers' request for permission to search his belongings and to employ that consent to advance both an argument particular to *Bostick* as well as a more general hypothesis. Regarding *Bostick*, the argument would be that the police officers' presence on the bus created a sufficiently coercive atmosphere to cause a person who was in possession of drugs to consent to the search of his luggage. The hypothesis would be that if Bostick consented to the search of his belongings knowing that he was in possession of drugs, an innocent

261. *Id.* at 29.

262. Florida v. Bostick, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting).

person would have consented as well. Indulging this hypothesis is not the same as framing the consent inquiry from the perspective of a person who is not innocent. In other words, employing the disincentives Bostick had to consent to the search of his luggage to make an argument about coercion is not the same as arguing that Bostick's status as a person in possession of drugs rendered the encounter coercive, compelled his consent, or both.

C. *Involuntary Consent:* Bostick*'s Relationship to* Schneckloth v. Bustamonte

Assume that Bostick assented to the search of his luggage, and that his assent was a function of the fact that he did not know that he had a right to say no. At least two arguments are available to challenge the constitutionality of the search: an involuntary argument and an argument about uninformed decisionmaking or lack of knowledge. The involuntary argument would be that because Bostick did not know he had a right to refuse consent, he thought he must. In other words, he perceived that if he said no, the officers would detain or formally arrest him. Under this theory, Bostick's lack of knowledge with respect to his right to say no to police authority actually compelled him to say yes. The lack of knowledge argument would be that "the capacity to choose necessarily depends upon knowledge that there is a choice to be made."[263] Stated more pointedly with respect to consent searches, one cannot be said to have consented to a search, particularly if one is disinclined to so consent, if one does not know that consenting is optional. Under this theory, Bostick's lack of knowledge with respect to his right to say no rendered his assent uninformed.

Both of these theories could be subsumed under a broader waiver analysis. Here, the argument would be that, to the extent that a person consents to the search of her belongings, she waives her Fourth Amendment rights. In order for this waiver to be valid, it must be voluntarily and knowingly made. The Supreme Court's holding in *Schneckloth v. Bustamonte* renders this waiver analysis unavailable. *Bustamonte* involved a consent search pursuant to a traffic stop. A police officer, Officer Rand, stopped a car after observing two burned-out lights.[264] Robert Bustamonte was a passenger, and five other men were in the car. Only one of the men, passenger Joe Alcala, had identification.[265] Officer Rand asked each man to exit the car.[266] By this

263. Schneckloth v. Bustamonte, 412 U.S. 218, 277 (1973) (Marshall, J., dissenting). I do not interpret this claim as some sort of logical truth. I interpret it to mean that the capacity to say yes to something, particularly if one is inclined to say no, presupposes that one knows that one can say no.

264. *Id.* at 220.

265. *Id.*

time, two other officers had arrived.[267] Subsequent to their arrival, Officer Rand requested permission to search the car.[268] To this request Alcala responded, "Sure, go ahead."[269] While there was no indication that Officer Rand or the other two officers employed force to elicit Alcala's consent,[270] none of the officers informed Alcala that he had the right to refuse consent.[271] Upon searching the car, the officers found three stolen checks under one of the seats.[272] Bustamonte challenged the legality of the search and lost.

In adjudicating the constitutionality of the consent search in *Bustamonte*, the Supreme Court framed the inquiry solely in terms of voluntariness. According to *Bustamonte*, "[t]he precise question . . . is what must the prosecution prove to demonstrate that a consent was 'voluntarily' given."[273] In two significant respects, the *Bustamonte* Court's approach to consent searches is consistent with the *Bostick* Court's approach to seizures. First, like *Bostick*'s seizure analysis, *Bustamonte*'s consent search analysis reflects the perpetrator perspective. Specifically, it focuses on what police officers do rather than on what individuals responding to police officers know. Second, both *Bostick* and *Bustamonte* obscure the fact that, because of race, people are differentially situated with respect to their vulnerability to police encounters. The literature on *Bustamonte*, and on consent searches more generally, has not fully captured the nature of this vulnerability. The racial vulnerability here derives not only from the relationship between race and knowledge about constitutional rights but also, and more fundamentally, from the nexus between race and social behavior in the context of police encounters. With respect to this latter relationship, two dynamics, both of which are a function of racial stereotypes about crime and criminality, deserve mention.

First, people of color will have to give up more of their privacy — will have to consent to more intrusive searches — than whites to erase the suspicions an officer may have about their criminality. Second, people of color are less likely than whites to assert their constitutional rights. Part of their racial socialization will include the idea that, in the

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. In affirming Bustamonte's conviction, the California Court of Appeal observed that "Alcala's assent . . . was freely, even casually given." People v. Bustamonte, 76 Cal. Rptr. 17, 20 (Cal. Ct. App. 1969). That court stated, "[a]t the time of the request to search the automobile the atmosphere, according to Rand [the officer], was 'congenial' . . . . Alcala even attempted to aid in the search." *Id.*; *see also Bustamonte*, 412 U.S. at 220.

271. 412 U.S. at 222.

272. *Id.* at 220.

273. *Id.* at 223.

context of encounters with the police, they should comport themselves (a) to signal racial respectability and (b) to make the officers racially comfortable.[274] The assertion of rights can undermine that performance strategy. Specifically, it can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both. Because the *Bustamonte* Court does not explicitly engage race, it obscures the foregoing realities. Demonstrating the specific ways in which the Court performs this obfuscation helps to clear the doctrinal ground for the articulation of other, less racially burdening conceptions of consent. The discussion proceeds in two parts, focusing first on the Court's conceptualization of voluntariness and then on the Court's conclusion that the traditional waiver analysis is inapplicable to consent searches.

1. *Voluntariness and Knowledge: Racializing Consent*

a. Performing Consent to Establish Innocence: The Racial Incentive System. *Bustamonte*'s voluntariness argument proceeds in five analytical steps: (1) "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession;"[275] (2) that body of case law "yield[s] no talismanic definition of 'voluntariness;' "[276] instead, courts have adopted a totality of the circumstances approach;[277] (3) under the totality of the circumstances approach, both the state of mind of the accused and the nature of the police conduct are relevant to, but not necessarily determinative of, the voluntariness inquiry;[278] (4) thus, the fact that a suspect does not know his constitutional rights does not, without more, render his assent to the search of his belongings involuntary;[279] and (5) the totality of the circumstances approach strikes the right balance between law enforcement interests and liberty interests.[280]

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274. Again, this is not to suggest that this socialization does not exist outside of black or nonwhite communities. That is, presumably whites feel pressured to comport themselves respectably in the context of police encounters as well. The point is that stereotypes about crime and criminality, and the nexus between police abuse and race, render the nature of this pressure qualitatively and quantitatively different for blacks. Many blacks operate under the assumption that police/citizen encounters are potentially life threatening.

275. *Bustamonte*, 412 U.S. at 223.

276. *Id.* at 224.

277. *Id.* at 226.

278. *Id.* at 226-27.

279. *Id.* at 227 ("While the state of the accused's mind, and the failure of the police to advise the accused on his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative.").

280. According to the Court:

The Court's reasoning contains a false necessity.[281] The Court need not have employed the due process confession cases to determine (rather than simply guide) what constitutes a voluntary consent. Indeed, in some respects, this was a strange doctrinal move for the Court to make. By the time *Bustamonte* was decided, it had become quite clear that the totality of the circumstances inquiry was a weak procedural safeguard.[282] Specifically, it did not meaningfully delineate the boundaries of permissible police conduct. The regime was variously described as " 'useless,' 'perplexing,' and 'legal double-talk.' "[283] The indeterminacy of the due process framework created a disincentive for courts to suppress, and a strong incentive for police officers to elicit from a suspect, the probative "I did *X*." Absent extreme examples of police overreaching, which smart police officers would carefully avoid, the likelihood that a court would, under a due process analysis, suppress a defendant's confession was decidedly slim.

Partly as a response to these incentives and the more general concern that the due process voluntariness framework was unmanageable, the Supreme Court had, by the late 1960s, developed two additional doctrines to determine the admissibility of confessions. In 1964, the

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> [The] "voluntariness" [inquiry] has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Id. at 224-25 (citations omitted).

281. James Boyle has defined false necessity as "the apparent inevitability of existing arrangements, the way that 'what is' gets converted into 'what ought to be.' " James Boyle, *A Symposium of Critical Legal Study: Introduction*, 34 AM. U. L. REV. 929, 930 (1985). For a collection of essays that provides a fair representation of the Critical Legal Studies movement, in which the notion of false necessity has been extensively interrogated, see CRITICAL LEGAL STUDIES (James Boyle, ed., 1992).

282. For a critique of the due process approach to confessions, see Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 126 (1988); Alfredo Garcia, *Mental Sanity and Confessions: The Supreme Court's New Version of the Old "Voluntariness" Standard*, 21 AKRON L. REV. 275 (1988); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988); George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79 (1993); George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117 (1991); James P. Byrne, Jr., Casenote, Colorado v. Connelly*: The Gratuitous Union of Voluntariness and State Coercion*, 21 J. MARSHALL L. REV. 199 (1987); Robert Paul, Comment, Arizona v. Fulminante: *The Application of Harmless Error Analysis to Admission of a Coerced Confession in Violation of the Due Process Clause of the Fourteenth Amendment*, 94 W. VA. L. REV. 1061, 1082 (1992); Kathryn Young-sook Kim, Note, *Self-Incrimination, Compulsion, and the Undercover Agent* — Illinois v. Perkins, *110 S.Ct. 2394 (1990)*, 66 WASH. L. REV. 605, 607 (1991).

283. Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985) (providing an indication of the scholarly criticism of the due process framework).

Court in *Massiah v. United States*[284] articulated a Sixth Amendment right to counsel doctrine. Under this doctrine, the commencement of formal criminal proceedings against a person bars the government from deliberately eliciting a confession from that person in the absence of the person's counsel. Two years later, in *Miranda v. Arizona*, the Court employed the Fifth Amendment to develop a custodial interrogation doctrine.[285] Under this doctrine, the government may not engage in custodial interrogation of a suspect without warning that suspect of her constitutional rights. Of course, neither *Massiah* nor *Miranda* was uncontroversially available to the *Bustamonte* Court. Alcala had not been formally charged prior to his consent, nor was his consent the product of custodial interrogation. The point is that, to some degree, both *Massiah* and *Miranda* were responses to the perceived inadequacy and indeterminacy of the due process regime.[286] It is curious that the Supreme Court would, in the context of determining the constitutionality of a consent search, invoke that body of law.

So, what's going on? The following passage from *Bustamonte* provides a partial answer:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified.[287]

This passage is remarkable. It links the legitimacy of consent searches to the fact that police officers often will not have the requisite justification to intrude upon a person's privacy. This turns Fourth Amendment protections upside down; it is precisely because consent searches

284. 377 U.S. 201 (1964).

285. 384 U.S. 436 (1966). For a discussion of the state of due process case law before *Miranda*, see Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996). *See also*, Kenji Yoshino, Miranda's *Fall*, 98 MICH. L. REV. 1399, 1409-11 (2000) (same) (book review).

286. The Court's discussion of the due process confession cases presents that body of law as though there were no controversy about the workability of the totality of the circumstances inquiry.

287. 412 U.S. at 227-28 (footnotes omitted).

do not require a prior justification that they ought to be suspect. Police officers do not have an absolute right to incriminating evidence. Put differently, they may not intrude upon our privacy and liberty interests by any means necessary. Thus, the fact that the officers in *Bustamonte* found incriminating evidence begins rather than ends the inquiry; the question is not whether, but rather how police officers ascertain the whereabouts of and retrieve incriminating evidence.

This upside-down conception of the Fourth Amendment has profound racial implications given existing racial stereotypes about crime and criminality. In the context of a police encounter with a black person, for example, the officer's starting point likely will be that this person is a criminal or a potential criminal. This burden of presumed criminality — a significant part of the burden of blackness — will not be easy to disprove. An officer's racial bias might lead him to ignore stereotype-disconfirming data. In other words, an officer's ex ante investment in seeing black people as criminal might racially blind him to the possibility of their innocence. The tension between stereotypes about blackness, on the one hand, and the perception of innocence necessary to avoid or easily terminate police encounters, on the other, creates a "racial incentive system" for blacks to signal noncriminality. That is, in the context of a police encounter, a black person will need to find ways to demonstrate to the police officer that stereotypes about blackness are wrong (all or most black people are not criminals) or that they do not apply to him (this black person is not a criminal).

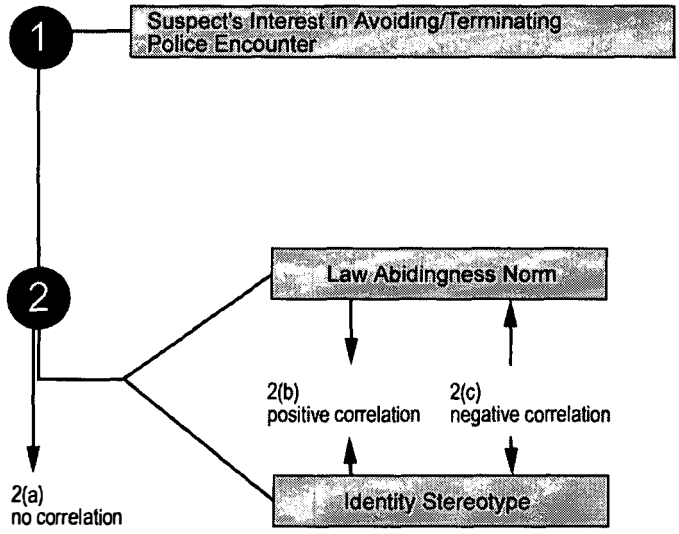
With respect to consent searches, one way for a black person to present counter-stereotypical information in response to the racial incentive system is to say yes to an officer's request for permission to conduct a search. As the *Bustamonte* Court explains: "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary."[288] The problem, however, is that because of racial stereotypes there is greater pressure for blacks to say yes to consent searches than there is for whites. Consenting to a search may be the only way a black person can demonstrate his innocence, particularly if the black person is young, male, "unprofessionally" dressed, and in a high crime (read: black neighborhood) or predominantly white (read: low crime) area. Thus, assuming that consent searches are a means by which any person can establish his innocence, the extent to which one perceives the need to do this — that is, to give up privacy to prove innocence — is a function of race.

Figure I, The Racial Incentive System, illustrates this problem more schematically.

288. *Id.* at 228.

Figure 1

The Racial Incentive System



The racial incentive system is constituted by: (1) the suspect's interest in avoiding/terminating police contact, (2) norms of law abidingness, and (3) identity stereotypes. Point 1 represents the suspect's interest in avoiding/terminating police contact. The stronger this interest, the stronger the incentive for the suspect to signal cooperation by engaging in privacy-compromising conduct (e.g., consenting to a search). Given the fact that race shapes peoples' trust of, and sense of vulnerability with respect to, the police, on the whole, it is likely black people will have a stronger interest in avoiding/terminating police encounters than whites and thus a greater incentive to signal cooperation.

Point 2 delineates three possible relationships that might exist between the norms of law abidingness and racial stereotypes about criminality. First, as reflected in Point 2(a), the relationship might be disconnected. Here, the suspect does not perceive that the officer harbors a stereotype about whether, or to what extent, she is law abiding. Second, the norms/stereotype relationship might be positively correlated: thus Point 2(b). Here, the suspect's assumption is that the police officer's stereotypes about her comport with norms of law. Finally, as suggested by Point 2(c), the norms/stereotype relationship might be a

negative one. When this is the case, the suspect's assumption is that the police officer's stereotypes about her are at odds with or oppositional to the norms of law abidingness.

Other things being equal, the incentive to signal cooperation is greatest at Point 2(c) and weakest at Point 2(a). Because blacks are more likely than whites to have interactions with the police that reflect Point 2(c) and whites are more likely than blacks to have police interactions that reflect Point 2(a), blacks have a stronger incentive than whites to employ consent searches (among other privacy-compromising strategies) to signal cooperation/non-criminality.

Quite apart from the theoretical incentive for blacks, in the context of police encounters, to signal cooperation via privacy and dignity-compromising identity performances, is the fact that they are encouraged to do both as a matter of socialization and formal or political advice. Consider, for example, Dr. Robert L. Johnson's and Dr. Steven Simring's *The Race Trap: Smart Strategies for Effective Racial Communication in Business and In Life*.[289] In it, Johnson and Simring offer the following strategies for people who are racially profiled:

- Don't argue the Fourth Amendment. . . . [A]t the point you are stopped it is important to maintain control of your emotions and your behavior.
- Don't be sarcastic or condescending to the officer. Always be cooperative and polite.
- Don't display anger — even if justified. Most police officers resent challenges to their authority, and may overreact to any real or perceived affront.
- Don't lose sight of your goal. The objective in most racial profiling scenarios is to end the encounter as quickly as possible with a minimum of potential trauma. Getting stopped for no good reason is inconvenient. But being jacked up against your car and searched is an experience that can stay with you for years. Getting handcuffed and taken into custody escalates the nightmare.[290]

Johnson and Simring conclude their discussion with the suggestion that "[r]acial profiling by the police is a reality in a system that often treats minorities unfairly. However, the immediate issue isn't fairness. Rather, it's your ability to negotiate the encounter you are facing at the time."[291] The negotiation to which Johnson and Simring refer is between a suspect's sense of self (as a rights-bearing person of worth and dignity) and the suspect's sense of what he needs to do to manage the

289. JOHNSON & SIMRING, *supra* note 161; *see also* MEEKS, *supra* note 37, at 138, 142, 148.

290. *Id.* at 121-22.

291. *Id.* at 121 (emphasis added).

police encounter (establish that he is not a criminal). Conduct engaged in to demonstrate the latter often will compromise the former.

Yet blacks make this compromise or strike this bargain all the time. Indeed, their parents, family members, and community leaders teach them how — when, if at all, to speak, when and how to say "Sir,"[292] or Officer, or Trooper,[293] whether or not to move,[294] and when, if at all, to assert rights.[295] In short, blacks grow up with the expectation that they will be called upon to negotiate their dignity and privacy in the context of police encounters. Part of what I am suggesting here is that one way to perform this negotiation is to say "yes" to an officer's request for permission to conduct a search. Not only does this strategy signal cooperation and obedience, it can also establish innocence.

