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Stories of Fourth Amendment Disrespect: From Elian to the Internment

Cover Page Footnote

Visiting Professor, Duke University Law School, 2000-01; Professor of Law, Howard University School of Law; J.D., University of Pennsylvania School of Law, 1981, former Assistant District Attorney, Philadelphia, Pennsylvania. I thank my wife, Patricia V. Sun, Esq., Professors Robert Mosteller, Sara Sun-Beale, Girardeau Spann, Joseph Kennedy, Eric Muller, Ronald Wright, and many other members of the Triangle Criminal Law Working Group, for their comments on early drafts of this Article. I also thank my research assistants, Nicole Crawford, Eli Mazur, and Amy Pope, and my secretary, Ann McCloskey. Appreciation also goes to the Howard University School of Law for funding this project, and to the Duke University Law School for helping me see this effort through to its completion.

ARTICLES

**STORIES OF FOURTH AMENDMENT
DISRESPECT: FROM ELIAN TO THE
INTERNMENT**

*Andrew E. Taslitz**

I. RESPECT: THE MISSING PIECE OF THE FOURTH AMENDMENT
PUZZLE

*A. Broader Fourth Amendment Lessons to Be Learned from the Racial
Profiling Controversy*

In early April 2001, an unarmed black teenager, Timothy Thomas, was shot to death by Cincinnati police officers.¹ The officers were pursuing Thomas on outstanding arrest warrants for two alleged misdemeanors and numerous traffic offenses.² The shooting sparked protests in Cincinnati's African-American community, as protesters alleged that the officers used excessive force because of Thomas's race.³ Thomas was the fourth black male killed by the Cincinnati police since 1995, the police having killed not one white suspect during that time.⁴ Feelings ran so high that the protests turned violent, with newspapers describing the reaction as a riot.⁵

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1. Amy DePaul & Peter Slevin, *Cincinnati Officials Impose Curfew; Mayor Acknowledges Race Woes as City Acts to Quell Violence*, Wash. Post, Apr. 13, 2001, at A1.

2. *See id.*

3. *See* Francis X. Clines, *In Aftershock of Unrest, Cincinnati Seeks Answers*, N.Y. Times, Apr. 23, 2001, at A11 [hereinafter Clines, *Aftershock of Unrest*] (suggesting protests partly sparked by concerns that the Thomas shooting was the latest in a long line of excessive force cases).

4. *See Cincinnati Calm After 2 Days of Violence; Riots Had Followed Shooting by*

But, the protests and resulting violence were about far more than the excessive use of force. Protesters were also angered at, in their view, years of degrading racial profiling by the local police.⁶ A teenager interviewed by the Washington Post seemed to capture the sense of the community:

“The riots are not just a reaction to the killing of an African American male, but to the injustice to our people for so long,” said Christopher Johnson, 16, as he stood on the church steps. “Just walking down the street I get asked [by police], ‘What are you doing?’ I pay taxes like they do. I should be able to walk down a public street.”⁷

Indeed, shortly before the Thomas shooting, the Cincinnati Black United Front and the American Civil Liberties Union of Ohio filed a lawsuit accusing the city’s police force of a thirty-year pattern of racial profiling, including unduly frequent traffic and jaywalking stops, often involving unnecessary humiliation and use of force.⁸ Cincinnati was, of course, an infamous site of riots breaking out in the violent summer of 1968, after African-Americans charged that they were harassed by local police abusing their discretion under loitering laws.⁹ That allegation was supported the next year by the Kerner Commission’s Report examining the causes of those riots and of similar violence in seven other cities.¹⁰ The recent ACLU suit essentially alleges that little has changed since 1968.¹¹

The Cincinnati protests were a particularly dramatic reaction to the perception that the police were engaging in racial profiling. But nationwide concerns about racial profiling have been in national headlines for the past several years.¹² Extreme incidents ending in

Police, N.Y. Times, Apr. 12, 2001, at A1 [hereinafter *Cincinnati Calm*].

5. *See id.*

6. *See* Clines, *Aftershock of Unrest*, *supra* note 3; *Cincinnati Calm*, *supra* note 4; DePaul & Slevin, *supra* note 1.

7. DePaul & Slevin, *supra* note 1.

8. *See id.*; *see also* Clines, *Aftershock of Unrest*, *supra* note 3; *Cincinnati Calm*, *supra* note 4.

9. *See* DePaul & Slevin, *supra* note 1; *see generally* Andrew E. Taslitz, *Mob Violence and Vigilantism*, in *The Oxford Companion to American Law* (Kermit L. Hall et al. eds., 2002) [hereinafter *Taslitz, Mob Violence and Vigilantism*] (discussing social forces causing the 1968 urban race riots in Cincinnati and other major cities).

10. *See* DePaul & Slevin, *supra* note 1; *see also* Taslitz, *Mob Violence and Vigilantism*, *supra* note 9.

11. *See* DePaul & Slevin, *supra* note 1 (“We have not a few isolated incidents We have a pattern perceived by the Kerner Commission in 1968 and perceived continuously to this day. It’s difficult for the city to credibly deny that this problem exists.” (quoting Raymond Vasvari, Legal Director of the American Civil Liberties Union of Ohio)).

12. *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 Minn. L. Rev. 265, 265-75 nn. 1-56 (1999) [hereinafter *Harris, Statistics*] (collecting selected interviews and news stories on racial profiling); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. Times, June 20, 1999, § 6

shooting deaths like Thomas's have drawn particular attention,¹³ as have particularly invasive searches like that of Patricia Appleton, a black woman travel agent returning from Jamaica via Chicago's O'Hare Airport.¹⁴ The American Bar Association's Journal described the February 1997 search by United States Customs officials:

[T]hey directed her to a small room, barely the size of a jail cell, where Appleton assumed that she would be patted down. After about 20 minutes, two female customs inspectors entered.

"They told me they were going to strip-search me," Appleton recalls. "They didn't give me a reason." The next thing Appleton knew, she was naked and spread-eagled against the wall. The inspector told her to back up two steps, bend over and grab her ankles.

"I think I see something," she remembers one inspector saying. "They made me bend over farther. By then, I'm hysterical and crying. I said, 'I can't do this anymore.'"

Finally, they let her go. They eventually told her they suspected she'd swallowed drugs. Appleton says only one other event in her life approached the humiliation and vulnerability she felt at O'Hare: "I had been brutally raped when I was 15, and this was close to it."¹⁵

Any strip search is, of course, extremely emotionally disturbing, but this search was made worse by Appleton's belief that her race prompted the Customs Service's extreme action.¹⁶ Indeed, in August of that same year, she was strip-searched at O'Hare again. She ultimately joined eighty-four other African-American women in a lawsuit against the Customs Service, alleging that the women were strip-searched because they were black.¹⁷

What is especially interesting about extreme cases like Thomas's killing and Appleton's strip search, however, is that far more mundane cases of alleged racial profiling—such as brief investigative

(Magazine), at 51 (providing a lengthy expose about racial profiling and officers' views on the subject); *accord* Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* 33-46 (1998) (summarizing empirical, historical, and anecdotal data on racial profiling).

13. See Jill Nelson, *Police Brutality: An Anthology* 9-11 (Jill Nelson ed., 2000) (portraying the police shooting and killing of twenty-two year-old Guinea immigrant, Amadou Diallo, as the quintessential modern example of race-based police decisionmaking).

14. See John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J., Feb. 1999, at 46.

15. *Id.*

16. *See id.*

17. *See id.* In apparent reaction to these sorts of lawsuits and to critical media coverage, the Customs Service seems to have significantly reduced racial profiling by its inspectors. See Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, Wash. Post, June 28, 2001, at A1 [hereinafter Montgomery, *Discourage Racial Profiling*].

stops of pedestrians for questioning or automobile stops for traffic violations—elicit similar rage in victims and their communities.¹⁸ One black social worker arrested after being stopped for speeding thereafter

felt a wave of fear wash over her every time she saw a police car in her rearview mirror. In that one brief encounter, her entire sense of herself—her job, the fact that she is a mother and an educated, law-abiding person working on a master's degree—was stripped away.¹⁹

A forty-one year-old, African-American male, a top executive in a major public institution, who had been repeatedly stopped even when he drove with extra caution, felt angry and frustrated, and explained his deeper sense of powerlessness: "They have the power and they can do whatever they want to do to you for that period of time You're never beyond this, because of the color of your skin."²⁰ These experiences are sufficiently common among African-Americans to have prompted an organized nationwide campaign against racial profiling.²¹ Those efforts have begun to bear fruit, with both federal and state legislative efforts under way at least to collect data on racial profiling and with some police departments experimenting with ways to document and address the problem.²² The United States Supreme Court and many state courts have instead washed their hands of the problem.²³

In *Whren v. United States*,²⁴ for example, the Supreme Court held that an officer's subjective motivation for stopping drivers is irrelevant under the Fourth Amendment. Civil suit is possible under the Equal Protection Clause, said the Court, but, in another case, *United States v. Armstrong*,²⁵ the Court set the standard of proof so high even to

18. See Kenneth Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks: How to Fight Back if You Are a Victim of Racial Profiling* 3-20, 63-157 (2000) [hereinafter Meeks, *Driving While Black*] (reviewing the different types of racial profiling and recounting the emotional reactions of numerous victims); John L. Burris, *Blue vs. Black: Let's End the Conflict Between Cops and Minorities* 81-106 (1999) (summarizing stories of the humiliation and anger felt by persons stopped by the police for "walking while black").

19. Harris, *Statistics*, *supra* note 12, at 273 (describing the experience of Karen Brank, a mother in her early thirties with no record of being in trouble with the police) (footnote omitted).

20. See *id.* at 272-73 (quoting Interview by David Harris with Michael in Toledo, Ohio (Oct. 1, 1998)).

21. See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. Pa. J. Const. L. 367, 377-97 (2001) [hereinafter Harris, *New Federalism*] (summarizing the results of the movement).

22. See *id.*; see also Montgomery, *Discourage Racial Profiling*, *supra* note 17.

23. See Harris, *New Federalism*, *supra* note 21, at 374-85 (summarizing state and federal judicial responses to profiling).

24. 517 U.S. 806 (1996).

25. 517 U.S. 456 (1996); see also Andrew E. Taslitz & Margaret L. Paris, *Constitutional Criminal Procedure* 393-95, 410-12 (1997) [hereinafter Taslitz & Paris,

obtain discovery as to render the equal protection remedy meaningless. Moreover, many police simply deny that profiling happens in their department,²⁶ while public debates rage over what “profiling” is: What if an officer’s reliance on race is subconscious? Merely one factor among others? Justified by the proportion of people of a particular race who commit certain crimes? Many police and commentators would not consider these situations—all of which fall short of intentional racial discrimination—to involve profiling.²⁷

All these points about racial profiling have been thoroughly addressed by numerous scholars, each offering their own solutions to the problem.²⁸ Other scholars have not discussed, however, what broader lessons the justice system’s experience with racial profiling may have to teach about Fourth Amendment jurisprudence more generally.

What was particularly arresting to me in the individual interviews with victims of racial profiling recounted above was their repeated sense of insult and humiliation. Merely being briefly stopped led the forty-one-year-old executive to complain of a sense of being at another’s mercy, expecting repeatedly to be so again. The social worker arrested for speeding suffered depression and lost much of her sense of self-worth. And, in the more extreme cases, the strip-searched women felt raped and the Cincinnati survivors felt fearful of police assaults. These emotional wounds were shared by the many African-Americans who heard or read about these incidents, as if the

Constitutional Criminal Procedure] (explaining the implications for search and seizure analysis when *Whren*—a Fourth Amendment case—is read in conjunction with *Armstrong*—an Equal Protection claim involving alleged selective prosecution in a federal crack cocaine case motion to compel discovery).

26. See Goldberg, *supra* note 12 (“When asked, most cops will declare themselves color blind.”).

27. See John Cloud, *What’s Race Got to Do with It?*, Time, July 30, 2001, at 45-47.

But how much racial profiling actually occurs? Criminologists are still debating how to answer that question. Should we take the percentage of traffic stops for a certain racial group and hold it against that group’s percentage in the population? Or should it be the percentage of stops vs. the actual driving presence of that group in the area where the arrests were made? If we are talking about the percentage of people arrested for a certain crime, can we consider the rate at which others of their race have been picked up for that crime in the past, or is that data always tainted by the racism of the cops who arrested them?

... No one worth hearing argues that race should be the only factor in decisionmaking, but should race never be part of a criminal profile?

... Perhaps police are more likely to search minorities because they commit a disproportionate number of crimes.

Id.; see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 983-87 (1999) (reviewing social science research on the often subconscious impact of categorization, schemas, and stereotyping on police work).

28. See Harris, *Statistics*, *supra* note 12; Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333 (1998); Thompson, *supra* note 27.

community as a whole had been attacked by the officers involved in the individual cases.²⁹ The individuals' insult, of course, stemmed in part from their sense that unjustified stops, searches, or arrests are humiliating in themselves.³⁰ But, they were also independently wounded by their sense that their individuality had been ignored, their racial group membership being enough to subject them to suspicion.³¹ Correspondingly, the insult to the part of themselves identifying with their racial group amplified their pain.³² For similar reasons, other blacks saw the incidents as insults directed to the entire African-American community.³³ In short, the rage inspired by racial profiling

29. See Randall Kennedy, *Race, Crime, and the Law* 151 (1997) (“[One] reason for more tightly circumscribing police use of race-dependent criteria is that the current permissive regime nourishes powerful feelings of racial grievance against law enforcement that are prevalent in every strata of black communities.”). Professor Henry Louis Gates, Jr., summarizes:

Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don't have more than one story to tell. Erroll McDonald, one of the few prominent blacks in publishing, tells of renting a Jaguar in New Orleans and being stopped by the police—simply “to show cause why I shouldn't be deemed a problematic Negro in a possibly stolen car.” Wynton Marsalis says, “Shit, the police slapped me upside the head when I was in high school. I wasn't Wynton Marsalis then. I was just another nigger standing out somewhere on the street whose head could be slapped and did get slapped.” The crime novelist Walter Mosley recalls, “When I was a kid in Los Angeles, they used to spot me all the time, beat on me, follow me around, tell me that I was stealing things. Nor does William Julius Wilson wonder why he was stopped near a small New England town by a policeman who wanted to know what he was doing in those parts.

Id. at 151-52 (citation omitted).

30. See Andrew E. Taslitz, *Respect and Justice: The Fourth Amendment from the Bottom Up* (2002) (unpublished manuscript, on file with the author) [hereinafter Taslitz, *Bottom Up*] (describing social science and political theory on why interference with Fourth Amendment freedoms is humiliating); Andrew E. Taslitz, *Respect and the Fourth Amendment* (2002) (unpublished manuscript, on file with author) [hereinafter Taslitz, *Respect*] (linking philosophical notions of respect and humiliation to police conduct).

31. See Kennedy, *supra* note 29, at 157:

By too easily permitting the police to use race as an indicia of suspiciousness, courts also derogate from the idea that individuals should be judged on the basis of their own, particular conduct and not on the basis—not even *partly* on the basis of racial generalizations. Race-dependent policing erodes the difficult-to-maintain habit of individualizing persons and strengthens the reflex of lumping people together according to gross racial categories.

Id.; see also Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. Rev. 739, 746-58 (1999) [hereinafter Taslitz, *Racist Personality*] (arguing that social science and philosophy support human need for individualized assessments of character and wrongdoing).

32. See Taslitz, *Racist Personality*, *supra* note 31, at 746-58 (stating that our sense of individual uniqueness is partly constituted by our sense of identification with our own particular combination of personally salient social groups).

33. See *id.* at 758-65 (explaining why racial groups may perceive injuries to individual group members as group injuries and vice-versa).

stems from the sense of state-sanctioned disrespect for the individual victims and their racial community.³⁴

Curiously, words like “insult,” “respect,” and “humiliation” very rarely make their way into Supreme Court Fourth Amendment case law.³⁵ Even more rarely do these concepts play any role in the Court’s conclusions. As early as 1968—the same year of the race riots in Cincinnati and other major cities—the Court held, in *Terry v. Ohio*,³⁶ that the police could engage in investigatory stops on less than probable cause, reasonable suspicion being sufficient. The Court recognized in passing that stops amounting to perceived wholesale harassment were “a major source of friction between the police and minority groups.”³⁷ Furthermore, the Court acknowledged that these tensions could be exacerbated by actions “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”³⁸ Nevertheless, the Court considered the exclusionary rule a “futile protest” against such practices that might “exact a high toll in human injury and frustration of efforts to prevent crime.”³⁹ The Court moved quickly on to refining and defending its new stop and frisk rule, a rule crafted as a result of the Court’s balancing the beat officer’s needs for safety and “swift action predicated upon . . . on-the-spot observations” against the “brief” intrusions of a stop or frisk.⁴⁰

The patterns established in *Terry* have continued to guide the Court’s attitude toward respect as a Fourth Amendment value. The Court crafts constitutional search-and-seizure rules based on balancing the state’s need for the evidence against the degree of intrusion into the individual’s interests in privacy, property, and free movement.⁴¹ But, as so stated, this is a lopsided process: society’s need for crime control is weighed only against the injury to an individual.⁴² It is true that the Court does consider how other

34. For elaboration on the meaning of respect, see *infra* text accompanying notes 112-72. For a more in-depth analysis, see Taslitz, *Respect*, *supra* note 30.

35. *But see* Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (mentioning, with little explanation of its significance, the importance of considering the degree of intrusiveness upon “personal privacy and indeed *even personal dignity*” (emphasis added)); *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (a frisk is a “serious intrusion upon the sanctity of the person, *which may inflict great indignity and arouse strong resentment.*” (emphasis added)).

36. 392 U.S. 1 (1968).

37. *Id.* at 14 n.11 (quotation and citation omitted).

38. *Id.* at 15 n.11 (quotations and citations omitted).

39. *Id.* at 15.

40. *See id.* at 20-22. For a more detailed analysis of *Terry*, see Taslitz, *Respect*, *supra* note 30, and for a summary of *Terry*’s progeny, see Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 334-49.

41. *See* Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 150-58 (describing the Court’s “categorical reasonableness balancing” analytical method).

42. *See id.* at 150, 350 (showing that the Court weighs governmental need against

similarly situated future suspects might be treated.⁴³ But the Court generally either does not consider, or only summarily addresses, the more broadly defined social costs of a search or seizure, such as the impact on racial or ethnic communities.⁴⁴ Nor does the Court, outside of searches of the home, generally give individuals' interests much weight in the balance, there being a few important exceptions.⁴⁵ Notably, the Court's privileging of interests in the home means that

an *individual's interests*).

43. For example, in considering the constitutionality of a suspicion-less, random drug-testing program for high school athletes, the Court looked to what it deemed to be the likely experiences of most high school athletes, not only the experiences of the athletes in the case then at hand. "School sports are not for the bashful. They require 'suing up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). Just as the Court drew on the supposed experiences of other similarly-situated high school athletes, its approval of the Vernonia School District program suggests that reasonably similar programs affecting athletes at other high schools will also be constitutional.

Conversely, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), discussed below, the Court concluded that the impact of police conduct on the individual arrested was significant, but found the conduct constitutional because it believed that there would be few others so victimized and that the political process would prevent a rise in victimizations. *See infra* text accompanying notes 50-61 (analyzing *Atwater*). This reasoning does not involve considering the impact on *an individual* at all. Rather, the *Atwater* Court considered only the cumulative impact on similarly situated individuals, clearly weighing the needs of the majority (who benefit from generally discretionary and active law enforcement but do not pay its costs) against the harms to the minority (the few who suffered in ways similar to Ms. Atwater). This analytical style differs from that in *Vernonia*, where the Court at least considered the impact of random searches on *both* the individuals before it *and* similarly-situated individuals. In neither reasoning style, however, does the Court seriously consider the impact on those not similarly-situated, for example, on whether high school students not in athletics will lose trust in their teachers or decide not to pursue athletics; on the athletes' parents who may see the distrust of their children as insulting; or on children generally becoming so accustomed to such invasions that we raise a populace with ever-declining expectations of privacy.

The Court will soon have another opportunity to consider these issues. *See Earls ex rel. Earls v. Bd. of Educ. Of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264 (10th Cir. 2001), *cert. granted* 122 S. Ct. 509 (Nov. 8, 2001) (raising question of Fourth Amendment reasonableness of public high school's policy of suspicionless urinalysis drug testing in competitive extracurricular activities).

44. *See Whren v. United States*, 517 U.S. 806, 813-19 (1996) (dismissing inquiry into racial pretext under the Fourth Amendment); *infra* text accompanying notes 259-75 (examining Court's limited notion of social costs in its recent decision in *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

45. *See* Erik G. Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 787, 829-31 (1999) [hereinafter Luna, *Sovereignty and Suspicion*] (making analogous point); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1328-30 (1990) [hereinafter Maclin, *Right of Locomotion*] (stating that search and seizure protections generally plummet outside the home); *see also* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 St. John's L. Rev. 975 (1998) [hereinafter Harris, *Categorical Judgments*]; Taslitz, *Respect, supra* note 30.

the interest in freedom of movement—which definitionally happens outside the home—rarely gets significant weight, unless the intrusion effectively rises to the level of an arrest, just as the *Terry* Court viewed a stop of a pedestrian as a relatively minimal interference,⁴⁶ despite its brief protestations to the contrary. This assessment undervalues the critical role that free movement plays in human autonomy, the sense of making your own informed life choices as part of human dignity.⁴⁷

Correspondingly, the Court usually gives little weight to human emotion in general, either ignoring it, adopting a mode of reasoning rendering it irrelevant, or minimizing its importance.⁴⁸ Humiliation, of course, need not be based on disparate racial treatment, though that has a special emotional power.⁴⁹ For example, in *Atwater v. City of Lago Vista*,⁵⁰ the Court expressly considered the importance of the emotion of humiliation where race discrimination was not an issue. There, a police officer arrested a woman who drove without having fastened her seat belt or those of her two children who were riding with her.⁵¹ She was handcuffed, booked, and held in a jail cell, her terrified children rescued from further participation in the ordeal by a nearby friend who heard what was happening and came to care for the kids.⁵² The Court agreed that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.”⁵³ Moreover, agreed the Court, “Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”⁵⁴ Nevertheless, the Court found Atwater’s arrest “no more ‘harmful to . . . privacy or . . . physical interests’ than the

46. See Maclin, *Right of Locomotion*, *supra* note 45, at 1328-30 (describing the connection between home and minimal weight given to freedom of movement); see also Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 334-40 (detailing circumstances in which an interference with free movement rises to the level of an effective arrest, requiring probable cause).

47. See Taslitz, *Bottom Up*, *supra* note 30 (free movement and autonomy); Taslitz, *Respect*, *supra* note 30 (discussing the respect-autonomy connection and meaning).

48. See, e.g., *Atwater*, 532 U.S. at 354-55 (finding arrested seat-belt violator’s humiliation ultimately irrelevant to the Court’s decision); Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 452-53 (1990) (describing the fear and annoyance of motorists stopped at police sobriety checkpoints as minimal); *Terry v. Ohio*, 392 U.S. 1, 11 & n.5, 17 & n.13 (1968) (noting community resentment over stops and frisks). See generally Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 *Law & Contemp. Probs.* ___ (forthcoming 2002) [hereinafter Taslitz, *Twenty-First Century*] (discussing Court’s failure to understand the emotions underlying privacy concerns and their implications).

49. See Taslitz, *Respect*, *supra* note 30.

50. 532 U.S. 318 (2001).

51. *Id.* at 322-24.

52. *Id.* at 324.

53. *Id.* at 346-47.

54. *Id.* at 347.

normal custodial arrest."⁵⁵ The arrest and booking were "inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment."⁵⁶ In any event, the Court suggested, the invasions of Atwater's person were justified by probable cause and thus almost definitionally reasonable. Moreover, the Court assumed that if arrests became common for fine-only offenses, the political process would correct the problem. Perhaps more importantly, in the Court's view, the history leading up to the 1791 ratification of the Fourth Amendment did not reveal any prohibition of warrantless misdemeanor arrests not involving a breach of the peace.⁵⁷

Atwater revealed the extent to which the Court minimizes harmful emotions, especially humiliation, suffered by those who are searched and seized. Yet the Court's greater tone-deafness to issues of insult, humiliation, and disrespect is its failure to examine the ways in which the interests in privacy, property, and locomotion that the Fourth Amendment protects are worthy of such protection partly *because* they safeguard against humiliating emotional abuses. Privacy is essential to the flourishing of human relationships and free thought.⁵⁸ Property adds to the independence and security that give us a measure of freedom from state and private coercion.⁵⁹ Free movement—the

55. *Id.* at 354.

56. *Id.* at 355.

57. For a thorough analysis of the Court's "new originalist" approach to the Fourth Amendment and its flaws, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739 (2000). For critiques of the claim that the electoral process can readily be trusted to protect Fourth Amendment freedoms, see generally most of the essays other than those by Tracey L. Meares and Dan M. Kahan in *Urgent Times: Policing and Rights in Inner-City Communities* (Joshua Cohen & Joel Rogers eds., 1999) [hereinafter *Urgent Times*]. See generally Luna, *Sovereignty and Suspicion*, *supra* note 45.

58. See Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* 61-80 (1997) (explaining that without privacy, we feel weak and vulnerable; with privacy, we feel the independence and strength to resist conformity and exercise the autonomy to forge our own unique lifestyle); Julie C. Inness, *Privacy, Intimacy, and Isolation* 107-08 (1992) (stating that privacy promotes intimacy and the capacities for love, care, and like); Ferdinand David Schoeman, *Privacy and Social Freedom* (1992) (arguing that privacy enables us to express our innermost selves to selected others); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 Wis. Women's L.J. 3, 66 (2000) (claiming privacy allows for the creation and expression of our unique individual identity).

59. See Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* 17 (2000) ("Property promotes liberty by giving individuals the resources they need to create a home, engage in work, develop relationships with others, and live their lives on their own terms."). Singer argues that "[f]ailing to respect the property of another wrongs that person because it fails to treat the other person as one created in the image of God." *Id.* at 53; see also Joseph William Singer, *Entitlement: The Paradoxes of Property* 11, 23, 31-32, 131 (2000) (arguing that property rights help to promote human relationships that comprise a defensible form of social life, providing a setting in which other liberties—such as free speech, religious activity, and a private family life—can be exercised without undue government interference, thus also promoting autonomy, and allowing social relations among interdependent and free individuals to flourish).

right of locomotion—allows us to travel, work, visit friends, and participate in community and educational activities unmolested, in ways essential to human autonomy and diversity.⁶⁰ The inviolability of these interests is central to our sense that we are being treated with dignity.⁶¹

The Court's failure to explore the underlying value of dignity connecting various Fourth Amendment interests has led to constitutional rules that leave a wide range of activities and areas with little, if any, protection. Law enforcement may ignore no trespassing signs, snoop into buildings adjacent to residences, rummage through garbage bags, and obtain the telephone numbers dialed from homes.⁶² They may fly over homes in planes or helicopters to spy on barbecues or romantic interludes.⁶³ They may do all this without judicial

60. James Jasper has argued that an obsession with free movement has defined the American character:

Americans move in order to do better economically, to get in touch with the higher things in life, including their own souls, to adjust or flee their family ties, to pursue physical health, to escape what constrains them. This restlessness is especially characteristic of American men, who believe in a true inner self untouched by civilization, other people, or organized social life—a self they can move intact to a new location.

James M. Jasper, *Restless Nation: Starting Over in America*, at ix (2000); see also Houston A. Baker Jr., *Turning South Again: Re-thinking Modernism/Re-reading Booker T.* 79-98 (2001) (arguing black oppression in the United States has largely been defined by an effective incarceration, denying African-Americans free movement in many walks of life); John Harmon McElroy, *American Beliefs: What Keeps a Big Country and a Diverse People United* 86 (1999) (“[T]hese processes of freedom of movement and self-determination were dynamically related [in the United States]: self-determination presupposes a freedom to move about without government control.”); Maclin, *Right of Locomotion*, *supra* note 45 (arguing that the Fourth Amendment doctrine unduly limits the right to locomotion); Taslitz, *Bottom Up*, *supra* note 30 (arguing that the freedom of movement is central to the Fourth Amendment yet undervalued by the courts). Robin Blackburn amplifies the role of denying locomotion as central to social exclusion, specifically under slavery:

Any personal autonomy allowed to—or won—by the slaves was restricted by the ferocious labour demands of the plantation, by detailed rules of conduct and by the ever-present fear of savage sanctions in the case of any real or imagined transgression. Offenders would be mercilessly flogged and deprived of all petty privileges or extra rations. Slaves could not set foot outside the plantation without express permission; however, some of the slave ‘elite’ might regularly be able to obtain chits permitting them to go to neighbouring plantations or the local township, either to visit relatives or to buy or sell provisions.

Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern 1492-1800*, at 418 (1997). The history summarized by Blackburn is explored in greater detail as relevant to modern Fourth Amendment jurisprudence in Andrew E. Taslitz & Margaret L. Paris, *Law on the Street: Search and Seizure, Race and Respect in American Life* (forthcoming 2003) [hereinafter Taslitz & Paris, *Law on the Street*].

61. The ways in which the values protected by the Fourth Amendment are underweighted and misunderstood are discussed in Taslitz, *Bottom Up*, *supra* note 30; Taslitz, *Respect*, *supra* note 30.

62. See Luna, *Sovereignty and Suspicion*, *supra* note 45, at 827.

63. See *id.* at 827-28.

oversight and without probable cause.⁶⁴ In a post-*Terry* world, they can stop you for “voluntary encounters” with no cause at all, or for far more intrusive stops on “reasonable suspicion,”⁶⁵ a term meant to suggest *individualized suspicion* but in fact routinely interpreted by lower courts as established by categorical and stereotyped judgments.⁶⁶ The police can also seize cars when arrests are made, for example, during traffic stops, subsequently searching the car and any containers within it without any evidence that contraband or evidence of a crime will thereby be found.⁶⁷ Yet these decisions are likely radically inconsistent with the values and social practices of most Americans.⁶⁸

Another anomaly concerning the Court’s blindness toward issues of disrespect and humiliation arises in the Court’s use of history. After years of largely ignoring history in its Fourth Amendment cases, the Court has begun a “new originalism,” looking for what the common law prohibited or permitted in 1791,⁶⁹ much as it did in the *Atwater* case. But the Fourth Amendment has been incorporated against the states by the Fourteenth Amendment, and search and seizure concerns in the 1860s were far different from those of the 1790s.⁷⁰

64. *See id.* at 828.

65. Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 334-40.

66. Harris, *Categorical Judgments*, *supra* note 45, at 987-1012.

67. *See* Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 370-75 (summarizing the law on inventory searches, especially as to automobiles).

68. *See* Christopher Slobogin & Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 Law & Hum. Behav. 183 (1993) (describing an empirical study finding significant differences between the public’s privacy expectations and those recognized by the Court); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 Duke L.J. 727 (1993) (expanded explanation of their study); *see also* Norman J. Finkel, *Commonsense Justice: Jurors’ Notions of the Law* 96-111 (1995) (arguing that commonsense notions of privacy differ from the Court’s); John Gilliom, *Surveillance, Privacy, and the Law: Employee Drug Testing and the Politics of Social Control* 61-84 (1996) (arguing that workers’ estimation of the intrusiveness of drug-testing differs from the Court’s); Dorothy K. Kagehiro, *Psychological Research on the Fourth Amendment*, 1 Psychol. Sci. 197 (1990) (finding college students’ conceptions about when there is “consent” to search differ from the Court’s).

69. *See generally* Sklansky, *supra* note 57.

70. *See* Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 24-25, 396-404 (reviewing incorporation and its significance for determining the Fourth Amendment’s meaning today). *See generally*, Milton R. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* (2001) (reviewing history of how certain rights—including those recited in the Fourth Amendment—came to be recognized as so fundamental as to be incorporated against the states by the Fourteenth Amendment); Taslitz & Paris, *Law on the Street*, *supra* note 60 (reviewing in depth the history of antebellum and Reconstruction search and seizure practices and their implications for modern Fourth Amendment decisionmaking); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 Ga. St. U. L. Rev. 709 (1999) [hereinafter Taslitz, *Slaves No More!*] (summarizing history of search and seizure practices under slavery and Reconstruction leading up to the Fourteenth

Slavery in particular was defined by the humiliation involved in the complete denial of slaves' freedoms of movement, privacy, and property.⁷¹ A slave who could leave a plantation to find paying work elsewhere would, after all, be no slave at all.⁷² Similarly, slave cabins were subject to promiscuous searches by whites,⁷³ and slaves were, but did not own, property.⁷⁴ The humiliation that this denial of Fourth Amendment-like rights imposed on slaves was central to the Southern white sense of honor and of black dishonor that defined and sustained America's "peculiar institution."⁷⁵ Abolitionist whites, who sought to end slavery by distributing literature and preaching, also found their mail seized, their homes and businesses searched, and their persons assaulted or banished for trying to end slaves' subjection to their masters.⁷⁶ Racially motivated searches and seizures, and the humiliation caused by them, thus become critical to understanding what the Fourth Amendment means today.⁷⁷ This insight is one that is entirely missing from the Court's opinions.⁷⁸

Nor does the Court generally use history in another way: as a source of experience helpful in understanding modern problems.⁷⁹

Amendment's ratification and illustrating some selected implications of that history for modern Fourth Amendment doctrine).