It bears mentioning again that whites are subject to pressures to comply with requests from the police as well. That is, whites are also subject to the racial incentive system I have described. However, the pressure/incentive for whites to comply with police orders is not as great as the pressure/incentive for blacks to comply; because white people are not presumed to be criminals. Because of stereotypes, black people are subject to a kind of surplus compliance. They are more vulnerable to compliance requests, more likely to comply, and have to give up more privacy to do so.

b. The Limitations of Consent as a Performance Strategy. But consent searches will not always be enough to establish innocence. Nor is the *Bustamonte* doctrinal regime fundamentally informed by concerns about innocence. With respect to the latter point, consider again the Court's observation that "[i]f . . . [a consent] search is conducted and [it] proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified."[296] This argument is disingenuous. The very reason police officers engage in consent searches is that, without them, probative evidence will be "lost."[297] As the Court observes, "a search authorized by a valid con-

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292. *See* David Dante Trout, *The Race Industry, Brutality, and the Law of Mothers*, *in* NOT GUILTY, *supra* note 30, at 60 ("These lessons for young men of color, learned through the laws of the Law of Mothers' quizzes, questions, and warnings . . . That wisdom follows you around the country . . . to Louisville where a son of New York was taught the nuances of saying 'Sir.' ").

293. JOHNSON & SIMRING, *supra* note 161, at 125.

294. *Id.* at 121.

295. *Id; see also* RUSSELL, *supra* note 80, at 34.

296. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

297. An analogy might be made to the criminal confessions allegedly lost as a result of the arrest warning required under *Miranda v. Arizona*. Paul G. Cassell has worked assiduously to document what he views as the *Miranda* decision's debilitating effect on law en-

sent may be the only means [police officers have] of obtaining important and reliable evidence."[298] In this sense, the Court's investment in consent searches derives less from its perception that such searches are an efficient and effective way to establish innocence and more from its perception that they are an efficient and effective way to establish guilt.

This is not to say that consent searches do not offer individuals a possible means by which to terminate a police encounter. Certainly, exposing the interior of one's bag to a police officer is one way of saying, "I am not carrying drugs." Contrary to the Court's assumption, however, this will not always be enough to dissipate an officer's suspicions. That is, saying yes to a search may be insufficient to establish one's innocence. Imagine, for example, that a police officer perceives but does not have probable cause or articulable suspicion to believe that Tony, a black man, is a drug dealer. Assume that Tony is carrying a bag and that the officer requests permission to search it. Stipulate that Tony says yes, and the officer searches the bag but does not find any drugs. The officer's suspicions of Tony's criminality will not necessarily disappear. In other words, Tony's consent to the search of his bag will not necessarily terminate the interaction. In fact, his consent may prolong it. The officer may believe that Tony granted permission to search his bag because he is carrying drugs elsewhere on his person. Under this assumption, Tony strategically consents in order to conceal his criminality. Alternatively, the officer may believe that Tony's consent reflects (racial) vulnerability. This vulnerability could derive from Tony's awareness that the officer may be employing stereotypes to judge him, stereotypes that reflect the assumption that Tony is a criminal. If the officer believes that Tony has this racial awareness, he may also believe that Tony will want to prove to him (the officer) that he (Tony) is not the stereotypical black man — that is, a drug dealer. To the extent that the officer interprets Tony's consent in either of these ways, he is likely to request permission to conduct another and more intrusive search: a search of Tony's clothing. If Tony does not consent to this second search, the officer's suspicions are likely to intensify. Why would a person who is not carrying drugs grant permission to search his bag but not his person? This hypothetical suggests that it is less than clear that "fruitless" consent searches — consent searches that do not produce incriminating evidence — will be enough to terminate an encounter between an individual and the police.

And this is not just an hypothetical. The Supreme Court has granted certiorari in a case that implicates precisely this issue: whether compromising privacy will also work as a performance strategy— *United States v. Drayton*.[299] The facts of the case are quite similar to

forcement. *See* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996).

298. 412 U.S. at 227 (footnote omitted).

d States v. Drayton.[299] The facts of the case are quite similar to *Bostick*. Three members of the Tallahassee police department[300] boarded a bus just as it was about to depart. Working from the back of the bus forward, the officers asked passengers questions as to their travel destinations, their identity, and their personal belongings. The "[d]efendants Drayton and Brown were seated next to each other a few rows from the rear."[301] One of the officers identified himself as a police officer, informed the defendants that he was part of a drug interdiction team, and asked whether they had any luggage. Both responded in the affirmative. The officer then asked for permission to search the bag, to which Brown responded, "Go ahead." Another officer searched the bag but no illegal substances were found.[302]

To the extent that Brown's consent was a privacy-compromising strategy to disconfirm the assumption of criminality and to end the encounter, the strategy did not work. Indeed, the strategy had precisely the opposite effect. Upon learning that Brown's bag did not contain any illegal drugs, the officer requested permission to conduct another, more intrusive search of Brown's person: a pat down. His reason? He thought the defendants "were *overly cooperative* during the search [of the bag]."[303] In short, the fact that Brown and Drayton consented to the search of their bag created rather than eliminated suspicion, and prolonged rather than terminated the encounter.[304]

c. Undermining the Racial Incentive System: Why Warnings Might Help. Let us suppose, though, that fruitless consent searches have this terminating effect. The question remains as to how we should judge their constitutionality. According to *Bustamonte*, the inquiry is this:

> "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[305]

Implicit in the Court's analysis are two counterintuitive empirical claims. First, the Court assumes that a person's lack of knowledge with

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299. 231 F. 3d 787 (11th Cir. 2000), *cert. granted*, 70 U.S.L.W. 3420 (U.S. Jan. 4, 2002) (No. 01-631).

300. One of the officers is black and the other two are white. *Id.*

301. *Id.* at 789.

302. *Id.*

303. *Id.* (emphasis added).

304. The pat down of Brown produced incriminating evidence, as did the subsequent pat down of Drayton. Both the defendants were subjected to a full search off the bus, which uncovered additional evidence. *Id.* at 789-90. The Court of Appeals concluded that neither search was consensual and thus the evidence should not have been admitted. *Id.* at 788.

305. Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (citation omitted).

respect to her right to reject a police officer's request to search her belongings is not likely to constrain her choice as to whether she should consent. Second, the Court claims that, assuming a person is otherwise predisposed to decline consent, the fact that she may not know that she has the right to refuse consent is not likely to "overbear" her will. Both claims are contrary to the Court's explicit recognition that if people knew their constitutional rights, they probably would not consent to governmental searches. In other words, the Court's own analysis reflects the idea that people who do not know their constitutional rights are likely to feel compelled to assent to a police officer's request for permission to search. In this respect, the Court's analysis is not really about voluntariness; it is about creating the fiction of consent to legitimize searches for which the government has no prior justification.

Explicitly racializing the analysis further illuminates this fiction. Recall that according to *Bustamonte*, the consent search inquiry asks:

> [Is] the confession[/consent] the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess[/consent], it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession[/consent] offends due process.[306]

The Court ignores how race — and more particularly, racial stereotypes — can constrain one's choice, one's will, and one's capacity for self-determination. As previously discussed, in the context of a police encounter, a black person's behavior is structured by a racial incentive system. Likely he will always be concerned about, and thus be constrained by, the question of whether a particular course of conduct or identity performance will confirm or negate assumptions about his criminality. Informing this person of his constitutional rights would help to ameliorate this burden by undermining the racial incentive system. Specifically, it would mitigate the racial pressure for the black person to say yes to an officer's request for permission to search. This is not to say that knowledge of one's constitutional rights will always be sufficient racially to free a person's will from the burden of stereotypes. A black person may perceive that a police officer is likely to interpret his assertion of constitutional rights as confronting authority.[307] Still, to the extent that the officer informs the suspect of his rights, the warning sends a message that, as a matter a law (though not as a matter of practical reality), the suspect is not required to consent to a search as an exit, or a suspicion-disconfirming, strategy.

Had the *Bustamonte* Court been mindful of the stereotype-disconfirming performance strategies people of color employ in the

306. *Id.*

307. Such a person might be construed as violent or uppity.

context of police encounters, it could not so easily have concluded that the encounter in *Bustamonte* was not coercive. Implicit in the Court's analysis, and consistent with the perpetrator perspective, is the idea that the police officers' conduct in *Bustamonte* was not particularly egregious. The officers did not physically or verbally abuse any of the six men. As the Court indicates, "[p]rior to the search no one was threatened with arrest,"[308] and, according to the uncontradicted testimony of one of the officers, the situation " 'was all very congenial.' "[309] But rather than signaling a lack of coercion, the congeniality of the encounter was arguably a function of coercion. The encounter occurred at 2:40 a.m. in the morning in Sunnyvale, California, a predominately white community in the Bay Area.[310] The officers were all white and at least three of the occupants of the car were Latinos.[311] In the early 1970s, the relationship between police and the Latina/o community in California was marked by distrust and hostility, with many Latina/o leaders decrying instances of police brutality against their constituents.[312] Given stereotypes about Latinos — that they are illegal immigrants and criminally inclined — the occupants of the car undoubtedly would have been concerned about how the officers were going to treat

308. 412 U.S. at 220.

309. *Id.*

310. *See id.* According to 1990 Census figures, 65% of Sunnyvale's 117,229 residents were white, 19% were Asian or Pacific Islander, 7% were Hispanic, and 3% were black. These statistics are available at http://www.baynet.com/homes/US/BA/Santa_Clara/demographics/Sunnyvale.html.