71. See Taslitz, *Slaves No More!*, *supra* note 70, at 738-56 (defending this point); see also Taslitz & Paris, *Law on the Street*, *supra* note 60 (providing a similar but more extended defense).

72. See Taslitz, *Slaves No More!*, *supra* note 70, at 714-15, 740-41.

73. See Michael Wayne, *Death of an Overseer: Reopening a Murder Investigation from the Plantation South* 96 (2001) ("Servants . . . warned other slaves when their cabins were to be searched . . ."); accord John W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* 154 (rev. ed. 1979) ("The black autobiographers testified that many white men considered every slave cabin as a house of ill fame."); James Oakes, *Slavery and Freedom: An Interpretation of the Old South* 145 (1990) ("Slave cabins were not simply built to the master's specifications, they were open to periodic inspections.").

74. See Thomas D. Morris, *Southern Slavery and the Law 1619-1860*, at 61-80 (1996) (slaves as property); Jenny Bourne Wahl, *The Bondman's Burden: An Economic Analysis of the Common Law of Southern Slavery* 157-58, 256 n.133 (1998) (noting that slaves could not own property, but could sometimes control it at the master's sufferance).

75. See Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. Rev. 1283, 1316-22 (2000) [hereinafter Taslitz, *Mutual Indifference*] (honor, dishonor, and black slavery).

76. See *id.* at 1343-51, 1368-74 (mob violence and speech suppression); Taslitz, *Slaves No More!*, *supra* note 70, at 738-39 (mail seizures, business and home searches, and banishments).

77. Taslitz, *Slaves No More!*, *supra* note 70, at 771-76.

78. See *id.* at 761-76 (illustrating the Court's treatment of three modern search and seizure problems—police "testilying," police lies or indifference to truth in warrant applications, and racial pretext).

79. See Richard A. Posner, *Frontiers of Legal Theory* 159-60 (2001).

There is a big difference between relying on the past either because we lack good information about how to cope with the present and future or because legal innovation involves heavy transitional costs . . . and treating the past as normative [simply because it is past]. . . .

This function can be served by examining more recent history in addition to that of the eighteenth and nineteenth centuries.⁸⁰ Racial profiling, for example, we will soon see, had been a mid-twentieth-century problem for many Asian Americans in ways that shed important light on the current manifestations of the problem.⁸¹

[E]vents in the past can [also] create commitments for the future Constitutions and statutes can be thought of as kinds of contract But these are at best analogies

A look into history will often bring to light information relevant to dealing with the present and the future. But when this happens, it is the information itself that should shape our response to current problems, rather than the past as such; the past is just a data source.

Id.

I am generally sympathetic with Posner's views on the role of history in constitutional interpretation, but think that he goes too far in suggesting that the past has *no* normative authority simply because it is the past. The past does not dictate constitutional outcomes, nor should we be bound by some supposed narrow, subjective intentions of the framers. *See also* Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 30-31 (1994) (critiquing these positions). But, when the past culminates in an authoritative document such as a constitutional amendment, the past has special force precisely because it helps to reveal our continuing commitments as a people to certain principles. *See id.* at 30-31, 71, 208 (viewing the "Fourteenth Amendment as a moral and political guide for reconstructive legislation aimed at eradicating illegitimate social subordination"); *see also* Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 45-48, 91-102 (2001) (defining "peoplehood" and a "commitmentarian" approach to constitutional interpretation); Taslitz, *Respect, supra* note 30 (describing the implications for a Fourth Amendment jurisprudence of respect). In this Article, however, my differences with Posner are less important, because the four historical episodes I recount here did not result in authoritative documents and thus fit in the category of a relevant and helpful "data source."

80. *See* Taslitz, *Respect, supra* note 30, at 23-44 (defending the use of history that does *not* result in an authoritative document relevant to modern constitutional interpretation and explaining the respective roles of social practices, principles, and history).

81. *See infra* Part II.B. Other scholars have noted the instructive connection between the Japanese-American internment and modern racial profiling, but none has done so in more than a few paragraphs, as a catchy analogy to draw the reader into the authors' discussions of other matters. *See, e.g.,* Kennedy, *supra* note 29 at 138 ("Blacks are not the only racial minority to confront racially selective policing. The most dramatic and extensive single episode in which authorities used race as an indicia of potential criminality involved the wholesale detention of persons of Japanese ancestry during World War II.").

In 1942, over 120,000 Americans were stripped of their businesses and their homes and incarcerated for the duration of World War II. They had committed no offense. They were convicted of no crime. They were suspected, subjected to curfews, arrested, had their property confiscated, and finally imprisoned because of the color of their skin and their national origin or the national origin of their parents.

The internment of Japanese Americans in 1942 was an egregious example of what can happen when skin color and national origin are substituted for evidence and become, by themselves, a basis for suspicion and punishment.

But it was not the only egregious example.

Meeks, *Driving While Black, supra* note 18, at xi; *see also* Frank Wu, *Civil Liberties, National Security, and the Precedent of the Japanese-American Internment*, __ Crim. Just __ (forthcoming summer 2002) (brief essay directed toward criminal law

Correspondingly, that history helps in better understanding why the modern Court often gives too little weight to the values protected by the Fourth Amendment in contexts unconnected to race.

The Court's undervaluing of Fourth Amendment interests leads it to abandon its role of setting "a constitutional floor protecting individuals and constraining government."⁸² Rather than recognizing "zones of sovereignty" essential to honoring the minimum equal worth of all human beings, and thereby subjecting them to invasions only for ample reasons based on highly trustworthy evidence,⁸³ the Court creates "zones of contingency," easily invaded for reasons of administrative convenience or a speculative connection to crime control.⁸⁴ In so doing, the Court makes explicit or implicit judgments of institutional competency, routinely deferring to the experience and wisdom of the Executive Branch (most often the police) or the Legislative Branch,⁸⁵ as in *Atwater*,⁸⁶ where the Court assumed that

practitioners and discerning the application of lessons learned from the internment cases to modern racial profiling, albeit not doing so through the lens of the Fourth Amendment).

In this Article, I not only tell the internment story in more detail, but I try to do so by concentrating on the sorts of interests that the Fourth Amendment is designed to protect—free movement, privacy, and property—to illustrate the advantages of viewing the story through that Amendment's eyes. Moreover, I examine the ways in which the internment and modern racial profiling violate the principles of a jurisprudence of respect, hoping thereby more clearly to review the similarities between the two phenomena. Finally, the chronological distance but emotional power of the internment helps build empathy for others' suffering, which is too often lacking from the current Court's Fourth Amendment jurisprudence.

82. Luna, *Sovereignty and Suspicion*, *supra* note 45, at 787.

83. *See id.* at 832 ("[Z]ones of individual sovereignty . . . proclaims to the state that it may freely govern to the point where individual sovereignty begins . . . but it may then go no further."). Luna believes that his idea of "zones of sovereignty" is an alternative to privacy theory. *See id.* at 826-32. But I see the term more as a reminder of the limits created by privacy theory, properly understood. *See* Taslitz, *Twenty-First Century*, *supra* note 48 (discussing human emotion and the wisdom but incompleteness of privacy theory); Taslitz, *Bottom Up*, *supra* note 30 (describing the social functions served by privacy, property, and free movement in Fourth Amendment jurisprudence).

84. The term "zones of contingency" is mine. *See* Luna, *Sovereignty and Suspicion*, *supra* note 45, at 825-26 ("The Court has interpreted privacy to be a question of fact rather than a constitutional value. As such, privacy becomes a mere interest which is weighed against and can be defeated by other interests, even rather pedantic policy considerations.").

85. *See* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn From Vagueness Doctrine?*, 3 U. Pa. J. Const. L. 398 (2001) (arguing that the Court's Fourth Amendment doctrine too easily defers to police discretion); *accord* Taslitz & Paris, *Law on the Street*, *supra* note 60 (discussing the appropriate role of the legislature in search and seizure law); Erik Luna, *Constitutional Road Maps*, 90 J. Crim. L. & Criminology 1125 (2000) [hereinafter Luna, *Constitutional Roadmaps*] (noting that the Court must do a better job in constitutional criminal procedure of encouraging inter-branch dialogue and assessing the respective competencies of the three branches of government); Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107 (2000) [hereinafter Luna, *Transparent*] (arguing that creativity is necessary in creating institutions that will involve an active citizenry in the decisionmaking and monitoring

political forces would prod the legislature into correcting any widespread problem of arrests for fine-only offenses. There is an important insight in this deference: all three branches of government are bound by the Fourth Amendment, and one branch may be better-equipped than another to offer protection in a particular way.⁸⁷ But if the Fourth Amendment protects at least certain aspects of treatment necessary to accord each person his or her equal worth as a human being,⁸⁸ then subjecting Atwater to the “pointless indignity” of arrest was an unjustified invasion of her constitutional rights even if no one else suffered such an indignity.⁸⁹ Furthermore, whether one branch is better equipped than another to make certain judgments is a complex and contextual question.⁹⁰ Yet, the Court routinely defers to the executive and legislative branches without careful analysis.⁹¹ Bromides replace reason.

The Court’s refusal to examine in any depth why black communities feel humiliated by police stops, how slavery became defined by denials of Fourth-Amendment-style freedoms, and how minority communities have modernly been plagued by significant restrictions on privacy and locomotion reflects a general unwillingness of the

of the executive branch concerning searches and seizures)

86. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-55 (2001).

87. *See Luna, Constitutional Roadmaps, supra* note 85, at 1196-1206 (discussing the respective competencies of the judiciary and the legislature); *Luna, Sovereignty and Suspicion, supra* note 45 (discussing the relative competence of the citizenry and the executive branch); *infra* notes 276-378 and accompanying text (describing the failures of the executive branch to safeguard Fourth Amendment freedoms during World War II); *infra* notes 521-635 and accompanying text (noting wise judicial deference to the executive branch in the *Elian Gonzales* case).

88. *See Taslitz, Respect, supra* note 30, at 20-28.

89. *See Atwater*, 532 U.S. at 347; *Luna, Sovereignty and Suspicion, supra* note 45, at 832 (“Sovereignty theory articulates an inviolate baseline of rights for all citizens, prohibiting both blunt intrusions and stealthy encroachments, and creat[ing] an embankment on the slippery slope . . . shar[ing] this commitment to . . . individual rights.” (emphasis added)). That the individual’s rights must remain inviolate does not mean, however, that the costs and benefits of state action imposed on salient sub-groups and society generally should not be considered in deciding what rights the individual should hold. *See generally Taslitz, Respect, supra* note 30 (articulating a theory of how to go about creating respect-recognizing rights). Indeed, part of the point of this Article is to illustrate how the impact of search and seizure policies on certain social sub-groups and on the inseparable connection between the individual and his salient social groups needs greater attention in crafting individual rights. Moreover, a group can gain a voice via the rights granted to its individual members. *See id.* But, that does not mean that an individual suffering an acknowledged injury to her dignity can be ignored or readily scarified to the greater good. *See Luna, Sovereignty and Suspicion, supra* note 45, at 832-37 (arguing that minimizing such sacrifice is the whole point of “zones of sovereignty” and a “moral reading” of the Constitution).

90. *See Luna, Constitutional Roadmaps, supra* note 85, at 1196-1206 (reviewing some of these contextual complexities); *infra* text accompanying notes 276-380, 444-635 (demonstrating such complexities in the Japanese-American internment and *Elian Gonzales* cases).

91. *See supra* notes 85-86 and accompanying text.

Court to listen. A strategy of listening to those most vulnerable to police abuses can inform the Court's judgments about how best to protect us all.⁹² There is reason to believe, for example, that many African-Americans may perceive certain evidence as raising different inferences, and meriting different weight, than might most whites.⁹³ Many African-Americans also might perceive certain police conduct as more invasive than do most whites.⁹⁴ Understanding why this is so may lead a Court to decide at times to privilege the black perspective.⁹⁵ This need not involve the Court in a divisive enterprise, for if that perspective is more protective of Fourth Amendment rights than the "white perspective," then applying the former perspective to *all* searches or seizures regardless of the suspect's race protects all persons equally.⁹⁶ That does not mean that the "black perspective" (I leave aside essentialism objections for the moment)⁹⁷ always prevails, but it is an important source of information. Moreover, often there is little reason to believe that racial or ethnic group perspectives will significantly vary from that of the white majority.⁹⁸ Thus, most Americans probably assign greater weight than does the Court to the privacy interest in cars.⁹⁹ Yet, the Court fails to listen in these

92. See Iris Marion Young, *Justice and the Politics of Difference* 5 (1990) (articulating the strategy of listening); Melissa S. Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* 12 (1998) (refining this strategy); Taslitz, *Respect*, *supra* note 30, at 23-44 (adapting this strategy for Fourth Amendment analysis).

93. See *infra* Part II.A; cf. Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. Pub. Int. L.J. 219 (1998) [hereinafter Taslitz, *Black Judges on Justice*] (discussing the nature of such differences and how they may have played a role in the O.J. Simpson case); see also Tracey L. Mearns & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. Crim. L. & Criminology 733, 775-93 (2000). This work reviews recent social science research suggesting that, at least in New York City, "in high-crime urban communities where the population is disproportionately minority, flight from an identifiable police officer is a very poor indicator that crime is afoot." *Id.* at 792. This is a finding consistent with the idea that low income minority group members who are entirely innocent of any crime are more likely than others to regard contact with the police as dangerous. The problem of flight from the police is addressed *infra* Part II.A.

94. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 406-10 (summarizing the scholarly literature on this point).

95. See Taslitz, *Respect*, *supra* note 30, at 23-44 (explaining when, why, and how a court may decide which perspective to privilege).

96. Cf. Caroline A. Forell & Donna M. Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man*, at xvii-19 (2000) (defending application of a uniform reasonable woman standard to men and women alike in all areas of law in which gender is salient); Taslitz & Paris, *Law on the Street*, *supra* note 60 (considering the wisdom of applying a uniform "African-American perspective" to suspects of all races in making decisions in certain classes of search and seizure cases).

97. I treat those objections elsewhere. See Taslitz, *Respect*, *supra* note 30, at 80 n.324.

98. See Taslitz & Paris, *Law on the Street*, *supra* note 60 (examining evidence and implications of this observation).

99. See generally David A. Harris, *Car Wars: The Fourth Amendment's Death on*

instances, too rarely exploring social science or other forms of data on current community attitudes, values, and expectations seriously.¹⁰⁰

That sub-communities may have different perspectives, of course raises the problem of how we determine whose perspective should prevail. Similarly, even if most Americans agree on an issue, their perhaps transient and uninformed views should not necessarily prevail.¹⁰¹ Making these choices requires exploring not merely disrespect as an emotion, but also as a form of treatment—a way of acting that can be understood as insulting to human dignity, even if particular suspects do not actually feel insulted.¹⁰² Likewise, treatment can be respectful even if irrational suspects and observers feel abused.¹⁰³ The mere emotion of feeling disrespected is a cost always to be considered, but it is sometimes a cost that, for reasons of political morality, is worth sinking.¹⁰⁴ I will return shortly to how we can craft such an “objective” component to a respect-based jurisprudence. For now, I simply note that it too requires starting by listening to the Reconstruction history, as well as the modern experiences, of the disempowered to inform our judgments of what political morality requires.¹⁰⁵

Attending carefully to the national conversation about racial profiling thus prods a line of thinking that suggests a new Fourth Amendment jurisprudence of respect. Such a jurisprudence would be attentive to the framers of the nineteenth century as well as the eighteenth; to modern search and seizure history as a source of enlightening experience; to social science and other sources of

the Highway, 66 Geo. Wash. L. Rev. 556 (1998) [hereinafter Harris, *Car Wars*] (arguing that the Court offers little privacy protection against car searches, contrary to popular ideas of justice).

100. See *infra* Part II.A (illustrating this point in a recent United States Supreme Court case). The availability of social science, how to use it, and the definitions and uses of “other forms of data” on community attitudes are examined in Taslitz, *Respect*, *supra* note 30, at 80 n.324. See Meares & Harcourt, *supra* note 93, at 735-36 (making similar point).

101. See Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 12, 34, 42 (1996) (arguing that deliberation is “integral to the ideal of republican government as the Founders understood it” and requires an informed citizenry interacting in appropriately designed public fora protective of minority rights and conducive to the “self-correcting character of deliberation—its capacity to encourage citizens and officials to change their minds”); John Stuart Mill, *Considerations on Representative Government in 19 Collected Writings of John Stuart Mill* 68, 72 (1977) (noting that in political discussion, a citizen is “called upon . . . to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the general good”).

102. Taslitz, *Respect*, *supra* note 30, at 18-22; see *infra* text accompanying notes 112-56.

103. See Taslitz, *Respect*, *supra* note 30, at 19-20 (addressing the problem of hyper-sensitive individuals and groups).

104. See *infra* Part II.D.

105. See *infra* text accompanying notes 112-56.

majority and minority attitudes toward privacy, property, and free movement; to the binding nature of the Fourth Amendment on all three branches of government and the relative competence of each branch; to the wider social costs of searches and seizures; and to the central value of human dignity.¹⁰⁶ Moreover, a respect-based jurisprudence embraces the relevance of human emotion and the importance to individual worth of group identity.¹⁰⁷ Additionally, such a jurisprudence starts by listening to the voices of marginalized groups who are likely to offer special insights on how to promote respectful treatment. But, majority voices must be heard as well, the goal being to protect the equal worth of *all* human beings.¹⁰⁸

Promoting respect is not the only concern of the Fourth Amendment. Balancing will still be necessary.¹⁰⁹ Nor is it always clear what best promotes respect.¹¹⁰ I make no claims that a respect-based jurisprudence will lead to mechanical clarity. But, it will promote more informed conversations, and should alter outcomes by putting human dignity and the realities of historical and modern day experience at center stage.¹¹¹ I seek to start that process here by recounting four stories of Fourth Amendment disrespect—that of Judge Harold Baer, the Japanese-American internment, a racial roundup in Oneonta, New York, and Elian Gonzales and Miami's Cuban-American community.

B. Defining Terms

Up until now, I have used the words “insult,” “humiliation,” and “disrespect” interchangeably. For my purposes, they are equivalent, though endless quibbles about their respective meanings are possible.¹¹² In this section, I define my terms, encapsulating concepts that I have more fully developed elsewhere.

106. See generally Taslitz, *Respect*, *supra* note 30 (describing the philosophical defense of these principles); Taslitz, *Bottom Up*, *supra* note 30 (social science defense); Taslitz & Paris, *Law on the Street*, *supra* note 60 (noting the defense rooted in American history).

107. See Taslitz, *Twenty-First Century*, *supra* note 48; see also Andrew E. Taslitz, *Revitalizing Freedom of Movement: The Fourth Amendment and the American Passions* (2002) (unpublished manuscript, on file with author) [hereinafter *American Passions*].

108. See Taslitz, *Respect*, *supra* note 30, at 34-44.

109. See *id.* at 58.

110. Cf. Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 *Margins* 305, 330-39 (2001) [hereinafter Taslitz, *Inadequacies of Civil Society*] (positing a hypothetical in which, at first blush, any choice seems to make some racial or ethnic group understandably feel insulted).

111. See Guttman & Thompson, *supra* note 101, at 12, 34, 42, 97-101 (discussing the importance of conversational, deliberative exchange); Taslitz, *Respect*, *supra* note 30, at 52-58 (discussing the practical differences in process and outcomes made by a jurisprudence of respect).

112. On such quibbles, see Taslitz, *Respect*, *supra* note 30, at 20-22, 70-71 nn. 158-

“Respect,” as I define the term, means “fitting treatment.”¹¹³ To treat someone fittingly is to treat them in accordance with his or her status concerning some specified attribute.¹¹⁴ “Any lesser treatment is insulting,” humiliating, or disrespectful.¹¹⁵ In one sense, respect is an objective question: the status either exists or it does not apart from the feelings of the participants.¹¹⁶ Thus, a trustworthy worker is treated unfittingly if his co-workers act as if he is in fact *not* trustworthy. The treatment is ill-fitting even if both they and he subjectively but incorrectly believe that he is *untrustworthy*, for example, wrongly believing that he will be tardy or inattentive on his job.¹¹⁷

Human rights theorists generally agree that in some respect all humans are alike, thus all sharing the same status and therefore requiring treatment befitting that status.¹¹⁸ Theorists debate what attributes of sameness all humans share, but most often it is some variation on the idea that we are all capable of rationality and autonomy.¹¹⁹ These qualities, theorists also largely agree, entail certain rights or entitlements, without which our status as humans is ignored.¹²⁰ The case is easily made that these entitlements include the Fourth Amendment-style rights to privacy, property, and locomotion.¹²¹ Moreover, many fittingness theorists agree that

78, Taslitz, *Racist Personality*, *supra* note 31, at 780-85, and Taslitz, *Inadequacies of Civil Society*, *supra* note 110, at 40-45.

113. See Geoffrey Cupit, *Justice as Fittingness* 1-2, 15-28 (1996). The ideas reviewed in the definitional section of this Article are defended in more depth in Taslitz, *Respect*, *supra* note 30.

114. See Cupit, *supra* note 113, at 1-2, 15-28.

115. Taslitz, *Respect*, *supra* note 30, at 20-21.

116. See Cupit, *supra* note 113, at 15.

117. See *id.*

118. See John E. Coons & Patrick M. Brennan, *By Nature Equal: The Anatomy of a Western Insight* 3-15 (1999) (arguing that all rights in Western political thought are justified by an appeal to an idea of a “distinctive existent” quality shared in equal measure by all humans); Avishai Margalit, *The Decent Society* 57-112 (Naomi Goldblum trans., 1996) (reviewing and critiquing the major theories concerning the shared traits that justify respect for all humans).

119. See Coons & Brennan, *supra* note 118, at 13, 116-22 (summarizing and contrasting Kantian theory and an alternative theory of capacity to achieve moral goodness); Michael J. Perry, *The Idea Of Human Rights: Four Inquiries* 11-41 (1998) (arguing that the idea of human rights is “ineliminably religious”); William F. Schultz, *In Our Own Best Interest: How Defending Human Rights Benefits Us All* 17-37 (2001) (offering pragmatic arguments for accepting the idea of human rights and equality).

120. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 U.C.L.A. L. Rev. 1659, 1665-70 (1992).

121. See, e.g., Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* 73-75, 134-39 (1999) (noting that privacy, property, and freedom of movement are recognized as universal rights); Martha Minow, *Equality and the Bill of Rights*, in *The Constitution of Rights: Human Dignity and American Values* 118-28 (Michael J. Meyer & William A. Parent eds., 1992) (human dignity and equality). I need not address whether the rights that I identify are better thought of

because these rights act partly in service to human autonomy, they will result in diversity in life choices.¹²² An embrace of the differences among us that are central to each individual's identity is thus also implied by concern for human respect.¹²³ Furthermore, because individual identity is so often rooted in group identity, respect requires fitting treatment for both the individual and his salient social groups.¹²⁴ Finally, the status of being human requires, in addition to honoring our uniqueness, honoring our right to belong as well.¹²⁵ Specifically, every human being has a right to belong to some political society.¹²⁶ Those living under the rule of such a society, but treated as less than full members—as second-class citizens—are therefore also denied respect.¹²⁷

Respect or its denial, disrespect, must be distinguished from the emotion of *feeling* disrespected, insulted, or humiliated, a feeling that dominated much of my discussion in Part I.A., which relied only implicitly on the feeling/actuality of disrespect distinction that I now make explicit.¹²⁸ As the trustworthy employer example demonstrated,

as “American” than “universal” human rights because, in this instance, I believe that they are both the same. See Taslitz & Paris, *Law on the Street*, *supra* note 60 (reviewing relevant aspects of American history), though their particular manifestation in our political culture may have an American “spin.” See generally Taslitz, *American Passions*, *supra* note 107 (tracing what is distinctive about the American conception of the right to freedom of movement).

122. See R.A. Duff, *Punishment, Communication, and Community* 37 (2001) (arguing that liberal states should “leave individuals free to determine and pursue their own diverse conceptions of the good”). Duff recognizes the many legitimate criticisms of liberalism by communitarians, among others, and seeks to address those criticisms by the crafting of a “liberal legal community.” *Id.* at 35-73.

123. See Taslitz, *Racist Personality*, *supra* note 31, at 746-52.

124. See *id.* at 758-65 (making a similar point in the context of hate crimes); see also Margalit, *supra* note 118, at 135-38, 140-42, 153, 158-61, 167-69 (arguing that the most common and concrete form of humiliation—a form that therefore effectively defines the term—is the rejection of the “encompassing groups” that shape each of our lives as human beings). Political scientist Iris Marion Young expresses a similar sentiment:

Oppression happens to social groups While groups do not exist apart from individuals, they are socially prior to individuals, because people's identities are partly constituted by their group affinities. Social groups reflect ways that people identify themselves and others, which lead them to associate with some people more than others, and to treat others as different. Groups are identified in relation to one another. Their existence is fluid and often shifting, but nevertheless real.

Young, *supra* note 92, at 9.

125. See Margalit, *supra* note 118, at 135-38, 140-42, 153, 158-61 (making analogous point). See generally Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (1989) (arguing that equal citizenship turns on being treated as if you belong).

126. See Margalit, *supra* note 118, at 137-38, 140-42, 153, 158-61, 167-69.

127. See *id.*

128. *Id.* at 9.

Humiliation is any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured. This is a normative rather than a psychological sense of humiliation. On the one

one can be insulted without feeling so.¹²⁹ Correspondingly, one can feel insulted though there is no justification for that feeling.¹³⁰ For example, had the worker believed himself to be trustworthy when he was not, his co-workers' treatment of him as untrustworthy would have been justified.

Nevertheless, individuals' and groups' subjective sense of insult matters—even when those feelings are unjustified—for several reasons. First, conduct demonstrating some minimal degree of empathy and concern for our fellows' well being is also necessary to honoring their status as full and equal human beings.¹³¹ Indeed, history shows that eliminating empathy for certain others is essential to subjugating them, the antebellum slave South's treatment of African-American slaves and Nazi Germany's treatment of the Jews being two obvious examples.¹³²

hand, the normative sense does not entail that the person who has been provided with a sound reason for feeling humiliated actually feels that way. On the other hand, the psychological sense of humiliation does not entail that the person who feels humiliated has a sound reason for this feeling.

Id.

129. See *id.* at 9, 120-25. Margalit does initially draw a distinction between "insult" and "humiliation." "Insult," he explains, is an injury to "social honor," to what others in the society think of your worth, whether their judgments are fair or not. *Id.* at 41-44, 121. "Humiliation" is an injury to "self-respect," the individual's assessment of his own worth. *Id.* at 44-48, 121. But, Margalit next explains why in practice this distinction collapses:

The skeptical justification for respecting human beings is rooted in the fact that we all recognize one another as part of humanity and for this reason and this reason alone we deserve respect. As mentioned, the skeptical justification is based from the outset on an attitude rather than a trait. Any traits that might be used to justify respect are parasitic on our attitude toward human beings as human. Thus any attempt to reject a person from the human commonwealth erodes the base on which respect is founded.

Even if the humiliated person has no doubt that she has incurred an appalling injustice, whereas she is just as human as anyone else, she cannot ignore how others treat her in shaping the way she regards herself. This is because the attitudes of others, however base they may be, is required for determining what defines the commonwealth of mankind—a commonwealth that there is value in belonging to. The attitude of others is built into the very concept of the value of humans which the bearer of self-respect is supposed to adopt toward herself.

Id. at 124-25. The "skeptical justification" for respect, of which Margalit writes and seemingly embraces, says that we need not identify what common trait, if any, all humans equally share; it is enough that in our society people believe that humans deserve respect. But skepticism is not necessary to believing that "insult" (as he uses the term) necessarily implies "humiliation." All that is necessary is the belief that treating someone as not belonging—as outside the family of man—is insulting, an observation that is true regardless of our proffered justification for the idea that all humans deserve respect. See Cupit, *supra* note 113, at 66-70, 80-92. For these reasons, I see no need to further address the awkward distinctions among the terms "disrespect," "insult," and "humiliation."

130. See *infra* Part II.D (arguing that the Elian Gonzales case is a perfect example).

131. See Taslitz, *Mutual Indifference*, *supra* note 75, at 1284-1303.

132. See *id.*

Second, the feelings of others, especially subordinated groups whose life experiences and history may importantly differ from the majority's, can alert us to aspects of reality that we otherwise might ignore.¹³³ They can thus help to better inform society's crafting of legal rules that promote respect. Consideration of the experiences of the subordinated prods majorities to question whether the minorities' feelings are in fact justified and promotes the empathy necessary to fairly consider the minorities' plea.¹³⁴ A growing Northern understanding of the experience of slaves and growing Northern empathy for their plight notably led to some minimal recognition of former slaves' humanity, as embodied in the Reconstruction amendments that ended slavery, embraced equal protection, made African-Americans citizens, and granted them the right to vote.¹³⁵

That does not mean that insulted minorities' perspectives always prevail, for their sense of insult might directly contradict the principles of equal respect for others.¹³⁶ Thus, a white supremacist group might be insulted by the end of Jim Crow segregation. But, that is an emotion that a state committed to human equality must not validate.¹³⁷

This discussion still begs the question, "When is a sense of insult justified, that is, when, as an 'objective' matter, has the state treated someone as less than fully human?" Answering this question requires defining what it means to "treat" another unfittingly. Unfitting treatment turns on the meaning given to human action.¹³⁸ Where both the doer of an action and its recipient consciously agree on an action's meaning, there is no problem.¹³⁹ Again, white defenders of Jim Crow segregation in the 1950s and their African-American opponents arguably both understood that the whole point of these laws was the expression of an insult: the idea that black children, for example, are simply not worthy of sitting next to white children in public schools and sharing in their education.¹⁴⁰

133. See Taslitz, *Respect*, *supra* note 30, at 23-28.

134. See *id.* at 22-28, 31-44; see also Mark Tunick, *Practices and Principles: Approaches to Ethical and Legal Judgment* 9, 11, 159, 165 (1998) (studying social practices helps to inform moral and legal judgments); Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 *Hastings L.J.* 1039, 1054-57 (1998) (noting empathy as a central element to informed decisionmaking).

135. See Taslitz, *Mutual Indifference*, *supra* note 75, at 1338-87.

136. See Taslitz, *Respect*, *supra* note 30; cf. Taslitz, *Inadequacies of Civil Society*, *supra* note 110, at 330-38 (illustrating one group's sense of insult contradicting the moral justification for feeling such insult).

137. See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and mercy* 49 (1988) (offering similar example); see also Karst, *supra* note 125, at 15-27 (noting that Jim Crow legislation was, more than anything else, about status and exclusion).

138. See Cupit, *supra* note 113, at 15-16.

139. See Taslitz, *Respect*, *supra* note 30, at 36-37 (suggesting this as one reading of *Brown v. Board of Education*).

140. See generally What "*Brown v. Board of Education*" Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision

Other times, the sense of insult may be widely shared among members of both a privileged and an oppressed group but at a subconscious level for one or both groups.¹⁴¹ Indeed, recent research demonstrates that much unjustifiably disparate treatment based on race, gender, or ethnicity stems from such unconscious processes of group devaluation and stereotyping.¹⁴² In many areas, there is ample and undisputed evidence that these forces are at work, so the mere fact that they are subconscious does not raise difficult problems of proof.¹⁴³ This is especially the case because the law's quest should be for identifying broadly held social meanings—not the views of the individuals involved in a particular case—because it is the shared views that ultimately determine an individual's or group's status as an equal member of the American polity.¹⁴⁴ It is for similar reasons that Charles Lawrence advocated some years ago a “cultural meaning” test for whether state action unfairly stigmatized a group as central to equal protection analysis.¹⁴⁵ The search for unconscious meanings is still controversial, but is also still necessary.