311. Three of the occupants have surnames that do not explicitly signify Latina/o identity.

312. In 1970, the Chicano Moratorium movement held a series of rallies in California. The most famous of these rallies took place in East Los Angeles in August 1970, when a crowd of 20,000 gathered to protest U.S. involvement in the Vietnam War. The rally ended in violence as participants clashed with LAPD officers and Los Angeles County Sheriff's deputies. Three people died in the conflict, including Mexican-American journalist Ruben Salazar, who was killed by a tear gas canister fired by law enforcement. *See Mexican-Americans March in California to Mark '70 Protest*, N.Y. TIMES, Aug. 28, 1995, at A12. Months later, in January 1971, a Chicano Moratorium rally was held in Los Angeles to protest police brutality, and police fired on the crowd, injuring more than 30 people and killing one. *See New York Times Abstracts*, N.Y. TIMES, Jan. 10, 1971, at 29. Prompted in part by these clashes, a California Assembly committee held hearings in 1972 on the state of relations between Mexican Americans and law enforcement. *See* ASSEMBLY SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, HEARING JANUARY 28, 1972, LOS ANGELES, CALIFORNIA: RELATIONS BETWEEN THE POLICE AND MEXICAN-AMERICANS (1972); ASSEMBLY SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, HEARING APRIL 21, 1972, LOS ANGELES, CALIFORNIA: RELATIONS BETWEEN THE POLICE AND MEXICAN-AMERICANS (1972); ASSEMBLY SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, HEARING APRIL 28, 1972, LOS ANGELES, CALIFORNIA: RELATIONS BETWEEN THE POLICE AND MEXICAN-AMERICANS (1972). In these hearings, witnesses described numerous instances in which Latinas/os had been victimized by law enforcement, including cases of beatings, fatal shootings, and deaths in police custody. *See* HEARING JAN. 28 at 5-24. Witnesses also testified about Latina/o perceptions of law enforcement, reporting that a large majority believed that police were often abusive during arrests and detentions. *Id.* at 92-93.

them. They might have believed that fully cooperating with the police officers would decrease the likelihood that the police officers would physically abuse or otherwise mistreat them. They were bargaining in the shadow of potential racial violence.[313] This potential for violence both chills and overdetermines communication. As one commentator puts it:

> If, say, during a twenty-five-dollar traffic stop, an officer should decide that my manners are not good enough, he can summarily end my life. If my wife and daughter are lucky, an official might issue a tepid apology — with raised shoulders and thrown-up hands. It would be mistake, albeit a fatal one. And I would be faulted for disobedience, for resistance, for unlawful breathing.[314]

All of this is to say that the congeniality between the officers and the six Latinos could have derived from a strategy on the part of Latinos to signal racial obedience. This would explain not only why Alcala consented to the search, but also why he helped the officer conduct it.

Because the Court does not explicitly engage race, it avoids having to address, and thus masks the existence of, the foregoing racial dynamics. Its perpetrator-centered analysis colorblinds the encounter. Race is invisible here. Under the Court's construction of the event, the officers merely requested, and were granted, permission to conduct a search. This construction presumes that the officers pursued a legitimate investigative strategy. They did nothing wrong. Their conduct does not reflect the kind of police behavior that the due process regime was intended to regulate. After all, officers did not "wrench" the consent out of Alcala.[315] To the extent that Alcala consented because he did not know his constitutional rights, the officers are not to be blamed. Their job does not involve equalizing the social and racial terrain on which police officers act.

2. Bustamonte*'s Waiver Analysis*

In rejecting the idea that police officers should be required to inform suspects of their constitutional rights prior to conducting a con-

313. *Cf.* RUSSELL, *supra* note 80, at 34 (noting that "[f]or Black men, who are more likely to be stopped by the police than anyone else, each stop has the potential for police brutality").

314. Preston, *supra* note 30, at 158.

315. *See* Watts v. Indiana, 338 U.S. 49, 53 (1949) (finding confession involuntary where "the detention of an accused" was turned into a "process of wrenching from him evidence which could not be extorted in open court with all its safeguards"); U.S. v. Damaske, 4 C.M.R. 466 (CGBR 1952) (finding confession voluntary where "[t]here is no proof of any kind tending to show that the will of the accused was overborne in any manner or degree, or that there was any attempt to turn his detention for trial into a process of wrenching a confession from him").

sent search, the Court has to address the question of whether consent searches are waivers. An answer in the affirmative would render such searches unreasonable unless, barring an exigency, they were preceded by an instruction or a warning to the suspect that he has a right to refuse consent. The Court, however, answers the question in the negative, and its analysis reflects the perpetrator perspective. That is, the Court focuses on how warnings would burden police officers (i.e., law enforcement interests) and pays scant attention to how the lack of warnings burdens suspects (i.e., privacy interests). Finally, because the Court does not explicitly engage race, it fails to consider the extent to which consent searches, under particular racial circumstances, can be conceptualized as a form of "racial interrogation" — that is, police questioning that is reasonably likely to produce a privacy deprivation. Such a conceptualization provides a strong basis for the claim that consent searches should be preceded by warnings.

There are two ways to formulate a relationship between the constitutional legitimacy of consent searches and the notion that the Fourth Amendment prohibits unreasonable searches and seizures. Both formulations can be broadly interpreted as arguments about waiver. The first formulation is that an otherwise unreasonable search is rendered reasonable by a valid consent. Under this formulation, a person who consents to a warrantless search is saying to a police officer: "Even though you don't have a warrant to search my bag, it is not unreasonable for you to do so, because I am giving you permission." The second formulation is that a valid consent authorizes an unreasonable search. Here, the consenting person essentially says to the police officer: "I know you don't have a warrant to search my bag and that it is therefore unreasonable and unconstitutional for you to do so. But I am giving you permission to violate my constitutional rights, so go ahead and conduct the search." Doctrinally, one might quibble over which of the two formulations is more consistent with the idea that the Fourth Amendment prohibits unreasonable searches and seizures. An argument can be made, moreover, that neither formulation implicates the Supreme Court's waiver jurisprudence. Arguably, the former issue is more formalistic than substantive. Thus, focusing again on *Schneckloth v. Bustamonte*, it is the latter issue to which I now turn — that is, should consent searches be conceptualized as waivers? According to *Bustamonte*, if by a waiver one means the intentional relinquishment of a known right, the standard articulated in *Johnson v. Zerbst*,[316] consent searches should not be conceptualized as waivers. The Court articulates two chief reasons to explain why.

First, the Court argues that the *Zerbst* standard governs trial-like rights. According to the Court, "[a]lmost without exception, the re-

316. 304 U.S. 458, 464 (1938).

quirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[317] Fourth Amendment rights, the Court reasons, are not trial-related rights. "Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures."[318] Second, the Court argues that employing the *Zerbst* standard to regulate consent searches "would inevitably lead to a requirement of detailed warnings."[319] Such warnings, the Court argued, would be both impractical and, given the context in which consent searches typically take place, inappropriate. Both of these arguments reflect the perpetrator perspective.

With respect to the first, it is unclear why the dichotomy between trial-like rights and other criminal process rights decides the question of whether consent searches should be informed. Assuming the legitimacy and manageability of this dichotomy, the normative question remains: Should a person who says yes to a governmental intrusion know that she has the right to say no? One could take the position (as *Bustamonte* implicitly does) that trial-like constitutional rights require more procedural safeguards than other constitutional rights and still answer that question in the affirmative. The starting point for the argument could be that the waiver of *any* constitutional right should, to the extent possible, be informed. That is, as a general matter, a person should not be said to have given up something as important as a constitutional right unless she understands that she need not.[320] To the extent that one is of the view that trial-like rights are special, one could accord these rights "extra" procedural safeguards. One might do this in at least three ways. First, these safeguards could be reflected in the prosecutor's burden of proof. Under this approach, the nature of the prosecutor's burden with respect to demonstrating that a person waived her constitutional rights could be a function of the constitutional right being waived — that is, whether or not it is trial-like. Second, the extra safeguards could be imposed on law enforcement officials. Under this approach, the manner in which a police officer could legitimately elicit a waiver of a constitutional right would depend in

317. *Bustamonte*, 412 U.S. at 237.

318. *Id.* at 241.

319. *Id.* at 245 n.33.

320. Of course, people waive their constitutional rights all the time without knowing it. In the context of a civil trial, for example, a witness might believe erroneously that she has to answer a self-incriminating question because only criminal defendants can "take the Fifth." Should the issue arise, she will be held to have waived her Fifth Amendment right to silence, even though she did not know she did not have to give up that right. I am suggesting that to the extent that the cost of avoiding unknowing waivers are low, we should avoid them.

part on the nature of constitutional right at stake. Still a third approach could be based on judicial intervention. Under this approach, while both guilty pleas (the waiver of the right to a jury trial) and consent searches (the waiver of the right against unreasonable searches and seizures) would have to be informed, only the former would require an ex ante determination by a judge. Each of the foregoing approaches moves the dichotomy between trial-like rights and other criminal process rights away from the more fundamental question of whether the waiver of a constitutional right should be informed. The new inquiry would focus on articulating the appropriate criteria for determining whether (and the procedural safeguards for ensuring that) waivers are informed.[321]

This brings us to the second chief reason the *Bustamonte* Court concludes that the government should not be required to demonstrate that a person who consents to a search knows she has a right to decline consent: such a requirement would require police officers to administer extensive warnings. The Court seems to imagine that police officers would be required to employ something like the following script:

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.[322]

Many would argue that requiring this warning would be impracticable.[323] Indeed, that is precisely what the government argued on appeal — "that the very complexity of such a warning proves its unworkability."[324] But to say that warnings would be required is not yet to establish the nature of the warnings. In other words, one might conclude that police officers should be required to warn suspects of their right to refuse consent and yet reject the idea that the warnings would need to be extensive. The choice is not between telling the suspect nothing

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321. For a useful discussion of the different ways in which the Supreme Court conceptualizes waivers in the criminal context, see William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).