Yet, unconscious meanings among groups may differ, or clash with contrary conscious meanings, or with informed intuitions about respectful treatment.¹⁴⁶ Alternatively, there may be many instances where unconscious meanings are hard to prove or are in genuine dispute.¹⁴⁷ Where that is so, what cultural meaning prevails is necessarily in part a value-laden exercise. At a minimum, it requires looking to the history of the mutated Fourth Amendment—the Amendment as altered in the post-Civil War Reconstruction process of incorporating the Fourth Amendment against the states.¹⁴⁸ That inquiry enables us to make the best sense of what conduct the Fourth Amendment would today condemn as insulting, that is, what

(Jack M. Balkin ed., 2001) [hereinafter What “*Brown v. Board of Education*” Should Have Said] (consisting of essays which at least impliedly recognize this mutual understanding of public school segregation).

141. See Taslitz, *Respect*, *supra* note 30, at 37-38 (suggesting this alternative reading of *Brown*).

142. See, e.g., Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Cost of Being Black in America* (1997); Aaron T. Beck, M.D., *Prisoners Of Hate: The Cognitive Basis of Anger, Hostility, and Violence* (1999); Andrew E. Taslitz, *Rape and the Culture of the Courtroom* (1999) [hereinafter Taslitz, *Rape and Culture*]; Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. Cal. L. Rev. 747 (2001).

143. See, e.g., Chamallas, *supra* note 142 (surveying numerous such areas, primarily in the broad context of gender discrimination); Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (discussing similar points in the context of race discrimination).

144. See Taslitz, *Respect*, *supra* note 30, at 38-44.

145. See Lawrence, *supra* note 143, at 355-81; Taslitz, *Respect*, *supra* note 30, at 38-44 (defending application of an analogous sort of cultural meaning test in the context of search and seizure law).

146. See Taslitz, *Respect*, *supra* note 30, at 38-44.

147. See *id.*

148. See *id.* at 16-18, 23-44.

meanings the American people saw over time that they sought to challenge.¹⁴⁹ Similarly, exploration of more modern history and of current practices of the American people would reveal plausible changing understandings and attempt to fit them into the understandings embodied in the Reconstruction Amendments.¹⁵⁰ The quest for uncovering insulting meanings thus becomes an act of historical and social interpretation—something that the Court already does anyway, but for different purposes and with a narrower focus.¹⁵¹

These suggestions are, of course, quite general and vague.¹⁵² There are several strategies for defending the idea of a jurisprudence of respect and for crafting concrete guidelines to operationalize the concept. First, Southern antebellum and Reconstruction search and seizure practices and the Northern reaction against them can be explored.¹⁵³ Second, social science can be examined to search for both majority and subgroups' variations on what prompts the emotion of disrespect.¹⁵⁴ Third, political philosophy can be consulted to clarify respect's meaning.¹⁵⁵ Fourth, modern history, including significant events culminating in judicial precedent, can be explored for insight. The first three of these strategies I have employed in companion articles and in a forthcoming book.¹⁵⁶ The fourth strategy is the one followed in this Article, the historical tales told here simultaneously helping to illustrate both the need for a Fourth Amendment jurisprudence of respect and the consequences of doing so. Importantly, however, all four strategies converge in suggesting six principles necessary to operationalizing a respect-centered jurisprudence. These six principles are also implicit in the discussion thus far and may, therefore, have a familiar ring.

149. *See id.* at 23-44.

150. *See id.*

151. *See* Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 6-17 (reviewing the multiple data sources that the Court relies on in constitutional interpretation).

152. They are no more vague, however, than other scholars' suggestions that the guiding Fourth Amendment principle be "trust," "personal sovereignty," or "security." *See* Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 *Colum. L. Rev.* 1751, 1777-1802 (1994) (trust); Luna, *Sovereignty and Suspicion*, *supra* note 45; Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 *Wake Forest L. Rev.* 307 (1998) (security).

153. *See* Taslitz & Paris, *Law on the Street*, *supra* note 60 (employing this strategy in articulating a new vision of Fourth Amendment jurisprudence); *see also* Taslitz, *Slaves No More!*, *supra* note 70 (employing this strategy in resolving the specific question of the proper scope of discovery on search and seizure issues).

154. A task undertaken in Taslitz, *Bottom Up*, *supra* note 30, and in Taslitz, *American Passions*, *supra* note 107.

155. *See generally* Taslitz, *Respect*, *supra* note 30 (political philosophy and respect).

156. *See supra* notes 153-55.

C. *Six Principles of Respect*

The six, sometimes overlapping principles, of a respect-based Fourth Amendment jurisprudence are as follows:

1. *Individualizing Justice*: stressing that a suspect's particular qualities, circumstances, and actions must more often take precedence over the stereotyping implicitly at work in much of the high Court's modern jurisprudence. For example, sometimes the Court too easily views conduct as suspect because it takes place in a "high crime neighborhood." That attitude replaces close study of an individual's behavior with generalizations about the "sorts of people" who live in lower income areas.¹⁵⁷

2. *Racial-and-Ethnic Consciousness*: must be central to articulating Fourth Amendment principles. In particular, rules must be crafted that protect the most vulnerable racial and ethnic groups among us. Thus, courts may readily find "consent" to search without a warrant or probable cause. But if the police disproportionately seek consent from minority group members, the "colorblind" power to search upon consent unfairly imposes costs on minorities that are not imposed on majorities.¹⁵⁸ Rules also must consider police officers' subjective racial motivations as relevant to gauging the reasonableness of state actions. A police officer who searches suspects of a certain race because he assumes that they are for that reason more likely guilty breaches fundamental constitutional equality norms.¹⁵⁹

157. On the need for individualized justice in the criminal law, see Taslitz, *Racist Personality*, *supra* note 31, at 746-58. On its role in evidentiary procedure, see Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 Colum. L. Rev. 1093, 1114-18 (1996) and Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 Md. L. Rev. 1 (1993) [hereinafter Taslitz, *Myself Alone*]. On its role in criminal procedure, see Taslitz, *Bottom Up*, *supra* note 30. On the significance of the neighborhood's character and the Court's decisions in that area, see *infra* notes 231-75 and accompanying text, and 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 (1999). See also Bernard E. Harcourt, *Illusion Of Order: The False Promise of Broken Windows Policing* 127-60 (2001) (discussing the dangers of generalizations regarding the "sorts of people" who are "disordered" being used as the basis for search and seizure policy).

158. On the consent doctrine and the evils of colorblindness, see David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 16-62 (1999) [hereinafter, Cole, *No Equal Justice*]; cf. Forell & Matthews, *supra* note 96, at xvii-19 (protecting the most vulnerable among us).

159. See Taslitz, *Slaves No More!*, *supra* note 70, at 771-75. Racially discriminatory searches based upon alleged "consent" can be just as problematic. See Robert Hanley, *Search Rules Stricter for New Jersey Troopers*, N.Y. Times, Aug. 10, 2001, at B5 (explaining that troopers in New Jersey are now required to get a sergeant's permission for consent searches of automobiles). I am not suggesting that a suspect's race should be ignored as a factor in a case in which victims have described their specific offender as being of a particular race.

3. *Minority Communities Must Be Given Voice*: notably by explicitly making their communal experiences and attitudes about the police, privacy, property, and freedom of movement relevant to Fourth Amendment reasoning. As one example, a “seizure” occurs, implicating the amendment, if a “reasonable person” would not feel free to leave.¹⁶⁰ Yet, African-American, Hispanic-American, or Asian-American communities might on average have different notions from the white community about whether an encounter with the police is voluntary or not.¹⁶¹

4. *Shared Institutional Obligations*: the three branches of government—judicial, legislative, and executive—must more self-consciously recognize that they each have obligations in articulating and enforcing Fourth Amendment principles.¹⁶² Furthermore, the competence of each to act in a particular area must be understood as varying with context. If courts are unable or unwilling to provide certain protections, legislatures and executives occasionally face a constitutional imperative to do so.¹⁶³

5. *The Citizenry’s Monitorial Role in Regulating the Police*: must be acknowledged, requiring state action to educate citizens about police conduct. Notably, wide-open discovery by the defense of potential flaws in police procedures may be necessary to creating an informed, watchful citizenry.¹⁶⁴ Similarly, the media’s role in exposing abusive police practices must be enhanced, and criminal defense counsel’s function in aiding citizen monitoring must be recognized.¹⁶⁵

160. See Taslitz and Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 318-40 (summarizing law on when a person has been “seized”); see also Taslitz, *Rape and Culture*, *supra* note 142, at 134-51 (arguing the need for courts and legislatures to give the oppressed a voice in law creation and application); Taslitz, *Bottom Up*, *supra* note 30 (noting a similar argument in the Fourth Amendment context).

161. See *infra* text accompanying notes 231-75.

162. See Mark V. Tushnet, *Taking the Constitution away from the Courts* (2000); Taslitz, *Rape and Culture*, *supra* note 142, at 148-51 (on the “legislative constitution”); accord John J. Dinan, *Keeping the People’s Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (1998) (discussing the historical review of the relative success of different branches of government in protecting civil liberties); Wayne D. Moore, *Constitutional Rights and Powers of the People* 196-238 (1996) (noting the legislature’s role in constitutional interpretation); cf. Luna, *Constitutional Roadmaps*, *supra* note 85 (promoting inter-branch conversations); Maclin, *supra* note 85 (discussing undue deference to the executive).

163. On institutional competence in interpreting or implementing constitutional rights, see sources cited *supra* note 162. Other branches have, in the past, sometimes stepped in when the courts have failed. Compare *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (holding the search warrant for innocent third party newspaper’s office was constitutional), with Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (1994) (limiting permissible searches of persons reasonably believed to have the purpose of public communication in or affecting commerce, the Act being adopted as Congress’s reaction to *Zurcher*).

164. See Taslitz, *Slaves No More!*, *supra* note 70, at 761-75.

165. See *id.* at 756-61 (criminal defense counsel’s critical role in supporting a “monitorial citizenry”); see also Luna, *Transparent*, *supra* note 85 (recommending

6. *Ensuring a High Quantity and Quality of Evidence to Justify Police Action*: must be a central goal of each branch of government. For example, better evidence of reasonable suspicion to link a suspect to a crime than is now often the case should be required by the courts.¹⁶⁶ As one illustration, the Court has wrongly declared that reasonable suspicion can be based on not only a lower quantity but a *lower quality* of evidence than is required for probable cause.¹⁶⁷

These six interrelated principles jointly promote respect by treating all citizens equally and as equal members of a common American political community.¹⁶⁸ If we protect the most vulnerable among us, surely we will equally protect the less vulnerable.¹⁶⁹ "Protection" must be understood to be both from the police and from the devastation of crime.¹⁷⁰ Each of these principles is therefore attentive to the balance among citizen rights, group rights, and crime control.¹⁷¹ Some, or all, of these six principles will be seen at work in the tales that follow. While fully justifying and exploring the implications of these principles is the task of my forthcoming book,¹⁷² this Article seeks to lay the groundwork for the book's larger task by using specific examples. My hope is that such examples illustrate the meaning and importance of these principles in a way that a more abstract discussion cannot.

various institutional devices for increasing the citizenry's involvement in monitoring police conduct).

166. See Taslitz and Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 340-42 (summarizing law on quantity and quality of evidence necessary to demonstrate reasonable suspicion); *infra* text accompanying notes 231-75, 381-441 (illustrating how weak evidence of wrongdoing can be sufficient for reasonable suspicion).

167. See *Alabama v. White*, 496 U.S. 325, 330 (1990). Another area where the Court has failed adequately to require high quality evidence of data reliability is in the area of informants. See generally Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in *Wrongly Convicted: Perspectives on Failed Justice* 55 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

168. See Taslitz, *American Passions*, *supra* note 107, at 8-13 (procedural justice research on "respect"); Taslitz, *Bottom Up*, *supra* note 30 (defining "respect" in social science and political philosophy); Taslitz, *Respect*, *supra* note 30, at 38-44 (defining respect in political philosophy).

169. Cf. Forell & Matthews, *supra* note 96, at xvii-19 (emphasizing the importance of protecting women in gender discrimination cases).

170. See Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in *Public Values in Constitutional Law* 137 (Stephen E. Gottlieb ed., 1993) (describing sources of constitutional duty to protect citizens from crime); see also Taslitz and Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 4-5 (summarizing reasons for protecting the citizenry from excessive police discretion); *Urgent Times*, *supra* note 57, at 3-30 (noting that Fourth Amendment law must reflect a concern with the safety of the members of poor, minority communities).

171. Cf. *Community Justice: An Emerging Field* 137-252 (David R. Karp ed. 1998) (addressing whether such a balance is possible).

172. See Taslitz and Paris, *Law on the Street*, *supra* note 60.

D. *Why These Stories Are Told Through a Fourth Amendment Lens*

First, it is necessary briefly to explain why the problems that I discuss should be addressed under the Fourth Amendment in the first place. After all, my emphases on Reconstruction, equality, and the fair airing of views smack of Fourteenth Amendment equal protection and due process analyses.¹⁷³

Equal protection, however, generally *requires* proof of discriminatory animus.¹⁷⁴ It is useful to permit proof of such animus,¹⁷⁵ but requiring it makes evidence of disparate impact irrelevant unless it is sufficient to raise an inference of wrongful purpose.¹⁷⁶ Furthermore, the equal protection standard of proof in this area, as noted earlier, is extraordinarily high.¹⁷⁷ Additionally, the Fourth Amendment, while not subject to these same limitations,¹⁷⁸ also has substantive content independent of any inequality. For example, arresting people on less than probable cause violates the Fourth Amendment even if those arrests are equally distributed among all racial and ethnic groups.¹⁷⁹ Additionally, viewing the Fourth Amendment as serving both substantive and equality goals more completely identifies the nature of the injury when discrimination is present.¹⁸⁰ In one of the stories

173. See generally Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (1994).

174. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 393-95, 410-12 (analyzing *United States v. Armstrong*, 517 U.S. 456 (1996), an equal protection case requiring proof of racial animus, and its implications for Fourth Amendment doctrine).

175. See Taslitz, *Bottom Up*, *supra* note 30 (arguing that proof of racial animus, where possible, is necessary to address individual and community needs for retributive justice in response to police misconduct).

176. See Maclin, *supra* note 28, at 354-92 (arguing that United States Supreme Court case law and the Constitution can be read implicitly to support the relevance of disparate racial impact under the Fourth Amendment).

177. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 393-95, 410-12; *supra* notes 24-27 and accompanying text; *infra* notes 392-401 and accompanying text.

178. See Maclin, *supra*, note 28, at 354-92. It should be noted, however, that the Court has never squarely decided whether disparate racial impact is ever sufficient to make out a Fourth Amendment violation. The tone of the Court's opinion in *Whren v. United States*, 517 U.S. 806 (1996) (effectively rendering pretext and racial animus irrelevant under the Fourth Amendment); the Court's tendency to emphasize a search or seizure's costs to the *individual*, but benefits to society as a whole, see Taslitz, *Twenty-First Century*, *supra* note 48; and the Court's likely narrow reading of substantive evidence law, see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *Buff L. Rev.* 1275 (1999), raise serious doubts about whether the Court would embrace a disparate effects test, despite the soundness of Maclin's reasoning.

179. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 150-92 (summarizing relevant case law).

180. This seems to be Akhil Reed Amar's position. See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 37-40 (1997) (noting that the Fourth Amendment speaks to both substance and procedure, reasonableness and equality, rendering racially discriminatory effects, as well as some suspicionless searches, unreasonable).

told here—that of the Japanese-American internment—the internees therefore suffered both because they faced irrational racial discrimination and because they were effectively arrested without individualized probable cause.¹⁸¹

As for the Due Process Clause, the Court has generally at least claimed to disfavor free-standing reliance on that clause where it has incorporated more specific Bill of Rights guarantees, like those contained in the Fourth Amendment.¹⁸² With few exceptions, free-standing due process cases also tend to focus on the value of adjudicatory fairness—of protecting against convicting the innocent—rather than on the broader range of values in specific Bill of Rights guarantees.¹⁸³ The Fourth Amendment, especially where the exclusionary rule is applied in criminal cases, has nothing to do with the accuracy of convictions or acquittals at trial.¹⁸⁴ Instead, the Amendment subverts the truth, keeping truthful evidence from the jury to promote other values, such as protecting privacy, property, and free movement from unjustified invasion.¹⁸⁵

Exploring the Fourth Amendment's independent role from the Fourteenth also encourages closer analysis of the special values that the former Amendment protects.¹⁸⁶ Again, viewing the Japanese-American internment through Fourth Amendment eyes highlights the losses suffered by the internees' being specifically subjected to searches and seizures without individualized evidence of their

181. See *infra* Part II.C.

Yet a great many government actions can be properly understood as searches or seizures, especially when we remember that a person's "effects" may be intangible Unlike the due process clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims a need to distinguish between reasonable and unreasonable government policy. For those who believe in a "substantive due process" approach to the Constitution, the Fourth Amendment thus seems a far more plausible textual base than the due process clause itself. For those who believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the equal protection clause.

Amar, *supra* note 180, at 39-40

182. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 St. Louis U. L.J. 303, 388-89 (2001); accord Amar, *supra* note 180, at 39-40 (stating that the Fourth Amendment is a better textual home than due process for these sorts of issues and should best be read to have a wider scope than is now the case).

183. See Israel, *supra* note 182, at 397-99, 405-17.

184. See *United States v. Leon*, 468 U.S. 897 (1984) (noting that the Fourth Amendment exclusionary rule impedes the truth-finding function at trial, thus requiring a balancing of the gains in deterring the police against the harm done to truth).

185. This observation is why Professor Amar argues against the exclusionary rule. See Amar, *supra* note 180, at 20-22.

186. See *id.* at 20-22 (noting that the Fourth Amendment protects "personhood, property, and privacy"); *infra* notes 411-41 and accompanying text (explaining the interests that the Fourth Amendment protects).

wrongdoing, rather than, as procedural due process might, only whether they received fair hearings on these questions.¹⁸⁷

Additionally, with few exceptions, the Court's free-standing due process rulings are limited to the facts of each specific case.¹⁸⁸ This is, of course, true of much Fourth Amendment jurisprudence also.¹⁸⁹ However, the Court in its Fourth Amendment jurisprudence strives, where possible, for maximizing the number of bright-line case-transcendent rules that will give the police clearer guidance.¹⁹⁰

Ultimately, there is much potential overlap between the Fourth and Fourteenth Amendments. Many actions can be viewed in different ways to bring them under either or both amendments.¹⁹¹ But, the real error seems to be in reading the two Amendments as sharply distinct. The Fourteenth Amendment, in the process of incorporating the Fourth Amendment against the states, imported equality and fair hearing values into the latter's meaning.¹⁹² As Akhil Amar has argued in the analogous context of the First Amendment, the soundest approach is to view search and seizure issues as raising mutated Fourteenth Amendment problems.¹⁹³ That way, the principles embodied in both amendments are equally honored and their joint history properly respected. Moreover, seeing the Fourth Amendment as informed by equality values also prompts us to consider, at least as a starting point, search and seizure from the perspectives of the marginalized groups with which the Fourteenth Amendment is especially concerned.¹⁹⁴ Viewing the Fourth Amendment from the bottom up gives us a different perspective.¹⁹⁵ As the tales to come will reveal, the result can be changes in the nature of fact-finding at suppression hearings (for example, in what inferences can fairly be

187. See *infra* Part II.B.

188. Israel, *supra* note 182, at 396.

189. See *id.* at 396-97.

190. See *supra* text accompanying notes 50-61 (discussing the Supreme Court's majority opinion in *Atwater*). I will not address the Fourteenth Amendment's Privileges and Immunities Clause here, although I do so elsewhere. See Taslitz & Paris, *Law on the Street*, *supra* note 60. Despite its historical importance to its framers and the modern Court's hint of a modest revival of the Clause, it is still currently largely a dead letter in modern constitutional doctrine. See Konvitz, *supra* note 70, at 22-25, 35, 162-64 (bemoaning this fact, but noting with cautious optimism the Court's recent reliance on the Privileges and Immunities Clause in *Saenz v. Roe*, 526 U.S. 489 (1999)).

191. See Israel, *supra* note 182, at 397-98 (suggesting that this may be true for many problems under each of the Bill of Rights' criminal procedure guarantees, and that the Court, therefore, needs to provide clearer guidance).

192. See generally Taslitz, *Slaves No More!*, *supra* note 70.

193. See *id.* at 751-56. Although paying close attention to how incorporation of the First Amendment changed its meaning, Amar has ignored the lessons of his own theory when analyzing Fourth Amendment problems. See *id.*

194. See generally What "*Brown v. Board of Education*" Should Have Said, *supra* note 140 (recognizing that the Fourteenth Amendment's animating force was to protect marginalized groups, especially African-Americans).

195. See generally Taslitz, *Bottom Up*, *supra* note 30.

drawn from the evidence); in the degree of intrusiveness to be found in police action, thus affecting whether a police-citizen interaction was a voluntary encounter or a seizure; in the relevance given to disparate racial impact and the even greater importance of racial animus; in courts' reducing their deference to other branches in some instances while retaining it in others; in the imperative for adherence of other branches to the principles of respect as a condition of deference to their decisions; and in the way that social science can alter preconceived notions about social reality.

A final comment is needed on the groups chosen as "oppressed" in the following stories. The experiences of three groups are considered: African-Americans, Japanese-Americans, and Miami's Cuban-Americans. I would get little quarrel with my choice of the first of these three groups. But, many might argue that today Japanese-Americans have attained an extraordinary degree of status in the United States.¹⁹⁶ Even if that is correct, however, who is oppressed changes over time. The internment period examined here was unquestionably a time of extreme oppression of Japanese-Americans. Although each group's experience of oppression at each point in time is unique, Japanese-Americans during the internment shared with African-Americans during most of their sojourn in this country at least this: the experience of being on the receiving end of search and seizure practices insulting to both groups and individuals, denying them their equal humanity.¹⁹⁷

Other critics might object that Miami's Cuban-Americans are not oppressed and are, in fact, a powerful political force in that City, even in national politics.¹⁹⁸ Oppression, however, can also be contextual. A group with significant power in some contexts can be oppressed by the

196. This is, in any event, the popular stereotype, ignoring the diversity and complexity of the modern day experiences of all Asian-American groups with continuing inequalities. See Ronald Takaki, *Strangers from a Distant Shore: A History of Asian Americans* 478 (1989) ("Even middle-class whites, who are experiencing economic difficulties because of plant closures in a deindustrializing America and the expansion of low-wage service employment, have been urged to emulate the Asian-American 'model minority' and to work harder.").

197. One commentator has said:

During the time of the internment, Jim Crow laws and formal racial segregation existed in the American South and was so reified that virtually no one could imagine it ending. A nation that had long ago learned to tolerate and accept Jim Crow laws that victimized African Americans was well prepared to accept internment that victimized Japanese Americans.

Meeks, *Driving While Black*, *supra* note 18, at xi-xii; see also *infra* Part II.C (stating that similar oppression of African-Americans by search and seizure practices continues today).

198. See Cynthia R. Mabry, *Devuelvan los ninos a sus paisas* (Send the Children Home to Their Country), at 37 (2002) (draft manuscript, on file with author) [hereinafter Mabry, *Send the Children Home*] ("There are approximately 700,000 Cubans in Miami. They control Miami politics.").

majority in other circumstances.¹⁹⁹ Miami's Cuban-Americans in the events explored here—those surrounding six-year-old Elian Gonzalez—certainly perceived themselves, or at least portrayed themselves, as oppressed *as a group*.²⁰⁰ Furthermore, many members of that group experienced undoubted victimization at the hands of Cuba's communist regime, making their perceptions of current subjugation likely both sincere and understandable.²⁰¹ Therefore, I choose to accept their self-characterization partly to make the point that, even if true, an oppressed group's perspective does not necessarily prevail. Additionally, I choose to look at the experiences of oppressed groups for the insight it may offer us. But everyone, regardless of racial, ethnic, or class status, is entitled to respect under the Fourth Amendment. Even if Cuban-Americans are not today oppressed as a group in the United States, they deserve that respect. More importantly, however we characterize their current status, their

199. See generally Ronald Takaki, *A Different Mirror: A History Of Multicultural America* (1993) (tracing rising and falling levels of oppression of various groups in America over time and changing circumstances). Nor should it matter for Fourth Amendment purposes that Elian was an illegal immigrant. Though there is some dispute among academics about whether the Fourth Amendment protects non-citizens in this country illegally, it is likely that the Amendment does indeed protect them. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990) (plurality opinion) (noting the "People" consist of a "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," therefore including those aliens who have "come within the territory of the United States and developed substantial connections with this country"); cf. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 155 (2001) ("But in a sense, every person who spends a year in America is for that year an American. There would be nothing incoherent, as a matter of logic or law, in recognizing every such person as a member of the American people."). Despite the language quoted above from *Verdugo-Urquidez* (joined in by only four members of the Court), the precise circumstances under which a non-citizen becomes one of "the People" of the United States is unclear. Four Justices—Stevens, Brennan, Marshall, and Blackmun—in three separate opinions argued for a more expansive definition than the plurality's position, and one member—Justice Kennedy—concurred but argued for the irrelevance of "peoplehood" to the question before the Court. See *Verdugo-Urquidez*, 494 U.S. at 275-98. But see Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitierrez and the Tort Law/Immigration Law Parallel*, 35 Harv. C.R.-C.L. L. Rev. 57 (2000) (noting the lack of clarity, but persuasively arguing that the Fourth Amendment should apply to all non-citizens ensnared in the American criminal justice system); T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 151 (2002) (flatly declaring, without even recognizing the plausibility of a contrary position, that "[even undocumented aliens] arrested in the United States for crimes are entitled to all the usual protections afforded criminal defendants"). Whatever doubt there may be about Elian's status under the Fourth Amendment, there is little doubt that the Amendment protected Elian's uncle, Lazaro, whose house was raided by the INS in search of Lazaro. See Romero, *supra*, at 81 (arguing that those in this country with at least legal permanent residence status, and certainly naturalized citizens, are protected by the Amendment).

200. See *infra* Part II.B.

201. See *infra* text accompanying notes 458-87.

experiences at Castro's hands and their dealings with the federal government concerning Elian's fate offer illumination of both the advantages of a respect-based approach and its limits.

E. *The Importance of Stories*

Real-life stories are more effective at persuading and reaching a wider audience than are abstract theorizing and the cold collection of historical and social science data.²⁰² Stories also have the benefit of being concrete. The concrete detail of a narrative can convey subtleties and emotions that other forms of academic writing cannot.²⁰³ The emotional flavor of stories is particularly important here because I define respect partly in emotional terms: as individuals and groups *feeling* that they have been treated as equal status members of an inclusive American community.²⁰⁴ This Article tells four tales to convey the emotional need of minority communities for revised search and seizure practices that demonstrate respect.

The first of these stories, addressed in Part II.A of this Article, concerns Judge Baer, an important figure in the 1996 Presidential campaign between William Jefferson Clinton and Robert Dole.²⁰⁵ Judge Baer had granted a motion to suppress evidence in a drug case, in which police suspicion was aroused by the African-American suspects' flight from the officers. Baer granted the motion, because he saw it as perfectly rational for entirely innocent minority group members to flee from the police because they feared being physically abused or wrongfully accused by the officers.²⁰⁶ The suspects' flight did not therefore necessarily constitute an admission of their guilt.²⁰⁷ Apparently because of the political outcry from the majority community, however, Baer ultimately reversed his decision.²⁰⁸ Baer's story, and that of a suspect in a later similar case, *Illinois v. Wardlow*,²⁰⁹ also recounted here, demonstrate how denying a minority group's perspective a voice (African-American attitudes toward the police often differed from white attitudes),²¹⁰ while giving weight to

202. See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. Cal. Rev. L. & Women's Stud. 387, 404-39 (1996) (analyzing psychological and social processes that give stories persuasive power); see also Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law* 63-78 (1995) (juries are persuaded by culturally resonant stories).

203. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* 37-46 (2001) (explaining the advantages of storytelling as a method of academic discourse).

204. See Taslitz, *Bottom Up*, *supra* note 30 (defending this conception).

205. See *infra* text accompanying notes 241-44.

206. See *infra* text accompanying notes 237-40.

207. See *infra* text accompanying notes 237-40.

208. See *infra* text accompanying notes 241-49.

209. 528 U.S. 119 (2000).

210. See *id.* at 132 & n.7 (Stevens, J., dissenting) (summarizing social science and anecdotal evidence on minority group attitudes toward the police).

weak evidence of criminality and embracing a “color-blind” Fourth Amendment jurisprudence, undermine respect for individual suspects and for the salient groups to which they belong.²¹¹

The second story, recounted in Part II.B of this Article, is that of the Japanese-American internment during World War II. That story involves an early incident of racial profiling on a dramatic scale: thousands of citizens were arrested and imprisoned for years because of their race.²¹² Modern profiling is less noticeable than the internment, because modern efforts usually proceed one-by-one instead of involving mass detention.²¹³ The internment story vividly illustrates, however, the emotional power of using the state’s search and seizure tools to express disrespect for an entire racial group. Moreover, efforts akin to the internment’s mass detention happen today, albeit on a smaller scale.²¹⁴

The third tale, recounted in Part II.C, reveals the emotional links between the internment story and instances of modern profiling. This third story occurred in Oneonta, New York. There, the white victim of a robbery had described her assailant only as a young African-American male whose hand got cut during the struggle. There being only about fifty young African-American males in Oneonta, the police stopped all of them. None of them had a cut on his hand.²¹⁵ The courts initially dismissed most of the plaintiffs’ claims in the subsequent civil rights lawsuit.²¹⁶ Without explaining its change of heart, however, the United States Court of Appeals for the Second Circuit recently entered a revised opinion, backtracking without explanation on its dismissal of many of these claims.²¹⁷ Despite the altered result, the court’s reasoning hampers minority communities’ sense of respect, for reasons to be explored shortly.²¹⁸

The Oneonta and internment cases, like Judge Baer’s case, demonstrate the dangers of color-blindness, minority group voice-suppression, and reliance on weak evidence of wrongdoing.²¹⁹ But both cases add one further element to that in the Baer case: the pain imposed by replacing individualized assessments of a person with

211. On the failures of colorblind constitutionalism, see Taslitz, *Slaves No More!*, *supra* note 70, at 771-75 (rejecting Fourth Amendment colorblindness as inconsistent with that Amendment’s history).

212. See *infra* Part II.B.

213. See Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 Duke L.J. 331, 331-42 (2000) (illustrating the nature of modern racial profiling and collecting the growing scholarly literature on the subject).

214. See *infra* Part II.C (discussing a “round-up” of African-American males in a recent criminal investigation).

215. See *infra* Part III.C.2 (discussing *Brown v. Oneonta*, 195 F.3d 111 (2d Cir. 1999), *vacated*, 221 F.3d 329 (2d Cir. 2000)).

216. See *infra* text accompanying notes 392-410.

217. See *infra* text accompanying notes 424-30.

218. See *infra* text accompanying notes 431-41.

219. See *infra* text accompanying notes 431-41 and 636-55.

generalized or group-based stereotypical judgments.²²⁰ The internment and Oneonta cases also demonstrate the need for closer citizen monitoring of the state, though it is unlikely that such monitoring would have made a difference under the particular political circumstances of the World War II internment.²²¹ The internment case, because it largely involved executive action and judicial deference to that action, also demonstrates one way in which inadequate recognition of the Fourth Amendment's binding all three branches of government, and poor assessments of which branch is institutionally competent, fan the flames of group exclusion and resentment.²²²

This Article nears its end in Part II.D, with a story meant to illustrate the limits of a jurisprudence of respect: the tale of six-year old Elian Gonzales.²²³ Elian's mother fled Cuba with him in a boat. She died in the effort, but he lived.²²⁴ A contest developed between his uncle, who wanted Elian to stay in the United States, and his father, who wanted Elian to return to Cuba.²²⁵ The courts ultimately deferred to the executive branch's decision to allow Elian to return to Cuba,²²⁶ and the executive engaged in a raid of the Uncle's home, with the approval of the judiciary via a warrant, to assist Elian's return to the Castro regime. Miami's Cuban-Americans did not object to the raid or authorizing warrant on a ground of lack of individualized probable cause or reasonable suspicion, in sharp contrast to the other three cases considered in this Article. Rather, like Ms. Atwater (the mother arrested for driving without her seatbelt buckled), the Cuban-Americans argued that the search of Lazaro's home to seize Elian was unreasonable *despite* the existence of probable cause.²²⁷ Specifically, the Cuban-American community argued that these state actions were inherently unreasonable because they were done to return a child to the mercies of a totalitarian regime. Furthermore, they argued that the courts were obligated to act and that deference to the decisions of the politically motivated Clinton Administration was an insult not just to Elian and Lazaro, but to the Cuban-American community as a whole.²²⁸ I start Part II.D by presenting the Cuban-American

220. On the emotional pain caused by replacing individualized with generalized assessments of character and worth, see Taslitz, *Racist Personality*, *supra* note 31, at 746-58.