322. Brief for Petitioner at 21-22, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

323. *Bustamonte*, 412 U.S. at 231 (arguing that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning").

324. Brief for Petitioner at 22, *Bustamonte* (No. 71-732); *Bustamonte*, 412 U.S. at 243.

and telling her everything; a middle ground exists. Prior to conducting a consent search, police officers could be required to inform a suspect that "you have a right to refuse consent." At the time *Bustamonte* was litigated, "federal agents were already in the practice of giving such warnings."[325]

Of course, the notion that suspects should be informed of their constitutional rights is not novel. Indeed, as previously indicated, seven years before *Bustamonte* was decided, the Supreme Court's *Miranda*[326]opinion established a constitutional regime that required officers to apprise suspects of their constitutional rights prior to custodial interrogation. *Bustamonte*'s response to the *Miranda* "precedent" is formalistic: consent searches are not custodial interrogations.[327] The latter is presumptively coercive; the former is not.[328]

But consent searches can, under particular racial circumstances, be understood as presumptively coercive. In part, this is because race is not just an identity in a narrow descriptive sense. It is also a social structure — a complex of social meanings — within which people are situated and from which they cannot easily escape. This structure is constituted by, among other things, negative stereotypes. In the context of police encounters, black people are almost always going to be locked inside the officer's racial stereotypes. This location is not simply uncomfortable. It is, like custody, psychologically and physically constraining. In this location, the police officer has complete control over the initial racial meaning he assigns to the black person's identity. The more negative that racial assignment, the more unsafe and insecure the black person is likely to feel and the more limited his freedom of movement and expression will be. Under these circumstances, a black person will be under enormous "racial pressure" both to disconfirm negative stereotypes and to signal cooperation. In other words, he will feel *forced* to demonstrate racial obedience. A black person trapped in this position is likely to experience an officer's request for permission to conduct a search as "racial interrogation" — that is, as an inquiry that is reasonably likely to produce a privacy deprivation. Consequently, racial interrogation, like custodial interrogation, should be preceded by warnings.

Even if "racial interrogations" are not as problematic as "custodial interrogations," the conclusion that consent searches should not be

325. COLE, *supra* note 131, at 30.

326. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

327. *Bustamonte*, 412 U.S. at 246.

328. According to *Bustamonte*, the *Miranda* "Court found that *custodial* interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The Court made it clear that the basis for its decision was the need to protect the fairness of the trial itself." *Bustamonte*, 412 U.S. at 240.

preceded by warnings is not inexorable. Put another way, there is no reason to believe that, with respect to the circumstances under which the police should be required to apprise people of their constitutional rights, *Miranda* created a floor. Further, *Miranda* reflects concerns that transcend the narrower doctrinal question that the case presented. "[T]he Court thought that requiring that every suspect be read his rights and provided an attorney on request would put all interrogation suspects on equal footing."[329] A similar argument can be made about consent searches: requiring police officers to inform every suspect of her right to refuse consent would help to equalize people's vulnerability to consent searches.

IV. TRAFFICKING RACE

And they asked me right at Christmas
If my blackness, would it rub off?
I said, "Ask your mama."

Langston Hughes[330]

Any discussion of race and policing that excludes an examination of traffic stops is necessarily incomplete. Because we all commit traffic infractions all the time, and because the police have almost unbridled discretion with respect to deciding whom to stop, traffic stops provide police officers with the perfect opportunity to engage in pretextual, race-based policing. The problem is compounded by the reality that police officers have neither the resources nor the inclination to stop everyone. Under these conditions, the question becomes: Who are the police most likely to stop? Empirical evidence suggests that they are more likely to stop blacks and Latinas/os than whites.[331] This evidence confirms what blacks and Latinas/os have been saying for a long time: it is a crime to Drive While Black/Brown. Many of us find ourselves committing this crime — that is, trafficking in race — everyday. We try desperately not to get caught. Some strategies (e.g., avoiding certain

329. COLE, *supra* note 131, at 29.

330. LANGSTON HUGHES, ASK YOUR MAMA: 12 MOODS FOR JAZZ 8 (1961).

331. For example, one study found that "[b]etween January 1995 and September 1996, of the 823 citizens detained for drug searches on one stretch of Interstate 95, over seventy percent were African American." Thompson, *supra* note 92, at 957-58; *see also* Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 297 (1997) ("In one Florida county, 62% of the drivers stopped were minorities, and on an interstate in Colorado, 190 of 200 stops 'targeted minorities.' "); Iver Peterson, *Turnpike Data Show Decline in Searches*, N.Y. TIMES, Apr. 24, 2001, at B1 (reporting statistics compiled by New Jersey state police revealing that "[m]embers of minorities remain far more likely to be the subject of a consent search. . . . Of the 440 vehicles searched along the [New Jersey] turnpike in 1999, 211 were driven by blacks, 119 by whites, 109 by Hispanics and 1 by an Asian"). For an examination of the various studies detailing the extent of racial profiling, see David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

neighborhoods and driving low-profile cars) work better than others (e.g., sartorial choices and vanity license plates that signal professional identity).[332] None of these strategies, however, is 100% effective, and all of them are costly.

Few people publicly would take the position that it is legitimate for police officers to target black and brown motorists for traffic stops. That practice, which typically is labeled racial profiling, is almost universally condemned. Yet, racial profiling remains a very real social problem. Indeed, every few months a new report is released revealing just how pervasive racial profiling really is. There is a question, then, about the near universal condemnation of racial profiling, on the one hand, and its prevalence as a social practice, on the other. What explains the contradiction?

In two respects, the perpetrator perspective provides a partial explanation. First, the public condemnation of racial profiling is not total. Instead, it is based on the idea that "bad" cops are racially profiling "good" blacks and Latinas/os — doctors, lawyers, students, athletes, teachers, etc.[333] — "people with good jobs and families."[334] In this sense, the public is condemning not racial profiling per se, but rather racial profiling as it is deployed against certain blacks and Latinas/os. Second, the Supreme Court's conceptualization of racial profiling as a problem of motivation or conscious racial intentionality, rather than as a material harm that affects a person's privacy and sense of security, positions racial profiling beyond the doctrinal reach of the Fourth Amendment. To the extent that racial profiling escapes Fourth Amendment scrutiny it is, in a substantive sense, constitutionally unchecked.

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332. As Katheryn Russell notes:

> Many Black men have developed protective mechanisms to either avoid vehicle stops by the police or to minimize the potential for harm during these stops. The primary shield they use is an altered public persona. This includes a range of adaptive behaviors, e.g., sitting erect while driving, driving at the precise posted speed limit, avoiding certain neighborhoods, not wearing certain head gear (e.g., a baseball cap), and avoiding flashy cars. Another preemptive strategy that is available to a select few is vanity license plates that indicate professional status (e.g., M.D. or ESQ). Of course, vanity tags can work as both a magnet and a deterrent for a police stop.

RUSSELL, *supra* note 80, at 34; *see also* Micheal A. Fletcher, *Driven to Extremes: Black Men Take Steps To Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1.

333. *See* Harris, *supra* note 331, at 265-66 (suggesting the actors Wesley Snipes, Will Smith, Blair Underwood, and LeVar Burton, and the attorney Johnnie Cochran have been racially profiled).

334. *Id.* at 269.

A. *The Supreme Court and Racial Profiling*

Although *Whren v. United States*[335] is not the first case in which the Supreme Court has addressed the constitutionality of race-based policing, it is the case to which scholars most often refer to discuss the Supreme Court's response to racial profiling. In *Whren*, plain clothes officers in an unmarked car observed a Pathfinder at a stop sign in a "high drug area."[336] According to the officers, they became suspicious because the occupants of the car were young, the driver seemed to be looking toward the lap of the passenger, and the car had a temporary license plate.[337]

The officers' suspicions intensified after the vehicle remained at a stop sign for an "unusually long time" and subsequently drove off in excess of the speed limit.[338] The officers followed the vehicle, which came to a stop at a traffic light.[339] Upon approaching the vehicle, one of the officers observed that Whren, the passenger, was holding two plastic bags of a white powdery substance.[340] On the assumption that the substance was cocaine, the officers arrested both men.[341]

One could argue that the officers racially profiled Whren.[342] The claim would be that, but for Whren's race (he is black), the officers' suspicions would not have been aroused, and they would not have stopped the vehicle. Put another way, if Whren were white, the police likely would not have noticed the Pathfinder and Whren would have escaped the encounter altogether.

It is not easy to prove the foregoing claim. After all, the officers had an "objective" reason for stopping the vehicle: the driver had committed a traffic infraction. To the extent that this underlying justification is established, it becomes difficult to prove that the police officers racially profiled Whren. The Supreme Court is right, then, to

335. 517 U.S. 806 (1996).

336. *Id.* at 808.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 809.