221. See Taslitz, *Slaves No More!*, *supra* note 70, at 751-79 (describing the citizen-monitoring function); *infra* Part II.B (describing the political circumstances surrounding the Japanese internment).

222. See Taslitz, *Bottom Up*, *supra* note 30; Taslitz, *Slaves No More!*, *supra* note 70, at 757-79 (discussing the citizen monitorial function).

223. See *infra* Part II.D.

224. See *infra* text accompanying notes 446-48.

225. See *infra* text accompanying notes 449-57.

226. See *infra* text accompanying notes 521-30.

227. See *infra* text accompanying notes 488-520, 531-36.

228. See *infra* text accompanying notes 531-41 (describing the nature of the Cuban-

perspective in as favorable a light as I am able, both to give them their due and because of the way that their life experiences illustrate the importance of Fourth Amendment values.

Nevertheless, I conclude that the Cuban-American community was wrong on all counts. There were good reasons (unlike in the case of the internment) to defer to the Executive, who in fact treated Elian, Lazaro, and the Miami Cuban-American community with great respect. In our political culture, the Clinton Administration's actions cannot fairly be understood as treating Cuban-Americans with less than equal recognition of their full humanity. Rather, the Administration acted to vindicate the deep American commitment to parental autonomy and the sanctity of the family.²²⁹ Moreover, the Administration fully adhered to all six of the principles of the jurisprudence of respect.²³⁰

II. STORIES OF FOURTH AMENDMENT DISRESPECT

This part recounts the four historical tales noted in the Introduction that demonstrate the need for a jurisprudence of respect. The first of these tales is the saga of Judge Harold Baer.

A. *The Saga of Judge Baer*

1. If I Saw the Cops, I'd Run Too

The Honorable Harold Baer, sitting in the United States District Court for the Southern District of New York, is a well-respected jurist with a distinguished career.²³¹ In 1996, he was also the subject of angry calls for his impeachment by Congressmen on both sides of the aisle and by then-President William Jefferson Clinton.²³²

Americans' complaint); *supra* text accompanying notes 50-57 (summarizing *Anwater* facts).

229. See *infra* text accompanying notes 589-631.

230. See *infra* Part II.D.2.b.

231. See James D. Zirin, *Judges Who Dip Into Politics*, N.Y. Times, July 16, 1996, at A1 (describing Judge Baer as a "respected federal judge and former New York State trial judge and prosecuting attorney").

232. See, e.g., Senator Robert Dole, Luncheon Address at American Society of Newspaper Editors (Mar. 21, 1996), <http://www.asne.org/kiosk/archive/convention/conv96/dole.htm>; The White House, Office of the Press Secretary, Press Briefing by Mike McCurry (Mar. 21, 1996), <http://clinton6.nara.gov/1996/03/1996-03-21-press-briefing-by-mike-mccurry.html>; National Drug Strategy Network, NewsBriefs, *Judge Cites Police Abuse and Corruption, Throws Out Seized Drug Evidence and Confession, Incites Controversy About the Exclusionary Rule* (March 1996), <http://www.ndsn.org/March96/Baer.html>; National Drug Strategy Network, NewsBriefs, *New York Federal Judge Reverses Decision in Controversial Drug Case; Clinton, Dole Had Threatened to Ask for Resignation, Impeachment* (Apr. 1996) [hereinafter *New York Federal Judge Reverses Decision*], <http://www.ndsn.org/April96/bayless.html>; Bruce Fein, *Not for the Thin-Skinned: Scathing Criticism of Federal Judges is Constructive*, Legal Times, May 13, 1996 at 22; Liberal Judgements,

Baer's sin had been to grant a motion to suppress evidence against a drug dealer. More precisely, his sin consisted of giving reasons for doing so that were culturally unacceptable, ready fodder for the politics of the 1996 presidential campaign.

Baer's first reason for granting the defendant's motion was that the judge found the officers' testimony at the suppression hearing simply unbelievable.²³³ The police claimed that they saw a woman named Carol Bayless double park her car in a neighborhood center for the drug trade. Four men promptly crossed the street, leading Bayless simultaneously to pop open the trunk's lid. One man opened the trunk and put two duffel bags in it, then closed the lid. When the men saw Officer Carroll and his partner stop their unmarked car, the men fled rapidly in different directions. The officers' suspicions now aroused, they stopped Bayless's car, which sported Michigan license plates, and which had been leaving the area at a legal speed. Bayless explained that the car was rented but produced an agreement in another's name. She also denied that anyone put anything in her car. Officer Carroll accordingly arrested her, searching the trunk and finding drugs in the duffel bag.

Bayless quickly confessed on videotape, admitting not only to this crime, but also to twenty other drug buys. But, Bayless told a very different story from Officer Carroll's about that day's events. Judge Baer summarized those differences:

Officer Carroll testified that when he first observed defendant, she was driving a Red 1995 Chevrolet Caprice slowly along 176th Street. In contrast, defendant asserts that she did not drive to New York City from Detroit, rather she was . . . a passenger in the Caprice driven by Terry. Further, defendant did not get behind the wheel of the car until *after* it was stopped on 176th Street and Terry had exited the vehicle. Put another way, Officer Carroll apparently missed or overlooked the fact that the car had come to a halt, never saw the man exit the Caprice, and missed the million dollars [that her cohort Terry had earlier placed in the trunk] being taken out of the trunk If we credit the defendant's statement, and I do, one cannot keep from finding Carroll's story incredible.²³⁴

Judge Baer believed Bayless because of the "candor and the breadth" of her confession in which she freely implicated herself in numerous other crimes.²³⁵ Baer also disbelieved Officer Carroll because it made no sense that the four men putting items in the trunk fled from the police, yet the officers did nothing to stop those men, or, at the very least, did not "call for backup assistance in locating the

Transcript, Online Newshour (Apr. 2, 1996), http://www.pbs.org/newshour/bb/law/baer1_4-02.htm.

233. *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996).

234. *Id.* at 239-40 (citation omitted) (emphasis added).

235. *Id.* at 236.

males.”²³⁶ The most controversial part of his opinion, however, was his explanation for why he found the four men’s flight irrelevant to whether Officer Carroll could reasonably suspect that criminal activity was afoot. Baer explained that such flight was perfectly understandable, even wise, behavior, and “hard to characterize . . . as evasive conduct”.²³⁷

Police officers, even those traveling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney’s Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission [on police corruption in New York City], residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.²³⁸

Judge Baer went even further, suggesting that either conscious or subconscious racism infected the actions of New York’s finest: “What I find shattering,” said Baer, “is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person.”²³⁹ Judge Baer saw this observation as contrary to the values embraced by our constitution’s founding generation: “As Thomas Paine wrote just 220 years ago: ‘here too is the design and end of government, viz., Freedom and security.’”²⁴⁰

2. Baer Reconsiders

Reaction to Judge Baer’s opinion was swift and angry. Locally, former New York City Police Commissioner Raymond Kelly was outraged that Judge Baer had “impugned an honest officer.”²⁴¹ Nationally, presidential candidate and then-Senator Bob Dole described Judge Baer’s decision as “hardly an exception among

236. *Id.* at 242 & n.17.

237. *Id.* at 242.

238. *Id.* Although focusing on the specifics of Officer Carroll’s testimony, Judge Baer’s tone here is reminiscent of wariness about police “testilying.” See Taslitz, *Slaves No More!*, *supra* note 70, at 761-69. “Testilying” is a term coined by the Mollen Commission, investigating corruption in the New York City Police Department, to capture the frequency of police perjury at suppression hearings in that City. See *id.* On the general skepticism about police testimony and police behavior that is common among many African-American jurists and jurors, see Taslitz, *Black Judges on Justice*, *supra* note 93, at 235-37.

239. *Bayless*, 913 F. Supp. at 240; see generally Cole, *No Equal Justice*, *supra* note 158 (arguing that current search and seizure law promotes discriminatory treatment of African-Americans by the police).

240. *Bayless*, 913 F. Supp. at 240 (citation omitted).

241. See Raymond W. Kelly, *Handcuffing the Police*, N.Y. Times, Feb. 1, 1996, at A21.

President Clinton's judicial appointees . . . [an] example [] from Bill Clinton's judicial hall of shame."²⁴² Mike McCurry, President Clinton's press secretary, unwilling to allow Dole alone to adopt a law and order posture, reported that Clinton had encouraged the Justice Department to ask Baer to reconsider. McCurry suggested that the judge's action was on the list of the most "wrongheaded, stupid" judicial decisions.²⁴³ The press described McCurry as further declaring that Clinton regretted ever appointing Baer to the bench. A firestorm now erupted in the media as calls for Baer's impeachment mounted.²⁴⁴

Baer quickly relented, though he denied doing so. He granted the prosecution's motion to reconsider.²⁴⁵ At a new hearing, additional officers testified, allegedly confirming Officer Carroll's story. The defendant, Carol Bayless, also testified for the first time. Claiming that this new evidence placed the case into a wholly different light, Judge Baer declared that he now believed the police. He also used his new opinion as an opportunity to apologize for his original language: "[U]nfortunately the hyperbole . . . in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol . . . our great City."²⁴⁶ Despite the flip-flop, Judge Baer insisted that he had not given in to political pressure. He would, he said, "fearlessly" work against the "unfettered discretion of officers in the field."²⁴⁷ He cautioned that "[b]ecause the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike."²⁴⁸ Judge Baer's actions, however, seemed to belie his words, as judges and commentators stepped forward to defend against what they perceived had been a successful assault on judicial independence.²⁴⁹

242. Dole, *supra* note 232.

243. New York Federal Judge Reverses Decision, *supra* note 232.

244. See *United States v. Bayless* 201 F.3d 116, 119, 123 (2d Cir. 2000) ("Judge Baer's original decision . . . was fiercely criticized by politicians and press alike" and "perceived by many as an affront to the police and to victims of drug-related crime.").

245. See *United States v. Bayless*, 921 F. Supp. 211, 217-18 (S.D.N.Y. 1996) (deciding upon motion for reconsideration).

246. *Id.* at 217.

247. *Id.* (quoting *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980)). Academics increasingly share Judge Baer's concern with unfettered police officer discretion. See, e.g., Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990*, at 21-53 (1993) (considering successes and failures of efforts to control police officer discretion); Maclin, *supra* note 85 (extolling vagueness doctrine's concern with limiting police officer and prosecutor discretion as a model for Fourth Amendment analysis).

248. *Bayless*, 921 F. Supp. at 217 (quoting *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting)).

249. See David Cole, *Hope in the Face of Adversity: Civil Rights and Civil Liberties in 1996*, *Legal Times*, Dec. 23, 1996, at 33 ("[Judge Baer's] . . . reversal illustrated the

3. A Radical Theory

Why did Judge Baer's opinion inspire such ire that it became part of a presidential campaign and raised serious calls for the judge's impeachment? The answer: Judge Baer adopted a then novel perspective on the Fourth Amendment's meaning.

For Baer, Carol Bayless's fate was inextricably linked to that of her racial group, African-Americans. Though Bayless herself was a confessed criminal, her fate in the courts and at the hands of the police had implications for the future of all African-Americans. Baer thus openly worried about his "shattering" fear that blacks could "count on little security for their person."²⁵⁰ African-Americans in certain inner-city communities had indeed too often suffered from police abuses. Baer saw his judicial role as imposing a duty to protect such communities because they are especially vulnerable to excessive state zeal in investigating crime.²⁵¹

Baer was also unwilling to let the law in practice undermine the law on paper. He initially refused to be an accomplice in the officers' apparent "testilying" game. Baer had served on the Mollen Commission investigating police corruption in New York City, which had coined the "testilying" term.²⁵² He was, therefore, especially sensitive to the possibility that officers might lie to evade Fourth Amendment strictures. Judge Baer was further reluctant to follow a "colorblind" jurisprudence that left police the discretion in practice to use skin color as an indicator of suspicion.

Perhaps because of his Mollen Commission work, Judge Baer also understood that many in the lay African-American community had a very different view than many whites and police of what conduct justified "suspicion." Judge Baer gave that view voice: flight from the police, at least in this neighborhood, may be a wise way to avoid police harassment, not an acknowledgment of guilt.²⁵³

limits of an independent federal judiciary."); *Judges: Attacks on Baer Go Too Far*, Legal Times, Apr. 1, 1996, at 12; cf. *The Vindication of Judge Baer?*, N.Y. Post, Apr. 3, 1999, at 16 (describing recent investigations into abuses by the NYPD showing that "the prescient Judge Baer should take a bow").

250. *United States v. Bayless*, 913 F. Supp. 232, 240 (S.D.N.Y. 1996).

251. Cf. *The Vindication of Judge Baer?*, *supra* note 249. On the vulnerability of African-Americans to police abuses, see, e.g., Cole, *No Equal Justice*, *supra* note 158, at 16-62; Maclin, *supra* note 28, at 336 ("[P]olice departments across the nation . . . continue to target blacks in a manner reminiscent of the slave patrols of colonial America."); Walker, *supra* note 247 (statistical data).

252. See David Cole, *When Running Is Reasonable: Police Brutality in High-Crime Neighborhoods*, Legal Times, Mar. 4, 1996, at 20 (summarizing Judge Baer's background).

253. See *Bayless*, 913 F. Supp. at 242; cf. Cole, *No Equal Justice*, *supra* note 158, at 16-62 (how colorblind Fourth Amendment jurisprudence discriminates against minorities).

Baer drew as well on American history as an important source of Fourth Amendment values. His treatment of history was cursory and limited to the Founding Period.²⁵⁴ Yet he clearly recognized the need to turn to history to inform ourselves in resolving modern dilemmas. Additionally, he saw that history as reflecting a value of inclusion, of treating white and black alike to include all in the definition of an "American."²⁵⁵

Finally, Baer was unwilling to allow citizens' free movement to be infringed without a significant quantity of reliable evidence of individualized criminal wrongdoing. The police needed "reasonable suspicion" that Carol Bayless was involved in criminal activity before the officers could legitimately stop her car.²⁵⁶ Ignoring Bayless's alleged cohorts' flight as irrelevant left the police aware of only these facts: a Michigan resident was driving in an alleged high crime area of New York City in the early morning hours, first loading her car with baggage before setting off. She drove at a normal speed, engaging neither in flight nor in furtive conduct. Such a visitor could easily have been leaving so early in order to arrive in her home state by nightfall. That totality of circumstances is thoroughly consistent with innocent behavior and could not alone create reasonable suspicion.²⁵⁷

Baer's original opinion was an excellent first start toward a jurisprudence of respect. His second decision, which shied away from his original noble effort, was affirmed by the United States Court of Appeals for the Second Circuit. On April 3, 2000, the United States Supreme Court let that affirmance stand, refusing to hear Bayless's further appeal.²⁵⁸ Interestingly, the Supreme Court probably acted as it did because it decided a similar case that same term.

254. See *Bayless*, 913 F. Supp. at 240. For general background on the role of history in Fourth Amendment analysis, see, e.g. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925 (1997); Sklansky, *supra* note 57.

255. See generally George P. Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (2001) (arguing that Lincoln helped to transform America from rule by a republican elite to rule by popular democracy in an organic nation committed to the equality of all persons); Taslitz, *Rape And Culture*, *supra* note 142, at 134-45 (post-Reconstruction equality concepts embody ideas of inclusion and voice); Taslitz, *Mutual Indifference*, *supra* note 75 (post-Reconstruction American constitutionalism rejects indifference to the physical and economic suffering of racial and ethnic minorities); Taslitz, *Slaves No More!*, *supra* note 70 (Fourth Amendment embodies a principle of racial inclusion); Taslitz, *Racist Personality*, *supra* note 31 (post-Reconstruction constitution seeks to promote a virtuous citizenry committed to certain minimal principles of equality).

256. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 340-42.