341. *Id.*

342. Several articles have used the *Whren* decision as a starting point for a discussion of racial profiling. *See* Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States: *The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725 (2000); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999).

worry about the difficulties of proving that a particular police activity is race-motivated.[343]

But quite apart from the evidentiary difficulty of establishing racial profiling is the cognizability of such a claim in the first place. In *Whren*, the Supreme Court makes it clear that, at least under the Fourth Amendment, racial profiling claims are not constitutionally cognizable. In other words, for purposes of Fourth Amendment law, race does not matter. Indeed, the Court does not mention Whren's race in its recitation of the facts. It mentions that the occupants of the Pathfinder were "youthful" (which the officers claimed was one basis for their suspicion),[344] but not that they were black (which the officers claimed did not inform their decision to stop the Pathfinder). Thus, in the context of discussing the "legitimate" basis for the police officer's stop, Whren's race is not textually referenced. We learn that Whren is black via the Court's rejection of the argument that the Fourth Amendment can be employed to regulate race-based policing.[345] Here, the Supreme Court is *doing things with words*.[346] That is to say, the Court's racialization of the facts is not merely descriptive; it is performative, making race appear and disappear, relevant and irrelevant as a matter of text, law, and social reality.[347] *With words*, the Court recognizes Whren's race to deny him remediation and de-recognizes his race to deny the "important" police function blackness performs as a proxy for suspicion. *Whren* is problematic, then, not only because of the racial doctrine the Court announces (the Fourth Amendment does not reach racial profiling) but also because of the racial normativity of the opinion (the officers in *Whren* did not engage in racial profiling).

Fundamental to the Court's argument that the Fourth Amendment does not reach racial profiling is the idea that ulterior motives including but not limited to race cannot "invalidat[e] objectively justifiable behavior under the Fourth Amendment."[348] The Court is clear in pointing out that it is not suggesting that race-based profiling is constitutionally legitimate. It expressly indicates that racially discriminatory

343. The Supreme Court often has questioned the efficacy of an inquiry into hidden, improper motives in the Fourteenth Amendment context. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224 (1971) (stating, in upholding a Jackson, Mississippi ordinance that closed city-owned swimming pools to stave off their desegregation, that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment"); *see also* Rogers v. Lodge, 458 U.S. 613, 647 (1982) (Stevens, J., dissenting) ("Assuming that it is the intentions of the 'state actors' that is critical, how will their mental processes be discovered?").

344. *Whren*, 517 U.S. at 808.

345. *Id.* at 810. For an excellent racial critique of *Whren*, see Thompson, *supra* note 92.

346. *See generally* J.L. AUSTIN, *supra* note 50.

347. *Id.* at 4-11 (distinguishing between constative utterances which describe things and performative utterances which bring things into being).

348. *Whren*, 517 U.S. at 812.

policing violates the Fourteenth Amendment.[349] The Court's argument, then, is that such policing is not per se inconsistent with the Fourth Amendment.[350] In reaching this conclusion, the Court erects, even as it purports merely to apply, a "doctrinal barrier."[351] Reflecting the perpetrator perspective, this barrier is supported by a conceptualization of racial profiling as an attitude that resides in the mind of bad police officers rather than as a practice that "good" and "bad" police officers engage in (often without intent) and people of color experience.

B. *Policing Innocence: Looking for a Few Good Blacks.*

Although the constitutionality or moral legitimacy of racial profiling is arguably independent of whether the individual is committing or

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349. *Id.* at 813. In order to prevail on a racial discrimination claim in the Fourteenth Amendment context, however, a plaintiff must be able to show that the defendant acted intentionally. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). For critiques of the standard articulated in *Davis*, see Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968-69 (1993) (arguing that "the *Davis* rule reflects a distinctively white way of thinking about race" that is marked by "a complacency concerning, or even a commitment to, the racial status quo"); Lawrence, *supra* note 73, at 322:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional — in the sense that some outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

350. *Whren*, 517 U.S. at 813. For a detailed account of the widespread adoption of the *Whren* standard, see Abramovsky & Edelstein, *supra* note 342 at 738 n.98:

> The only state high court to reject *Whren* outright is the Washington State Supreme Court .... The only intermediate state appellate court to outright reject *Whren* is the New York Appellate Division First Department ... In almost every other state, the objective standard acclaimed by *Whren* has been adopted as law by at least some court.

See also Petrel v. State, 675 So. 2d 1049, 1050 (Fla. Dist. Ct. App. 1996); People v. Thompson, 283 Ill. App. 3d 796, 798 (Ill. 1996); State v. Hollins, 672 N.E. 2d 427, 430 (Ind. Ct. App. 1996); State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996); State v. George, 557 N.W.2d 575, 577 (Minn. 1997); Gama v. State, 920 P.2d 1010, 1012-13 (Nev. 1996); State v. McCall, 929 S.W.2d 601, 603 (Tex. Ct. App. 1996); State v. Ladson, 979 P.2d 833, 842-43 (Wash. 1999).

351. *Whren*, 517 U.S. at 813; *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4, at 20 (3d ed. Supp. 2002) (suggesting that the Court's "reckless use of its own precedents ... makes it appear that the issue raised by petitioners was already settled, while in fact it was very much an open question"); Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test For Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1025 (1996) (arguing that *Whren* "is built upon unreasoned distinctions, perversions of precedent, a question-begging unarticulated and unsupported premise, bootstrapping, logical inconsistencies, and a narrow vision of the Fourth Amendment"); Sklansky, *supra* note 108, at 298 ("What made the recent vehicle stop cases [including *Whren*] straightforward for the Court plainly was not the doctrinal inevitability of the results.").

has committed a crime,[352] the public campaign against racial profiling invariably calls upon notions of innocence. If, for example, a police officer racially profiles a black person who is not in possession of drugs or any other incriminating evidence, that person is perceived to be innocent. More particularly, he becomes a good black, and the officer who racially profiled him becomes a bad cop. As a good black, this person can be employed as an icon of racial victimization to challenge the conduct of the bad cop. This is precisely how the public has come to view racial profiling — as a bad law enforcement practice that affects good or innocent blacks, Latinas/os, and other nonwhites. In this sense, the public's understanding of racial profiling is locked into the perpetrator perspective.[353]

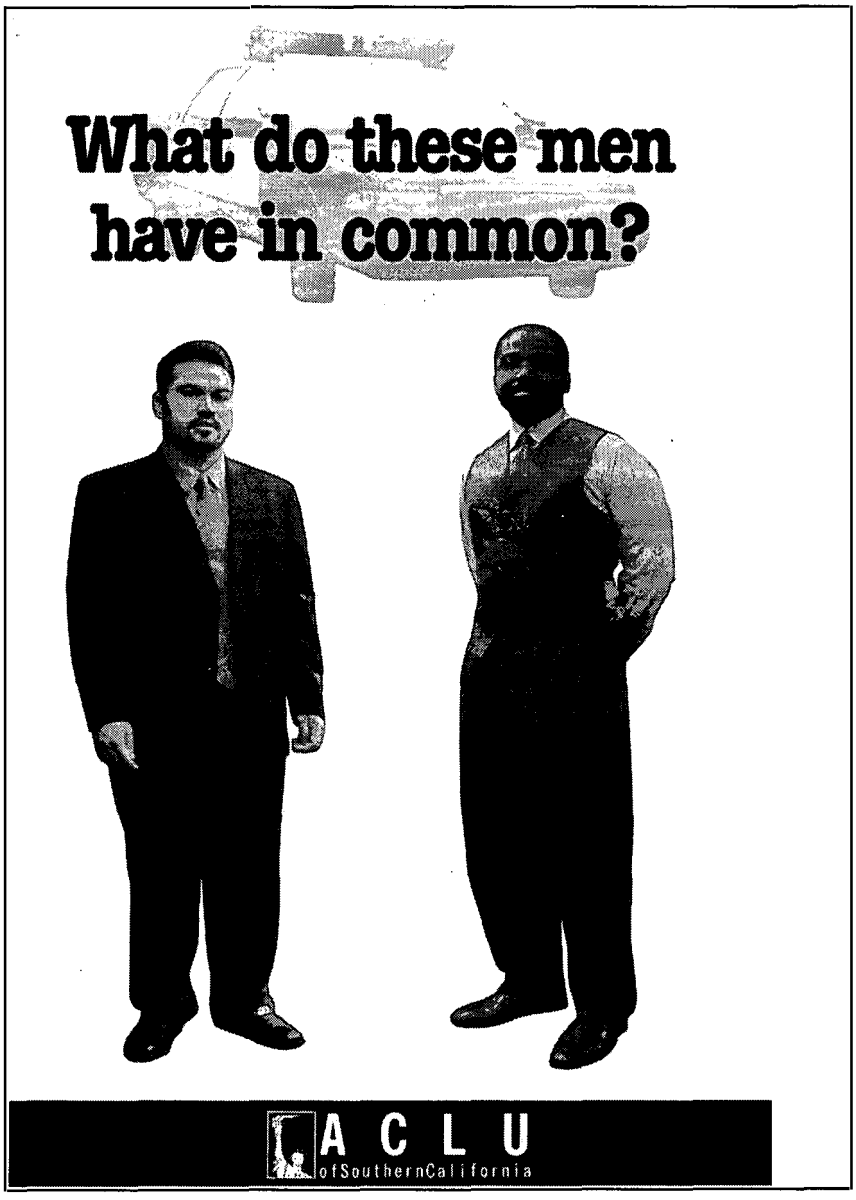
In part, this understanding of racial profiling derives from the way in which racial profiling is litigated and framed in public discourse. Consider, for example, the ACLU's campaign against racial profiling. The image and text below are excerpted from an ACLU pamphlet.

352. Some scholars have argued that the Supreme Court's focus on process fairness has been at a cost to law enforcement interest. *See* Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938, 945-48 (1987) (positing that *Miranda* rights have exacted a grave cost to the effectiveness of law enforcement, referring to studies in Philadelphia, New York County, and Pittsburgh that showed "immediate, dramatic reductions in statements and admissions obtained in custodial questioning" following the *Miranda* decision); *see also* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 52-55 (1996) (detailing the case of the exclusion of evidence against a defendant suspected of kidnapping, raping and holding captive a fourteen-year-old girl because the police officers' search of the defendant's apartment violated his Fourth Amendment rights). "This absurd decision completely ignores the facts of the case. More reasoned minds might suggest that Johnson forfeited his right to privacy when he kidnapped and locked Angela Skinner in his apartment." *Id.* at 53. Some argue that the police deserve more protection than suspects, who are "irrational, uncaring . . . thugs" who have "ripped the Constitution to threads." Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). *But see* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 31 (1987) (arguing that the purpose of the Bill of Rights is not to promote government efficiency but rather to identify values that must be protected regardless of the desire for expediency); Stephen J. Schulofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 436 (1987).

353. Outside of concerns about pragmatic racial politics, there might be a politically defensible reason for focusing on "good blacks." Consider David Harris's explanation:

> I deliberately chose to interview middle-class [black] people [about their experiences with racial profiling]. By doing so, I do not wish to deny or exclude the experiences of others who may not fit within this group, and certainly would not argue that their experiences are any less important than those of the people on whom I have focused. But I made this choice in an attempt to show that "driving while black" is not only an experience of the young black male, or those blacks at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation, or social station.

Harris, *supra* note 331, at 269-70, n.18.


What do these men have in common?
ACLU
of Southern California

Carlos Gonzalez
Is a junior high math teacher who was tailed by police, ordered out of his Mustang, and handcuffed on the street.
"I have lived in South Central Los Angeles for the past twenty-five years. I grew up loving the community that has watched me grow into the man I am today — a math teacher at Edison Middle School in my community. I was driving my red convertible Mustang when I was stopped, ordered out of my car, harassed, and handcuffed before the LAPD CRASH unit officers even asked me for my name. I was scared and I felt humiliated, all because two LAPD officers thought that I was a hoodlum or a criminal because of the way I looked.
"When I arrived home, I was noticeably angry and confused. I discussed the incident with my family and they were outraged. My son noticed that I was upset because I wasn't the same playful father I had always been. He asked me what was wrong, so I had to sit down and explain to him the ill-behavior of some people toward others. I hope my coming forward will ensure that my sons will not have to experience the kind of racist treatment that I experienced at the hands of the LAPD."

Timothy Campbell
Is a real estate developer who was pulled over by police in his Landrover and ordered out of the car at gunpoint.
"I was born, raised, and educated in Southern California. When I was a child, my parents taught me that the police were my friends and I could trust them. When I got older, however, I learned otherwise. I have been harassed by police for no valid reason on several occasions since I was old enough to drive.
"I thought that as I got older and looked more mature, I wouldn't be harassed anymore. But I found out that age and maturity are no deterrents for some police officers who stop people based on their race.
"I can understand how people who have not experienced what I've experienced may find it hard to believe that the police sometimes stop people only based on their race. But because I've been stopped repeatedly for that reason, I am proof that it happens. This conduct by police has to stop. When I've been stopped because of my race alone, I've felt violated and powerless in front of a bully with a badge and a gun."

The caption above the image asks: "What do these men have in common?" One answer, perhaps the easiest, is that they were both racially profiled. But at least two other similarities between these two men explain their interracial appearance on the cover of an ACLU pamphlet.

First, both men are "respectable." The visual economy of each image disconfirms stereotypes. They are not thugs, or gangsters, or drug dealers. They are ordinary men. Their suits and ties, polished shoes, and manicured faces exude middle class respectability.[354] To the extent that we perceive either of these men to be suspicious, it must be because of their race. In every other way, both men appear to be innocent and law abiding.

Second, the text of the pamphlet narrates a story about both men within which their innocence and respectability are explicit. With respect to Carlos Gonzalez, for example, the text reveals that he "is a junior high math teacher" in the community in which he grew up: South Central Los Angeles. He appears to be a responsible family man: a father who plays and communicates with his sons. His experience with racial profiling "humiliated" him. According to Gonzalez, he was made to endure that humiliation "all because two LAPD officers thought I was a hoodlum or a criminal because of the way I looked." To the extent that Gonzalez appears respectable — in suit and tie — the "look" to which he refers is, of course, his race. Indeed, controlling for Gonzalez's race, he is utterly unintelligible as a hoodlum.

The message the ACLU hopes to convey with this pamphlet is clear: racial profiling "results in the persecution of innocent people based on their skin color."[355] The political pragmatism behind this idea is also clear: to the extent that (white) people understand that racial profiling harms innocent blacks or Latinas/os, they are more likely to condemn racial profiling and the police officers who practice it.

This strategy is similar to the strategy the NAACP employed in the 1930s and 1940s to determine which criminal process cases to litigate. That is, the Association specifically sought out cases in which it perceived the defendants to be innocent.[356] The notion was that, in the Jim Crow era, white Americans were not going to be sympathetic to arguments about due process or racial inequality in the context of cases involving "bad Negroes." This approach to litigation was part of

354. HAZEL V. CARBY, RACE MEN (1998).

355. ACLU, DRIVING WHILE BLACK 5 (1999).

356. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, 28-29 (1994) (describing the NAACP's policy regarding criminal cases, illustrated by Association lead attorney Thurgood Marshall's decision to decline involvement in the defense of a youth convicted of rape because the youth was "not the type of person to justify our intervention").

a broader civil rights strategy to re-present black people as civil and civilized.[357] Litigating cases within which the defendants were not innocent would have undermined this project of racial respectability.[358]

According to Professor Randall Kennedy, the politics of respectability reflects two basic, if controversial, ideas:

> The principal tenet of the politics of respectability is that, freed of the crippling invidious racial discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans. . . . One of its strategies is to distance blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes.[359]

The second idea that buttresses the politics of respectability is that a "stigmatized minority" must make every effort to present itself so as to enhance the "reputation of the group" and "avoid the derogatory charges lying in wait in a hostile environment."[360] To the extent that either of these ideas structure how we think about racial profiling, only reputation-enhancing or stereotype-disconfirming minorities like Carlos Gonzalez and Timothy Campbell can figure as representative victims.

Not everyone who is racially profiled, however, has the innocent identities of Campbell or Gonzalez. Some are decidedly less respectable. Consider again *United States v. Whren*. Recall that Whren, the passenger, was found to be in possession of drugs. An examination of the ACLU's treatment of his case reveals just how important notions of innocence and respectability are to galvanizing the public against, and delegitimizing, racial profiling.

The ACLU discusses *Whren* in its clear, concise, and politically useful Driving While Black booklet. Its analysis of the case in this

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357. For a brief overview of the relationship between civil rights and the politics of respectability, see Austin, *supra* note 18, at 1791 (arguing that "[d]rawing on lawbreaker culture would add a bit of toughness, resilience, bluntness, and defiance to contemporary mainstream black political discourse, which evidences a marked preoccupation with civility, respectability, sentimentality, and decorum").

358. In his account of the infamous Scottsboro trials of the early 1930s, in which nine black youths were accused of raping two white women in Alabama, James Goodman notes that Walter White, the NAACP's secretary at the time, was reluctant to involve his organization in the youths' defense partly because he feared that the NAACP's image was at risk. *See* JAMES GOODMAN, STORIES OF SCOTTSBORO 33 (1994):

> [White] didn't enter the case the moment he read the first Associated Press reports of the arrests and near lynchings, or the moment black leaders in Chattanooga, writing a few days before the trials . . ., asked for help. He couldn't blindly associate the NAACP with what looked to him like nine pathetic teenagers, a motley crew of miscreants at best, at worst a gang of rapists, without risking the respectability it had taken two decades to gain.

359. KENNEDY, *supra* note 18, at 17.

360. *Id.* at 20. For critiques of Randall Kennedy's employment of the politics of respectability, see Paul Butler, *(Color)Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997), and Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE. L.J. 2619 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)).

venue is almost entirely doctrinal.[361] The pamphlet features no images of Whren. Nor does the booklet narrate a story about Whren's life — his family, education, upbringing, and community membership. Even the racial facts of *Whren* are conspicuously absent from the ACLU's description of the case, much as they are absent from the Court's recitation of the facts.

The obfuscation of the circumstances under which Whren was arrested relates to the fact that, unlike Campbell and Gonzalez, Whren was not innocent. He was a drug possessor, if not a drug dealer. He confirmed rather than disconfirmed stereotypes about black criminality. Accordingly, he is unlikely to engender public sympathy. The "good black" trope is not available to him. Presumably, the ACLU understood that their ability to employ Whren as a representative icon for racial profiling victimization was circumscribed by the fact that many people would perceive him to be a bad black. The ACLU may have surmised that, to the extent that people perceive Whren as bad, they likely would perceive the police officers who arrested him as good (as officers whose racial suspicions were confirmed).

None of this is to suggest that the ACLU's campaign against racial profiling has been unhelpful. On the contrary, the ACLU has played, and continues to play, an enormously important role in increasing public awareness about, and helping to fashion legal and political responses to, race-based, pretextual policing. As a result of this role, one can finally say that there is "[s]ome cautious optimism about the problem of racial profiling."[362]

But most of the news about racial profiling remains bad. And part of the bad news derives from the fact that public campaigns against racial profiling are locked into the perpetrator perspective. These campaigns are buttressed by the notion that bad police officers are harassing good blacks. The problem is that this good black/bad cop framework does not fully capture cases like *Whren*. Moreover, the framework renders such cases difficult to challenge publicly. Yet, it is precisely the cases involving bad blacks, cases like *Whren*, where the victim of racial profiling is vulnerable to incarceration, that the public must come to care about.[363] The ACLU's respectability-oriented ap-

361. According to the booklet, "[T]he constitutionality of pretextual traffic stops — using minor traffic infractions, real or alleged, as an excuse to stop and search a vehicle and its passengers — reached the Supreme Court in 1996 in a case called *Whren v. United States*." ACLU, *supra* note 355, at 5.

362. David A. Sklansky, *Some Cautious Optimism About the Problem of Racial Profiling*, 3 RUTGERS RACE & L. REV. 293 (2001).

363. On August 12, 2001, the Justice Department reported that of the 1.3 million people currently incarcerated in the nation's state and federal prisons, 428,000 were black men aged twenty through twenty-nine. That segment of the prison population is equal to 9.7% of all black men in that age group. By comparison, only 2.9% of Hispanic men and 1.1% of non-Hispanic white men in the same age group were imprisoned. *See* Fox Butterfield, *Number of People in State Prisons Declines Slightly*, N.Y. TIMES, Aug. 13, 2001, at A1. While blacks

proach to racial profiling encourages public indifference to, or at least is unlikely to engender public condemnation of, these cases.

The problem is worse: any approach to racial profiling that reflects (implicitly or explicitly) the idea that there are "good" and "bad" blacks entrenches the idea of blackness as a crime of identity. Indeed, the very notion that there are "good" and "bad" black people has political currency and makes sense only because there is already a presumption of blackness as bad (read: criminal). For example, few people, in the context of thinking about crime, would conceptualize whiteness or the category "white people" in terms of "good" and "bad." The dichotomy is intelligible vis-à-vis blacks because people understand it to mean "not *all* black people are bad. There are exceptions. *Some* of them are good."[364] This understanding encourages group surveillance — a racial gaze — even as it purports to be concerned only with accountable (bad) individuals (blacks). It invites black presentations of self as a respectable thing.[365] And it subjects all blacks to a kind of racial objectification that makes it "logical" — creates an incentive — for black people to be available for, indeed advocate for, white racial inspection of blackness.

Consider again Randall Kennedy's endorsement of respectability:

> It should be clear by now that I am recommending a politics of respectability, albeit a version that steers clear of excesses . . . . Some readers will undoubtedly object on the grounds that, however modified, the politics of respectability smells of Uncle Tomism. It may have been a necessary concession earlier, they concede, but championing the politics of respectability today, they charge, is an anachronistic error. Obviously, I disagree. In American political culture, the reputation of groups, be they religious denominations, labor unions, or racial groups, matters greatly. For that reason alone, those dedicated to advancing the interests

made up 12% of the U.S. population, there were currently 70,700 blacks in prison for murder, compared with 44,000 whites; 144,700 blacks were imprisoned for drug offenses, compared with 50,700 whites; and 97,300 blacks were in prison for robbery, compared with 33,800 whites. *Id.* One statistical study found that in 1994, nearly one in three black men aged twenty through twenty-nine was under the jurisdiction of the U.S. criminal justice system, either in prison or jail, on probation or parole. *See* MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1, 3 (1995).

364. This is not to say that whiteness is never conceptualized under good/bad binaries. Certainly in the context of Jim Crow, there were discourses — that both whites and blacks deployed — to the effect that not all whites are bad, the presumption being that most whites in the South were.

365. Catharine MacKinnon makes a similar point about gender. She writes:

> Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity. So many distinctive features of women's status is second class — the restriction and constraint and contortion, the servility and the display, *the self-mutilation and requisite presentation of self as a beautiful thing*, the enforced passivity, the humiliation — are made in the context of sex.

CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 130 (1989) (emphasis added).

> of African Americans ought to urge them to conduct themselves in a fashion that, without sacrificing rights or dignity, elicits respect and sympathy rather than fear and anger from colleagues of other races.[366]

Part of the problem with Kennedy's approach is that he does not seem to perceive there to be material costs to a politics of respectability, so long as this ideology "steers clear of excesses."[367] What I am suggesting, however, is that at least some of the excesses of the politics of respectability cannot be disaggregated from it. Put another way, the politics of respectability are inherently costly.[368] It is not clear to me that blacks can, and Kennedy's analysis does not supply a methodology for how blacks might, "conduct themselves in a fashion that, without sacrificing rights or dignity, elicits respect and sympathy rather than fear and anger from colleagues of other races."[369] Identity performances, particularly when they are intended to alter how "others see us" are always compromising. And as my discussion of consent searches and the seizure doctrine attests, they can compromise dignity and they can compromise rights. All of that said, I agree with Kennedy's basic idea that racial reputation and civil rights gains are positively correlated. The normative question is whether that correlation should be further entrenched. Kennedy seems to answer that question in the affirmative without (1) fully acknowledging the costs and burdens of "respectable" identity performances, and (2) realizing that the politics of respectability entrenches the notion that blacks are presumptively unrespectable. Finally, Kennedy's analysis nowhere discusses whiteness and respectability. He does not employ the language of respectability to impose a burden on whites to "conduct themselves in a fashion that, without sacrificing rights and dignities, elicits respect and sympathy rather than fear and anger from [black people]."[370] The imposition of such a burden might be particularly helpful in the context of policing given the level of distrust, anger and fear black people have of the police.

Of course, I am not the first to critique the politics of respectability generally and/or the particular way in which Professor Kennedy deploys the concept. However, much of this critique is based on the idea that the politics of respectability does little to address the social conditions of "bad blacks." As Regina Austin observes:

> [The politics of respectability] furthers the interests of a middle class uncertain of its material security and social status in white society. The per-

366. KENNEDY, *supra* note 18, at 21.

367. *Id.*

368. *See generally* Carbado & Gulati, *supra* note 9 (discussing the costs associated with identity performances that are informed by the politics of respectability).

369. KENNEDY, *supra* note 18, at 21.

370. *Cf.* KENNEDY, *supra* note 18, at 21.

> sons who fare best under this approach are those who are the most exceptional (i.e. those most like successful white people). At the same time, concentrating on black exceptionalism does little to improve the material conditions of those who conform to the stereotypes. Unfortunately, there are too many young people caught up in the criminal justice system to write them all off or to provide for their reentry into the mainstream one or two at a time. In addition, the politics of distinction encourages greater surveillance and harassment of those black citizens who are most vulnerable to unjustified interference because they resemble the lawbreakers in age, gender, and class.[371]

Paul Butler[372] and Sheri Lynn Johnson[373] advance a similar claim. What I am suggesting is that the good/bad dichotomy and the politics of respectability that underwrite it does not even protect "good" blacks. The case is quite the contrary. For to the extent that police officers operate under the assumption that part of their law enforcement project is to ferret out the "good" blacks from the "bad" blacks, and to the extent that the goodness (noncriminality) of blackness is not assumed but must be demonstrated (ex ante via identity performance) or established (ex post via a search or seizure), *all* black people are vulnerable to racial profiling.

V. CONCLUSION

Race itself has never been seen by the naked eye.

D. Marvin Jones[374]

The stories of Timothy Campbell and Carlos Gonzalez are effective precisely because they lack nuance. Outrage at their humiliation comes easy. The problem with such sharp examples of racial injustice is their tendency to blunt our sympathy for racial victims whose cases are more difficult. The Supreme Court in *Whren* had an opportunity to address a racially nuanced police encounter. Instead, the Court reinforced its commitment to a colorblind ideology, a commitment that is in fact racialized. The Court's move doubtlessly was made easier by the specter of this country's history of egregious racial crimes — particularly in the context of policing — to which Whren's case paled in comparison.

Significantly, *Whren* did not emerge in a jurisprudential vacuum. *Bostick*, *Delgado*, and *Bustamonte* created racial precedent. More particularly, each case helped to structure the colorblind terms upon

371. Austin, *supra* note 16, at 1773-74 (footnote omitted).

372. Butler, *supra* note 360 (noting the extent to which the politics of respectability is unconcerned with the overrepresentation of black men in prisons).

373. Johnson, *supra* note 360.

374. Jones, *supra* note 55, at 448.

which *Whren* would engage race. Cumulatively, these cases stand for the proposition that race matters in the Fourth Amendment context only to the extent that a police officer's conduct is overtly racially coercive.

The absence of avowedly racist officers does not mean, however, that a nonwhite person's encounter with police is unaffected by race. Historical and present-day realities complicate minorities' interactions with good cops as well as bad. For minorities' Fourth Amendment interests to be protected, this racial reality must be recognized and addressed. Yet, this is precisely what the Supreme Court has failed to do. It carefully enlists the ideology of colorblindness to elide the complexities of race. As a result of this racial elision, people of color continue to experience the Fourth Amendment more as a technology of surveillance than as a constitutional provision that renders them "secure in their persons, homes, papers and effects."