257. See *Bayless*, 913 F. Supp. at 240.

258. See *United States v. Bayless*, 201 F.3d 116, 120 (2d Cir. 2000), *cert. denied*, 529 U.S. 1061 (2000).

The majority opinion in that case, *Illinois v. Wardlow*,²⁵⁹ reflects the high Court's current approach to the Fourth Amendment, highlighting why Judge Baer's original position seemed so radical. Importantly, however, the dissenters in *Wardlow* moved in some ways even closer than Judge Baer originally did toward an alternative jurisprudence. Yet, the dissenters' words drew no outrage, perhaps because their position lost, or because their tone was more measured than Baer's, though the message was equally, if not more, radical.

4. *Illinois v. Wardlow*

a. *Flight Isn't Right*

William Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking.²⁶⁰ Two officers chased him, ultimately stopping and frisking him. On his person, the officers found an illegally possessed .38 caliber handgun. Wardlow was convicted for illegally possessing that weapon. When his appeal made its way to the United States Supreme Court, a majority affirmed.

That majority agreed that neither Wardlow's mere presence in a high crime area nor his refusal to cooperate with the police could alone establish reasonable suspicion that he was involved in a crime. "But unprovoked flight," said the Court, "is simply not a mere refusal to cooperate."²⁶¹ "Flight, by its very nature," the Court explained, "is not "going about one's business"; in fact, it is just the opposite."²⁶² Indeed, "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."²⁶³ That there might be innocent reasons for the flight was irrelevant, because, argued the majority, the Court "accepts the risk that officers may stop innocent people," especially given the "minimal intrusion" involved in stopping someone to investigate.²⁶⁴

The majority's approach differed sharply from Judge Baer's original perspective. The majority was almost ostentatiously indifferent to African-American views of the police and to the tension between individualized and group justice so central to Judge Baer's original opinion.²⁶⁵

259. 528 U.S. 119 (2000).

260. *Id.* at 121-22.

261. *Id.* at 125.

262. *Id.*

263. *Id.* at 124.

264. *Id.* at 126.

265. On the group-individualized justice tension, see Taslitz, *Racist Personality*, *supra* note 31, at 746-65; see also Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 50 Okla. L. Rev. 451, 453 (1997) (arguing *Terry* stop-and-frisk rule is

The dissenters' perspective was the polar opposite of the majority's opinion.

b. *Vindicating Judge Baer*

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer.²⁶⁶ Stevens concisely summed up his position:

Compare, e.g., Proverbs 28:1 ("The wicked flee when no man pursueth: but the righteous are as bold as a lion") with Proverbs 22:3 ("A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty"). I have rejected reliance on the former proverb in the past, because its "ivory-towered analysis of the real world" fails to account for the experiences of the many citizens of this country, particularly those who are minorities.²⁶⁷

Justice Stevens, unlike Judge Baer, made no claim that he could understand minority perspectives by common sense or by drawing on his own life experiences. Instead, Justice Stevens looked to social science research.²⁶⁸ There, he found a wealth of material suggesting that large percentages of African-Americans considered police brutality and harassment serious problems in their own communities. Indeed, one study found, in Justice Stevens's reading of the data, that African-Americans in twelve cities were more than twice as likely as white residents in the same community to be dissatisfied with police practices.²⁶⁹ Echoing Judge Baer, Justice Stevens saw these practices and minorities' reactions to them to be critical to Fourth Amendment analysis:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For

"particularly inappropriate for Black Americans").

266. *Wardlow*, 528 U.S. at 126 (Stevens, J., dissenting).

267. *Id.* at 129 n.3 (Stevens, J., dissenting).

268. *See id.* at 132 & n.7 (Stevens, J., dissenting). Stevens's use of social science in the Fourth Amendment context seems consistent with Professor David Faigman's suggestions for using social science in constitutional interpretation more generally. *See* David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541 (1991). For an example of how social science can be used more effectively under the Fourth Amendment, see Dorothy K. Kagehiro & William S. Laufer, *Illinois v. Rodriguez and the Social Psychology of Third-Party Consent*, 27 Crim. L. Bull. 42 (1991) (discussing discrepancies between judicial assumptions about lay perceptions of risk and consent and actual lay consensus); *see also* Meares & Harcourt, *supra* note 93, at 775-93 (reviewing social science demonstrating the *Wardlow* majority's errors).

269. *See Wardlow*, 528 U.S. at 132 n.7 (Stevens, J., dissenting). There are subtleties in the reading of the data that can, however, result in different, if less persuasive, interpretations of the data. *See* Taslitz, *Bottom Up*, *supra* note 30; Taslitz, *Respect*, *supra* note 30, at 62 n.56.

such a person, unprovoked flight is neither “aberrant” nor “abnormal.” Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.²⁷⁰

Stevens concluded, therefore, that the characterization of a neighborhood as a high crime area made an inference of guilt from unprovoked flight *less appropriate* than in a lower crime area. This was so “because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas.”²⁷¹ In other words, ordinary, honest citizens living where crime is most widespread are also those who believe that they have the most to fear from the police.

Stevens acknowledged, on the other hand, that flight can sometimes be a significant indicator of guilt. Given the concerns of minority communities, however, Stevens required highly reliable additional evidence before he would reach that conclusion. Consequently, Stevens closely examined the evidence in the *Wardlow* case in a way that the majority did not.²⁷²

The testifying officer in *Wardlow*, Officer Nolan, admitted that he did not have *any* credible information that specific criminal activity was then afoot when he saw Wardlow run. Officer Nolan did testify that Wardlow ““looked in our direction and began fleeing.””²⁷³ That interpretation of Wardlow’s conduct seemed oddly incomplete to Justice Stevens. Four police cars drove through this area, yet “presumably . . . [Wardlow] did not react to the first three cars, and we cannot even be sure that he recognized the occupants of the fourth as police officers.”²⁷⁴ Absent more testimony, there was, therefore, little evidence to support Officer Nolan’s conclusion that Wardlow ran *from the police*.

Moreover, Stevens noted, Officer Nolan had further testified that he expected to find an enormous number of people, including drug customers and lookouts, in an area where drug sales take place. Yet, Nolan never mentioned seeing anyone else nearby when Wardlow ran. That presumed absence of other people meant that there was no reason to believe that drug sales or other illegal activities were afoot.

270. 528 U. S. at 132-34 (Stevens, J., dissenting).

271. *Id.* at 139 (Stevens, J., dissenting).

272. Compare *id.* at 124-26 (majority’s analysis), with *id.* at 132-39 (dissent’s analysis). See generally Raymond, *supra* note 157 (considering when, if ever, the neighborhood in which an activity takes place is relevant to establishing the degree of suspicion that the activity creates).

273. *Wardlow*, 528 U.S. at 137 (Stevens, J., dissenting) (quoting Officer Nolan’s testimony).

274. *Id.* at 138 (Stevens, J., dissenting).

Unlike the majority, therefore, Stevens sought more than the sort of evidence that is as consistent with guilt as with innocence. Unlike Judge Baer, however, Stevens never charged the police with a propensity to perjure themselves. Nevertheless, Stevens was unwilling to defer to police judgment unsupported by other evidence. Stevens's opinion thus added several features to the approach of Judge Baer. Both jurists considered minority perceptions and real-world evidence of police treatment of minority communities to be important. But, Stevens crafted a more practical methodology than Baer's for gauging perceptions and practices by drawing on social science rather than personal experience. While Baer's independence from police judgment turned on credibility, Justice Stevens's independence turned on a willingness to carefully examine the quality of the evidence and the inferences that could fairly be drawn from it.

Stevens also required *more* evidence—a greater probability of guilt—than does current law, an issue Baer did not address. Because of the negative impact of certain actual or perceived police practices on individual minority members and on their communities, Stevens tread cautiously. He asked for confident assurance of a justified belief in individual wrongdoing before he would permit the police to intervene in citizens' lives.

Stevens did not pay homage to history the way that Baer did, however fleetingly. Nor did Stevens expose the problem of testilying to the light of day. Nevertheless, by looking to social science, carefully and critically examining the quality of evidence, giving voice to minority concerns in their own words (recorded in the social science studies), and raising the bar necessary to establish reasonable suspicion, Stevens at least implicitly outlined a more practical and potentially more radical way than Baer's to re-craft the Fourth Amendment. Stevens's approach, only one vote from garnering a majority of the Court, takes an excellent additional step toward a jurisprudence of respect.²⁷⁵

B. *Racial Profiling Writ Large: The Japanese Internment*

The Judge Baer and *Wardlow* stories are largely of minority community voices suppressed in the judicial determination of Fourth Amendment "reasonableness." That disregard of dissenting perspectives stemmed from the judiciary's narrow vision of Fourth Amendment costs and benefits. Such silencing crushes the human senses of self-worth, uniqueness, and autonomy: Our voices help to

275. For more details on the shape of such a jurisprudence, see Taslitz & Paris, *Law on the Street*, *supra* note 60. Of course, adding a sensitivity to American history and an awareness of testilying to Stevens's approach would fuse the best of his analysis with the best of Judge Baer's to create an even better third way.

define who we are and how we plan to live.²⁷⁶ But, in neither tale were minorities specifically targeted for searches of their cars, homes, and property. Were that to happen, it would constitute the phenomenon of “racial profiling.”²⁷⁷ That phenomenon also silences minority voices, but it is nevertheless different from the sort of assault on a minority group’s status that was involved in Judge Baer’s or William Wardlow’s cases.

Profiling has grabbed many headlines of late.²⁷⁸ “Driving while black”—that is, having your car stopped by the police because police see black skin color as inherently suspicious—is now a common buzz phrase.²⁷⁹ The sort of damage that such profiling does to the human spirit is highlighted by the story of the twentieth century’s most massive and infamous profiling incident: the Japanese internment, or racial profiling writ large. While the internment was unusual in its scope, severity, and candor as an instance of profiling, the story of the internment’s victims dramatically brings home the kind of damage to the human spirit and to that of the polity done by racial stereotyping.

1. Trying to Stem White Vitriol’s Tide

For many decades before the bombing of Pearl Harbor, political pressure for anti-Asian legislation originated in the western states.²⁸⁰ Japanese and Chinese workers were temporarily needed to build railroads and cut forests. But they would not be welcomed as “real Americans.”²⁸¹

276. See, e.g., Taslitz, *Rape and Culture*, *supra* note 142, at 134–48 (on the psychological and social functions of group voice concerning the meaning and application of legal standards).

277. On racial profiling generally, see Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425, 427 (1997) (discussing “discriminatory pretextual traffic stops”); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 546 (1997) (“[I]f past practice is any indication, [the police] will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics.”); Kathryn K. Russell, “*Driving While Black*”: *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. Rev. 717, 717 (1999) (cataloguing the “wide range of race-based suspicion of Black and Brown motorists” known as “*Driving While Black*”).

278. See, e.g., *Profiling Study Raises More Questions*, Hartford Courant, Jan. 31, 2001, at A8; Susan Vela, *Blacks Share Profiling Stories*, Cin. Enquirer, Jan. 28, 2001, at B1.

279. See, e.g., Laura Wides, *LAPD Worker Files Racial Profiling Suit Against Redondo Beach Police*, L.A. Times, Dec. 2, 2000, at B4. See generally Meeke, *Driving While Black*, *supra* note 18 (nature, scope, media coverage, and remedies for racial profiling, especially “*Driving While Black*”); Bob Herbert, *In America; Breathing While Black*, N.Y. Times, Nov. 4, 1999, at A29 (illustrates media coverage); Randall Kennedy, *Racial Profiling Usually Isn’t Racist*, The New Republic, Sept. 13, 1999, at 30 (similar).

280. See Donald W. Shriver, Jr., *An Ethic for Enemies: Forgiveness in Politics* 157 (1995).

281. See *id.* at 123–24, 157.

The December 7, 1941 bombing of Pearl Harbor prompted the open venting of white vitriol and fear against, and dehumanization of, west coast Japanese immigrants (the Issei) and their American-born children (the Nisei).²⁸² After Pearl Harbor, it became “utterly commonplace” to speak of all persons of Japanese ancestry as the “yellow enemy.”²⁸³ The *New Yorker* magazine responded to the attack with a short story describing those of Japanese descent as “yellow monkeys.”²⁸⁴ Monkey imagery dominated American cartoon art throughout the war, matched by press, cinema, radio, newsreel, and political propaganda, portraying Japanese Americans as sub-human.²⁸⁵

The military was poised to act quickly. As early as five years before the bombing, the federal government had contemplated interning the Japanese.²⁸⁶ In March 1941, the Justice and War Departments had developed contingency plans, reaching a secret agreement to coordinate the internment of enemy aliens. That agreement did not, however, contemplate mass incarceration, and explicitly provided for arrest under warrant obtained by a federal prosecutor, a subsequent preliminary hearing, and a Justice Department determination of individual loyalty.²⁸⁷ Citizens were also distinguished from aliens.²⁸⁸

On the very day of the bombing, this machinery was set into motion, with the Justice Department arresting over 2000 individuals, most of whom were Japanese.²⁸⁹ Enemy alien review boards quickly processed these people through individual loyalty hearings, then detained them, by the spring of 1942, in INS internment camps in Montana, New Mexico, and North Dakota, along with a smaller number of German and Italian enemy aliens suspected of disloyalty.²⁹⁰

Many swept up in this initial roundup of the Issei were leaders in the Nikkei (those of Japanese descent) community. That loss of leadership, combined with the desire of some Nikkei to prove their loyalty and with a cultural acceptance of what cannot be changed, made Nikkei resistance to later events difficult.²⁹¹ The Issei also discouraged their children from drawing others' attention. “The nail that sticks up,” they explained, “gets hammered.”²⁹²

282. *See id.* at 123-24, 254 n.12.

283. *See id.* at 123 (quoting John W. Dower, *War Without Mercy: Race and Power in the Pacific War* 37 (1986)).

284. *Id.*

285. *See Dower, supra* note 283, at 37, 182-85.

286. *See Yamamoto et al., Race, Rights and Reparation: Law and the Japanese American Internment* 3-4 (2001).

287. *See id.* at 97.

288. *See id.*

289. *See id.*

290. *See id.*

291. *See Paul R. Spickard, Japanese Americans: The Formation and Transformations of an Ethnic Group* 101 (1996).

292. Eric Muller, *Free to Die for Their Country: The Story of the Japanese*

For a few weeks, the Nisei held hope that, as citizens, they would not suffer a fate similar to many of their parents. United States Attorney General Francis Biddle had publicly urged the nation to care about ensuring the reality of democracy “for Germans, for Italians, for Japanese.”²⁹³ Biddle continued: “[T]he Bill of Rights protects not only American citizens but all human beings who live on our American soil under our American Flag.”²⁹⁴ Biddle assured the public that arrested aliens were given individualized assessments and that “[n]o alien was apprehended, and none will be, on the score of nationality.”²⁹⁵ The day after Pearl Harbor, Representative Coffee of Washington declared in Congress that programs against Japanese Americans would make a “mockery of our Bill of Rights.”²⁹⁶ In his February 10 diary entry, Secretary of War Henry Stimson worried that evacuation would “make a tremendous hole in our constitutional system.”²⁹⁷ FBI Director J. Edgar Hoover by December 10 “reported that ‘practically all’ the persons whom the FBI had intended to arrest had been taken into custody.”²⁹⁸ Hoover would later describe the coming calls for mass internment as a move more from “public and political pressure rather than factual data.”²⁹⁹ A significant number of high-level federal officials also believed that the military, legal, and constitutional bases for mass detention were weak.³⁰⁰ The military Governor of Hawaii, General Delos Emmons, further assured Japanese-Americans that the federal government had neither the intention nor the desire to create mass concentration camps.³⁰¹

“‘[T]his is America,’” he said, “‘and we must do things the American Way.’”³⁰² “‘We must distinguish between loyalty and disloyalty among our people.’”³⁰³ Chicago businessman, Curtis Munson, who had been asked to gather intelligence on Japanese in

American Draft Resisters in World War II, at 26 (2001); Spickard, *supra* note 291, at 101.

293. Muller, *supra* note 292, at 20.

294. *Id.*

295. Yamamoto et al., *supra* note 286, at 98 (quoting Biddle) (alteration in original).

296. Ronald Takaki, *Double Victory: A Multicultural History of America in World War II*, at 144 (2000) [hereinafter Takaki, *Double Victory*].

297. Comm. on Wartime Relocation and Internment of Citizens, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment* 79 (1982) [hereinafter *Relocation Commission*].

298. Yamamoto et al., *supra* note 286, at 97.

299. Shriver, *supra* note 280, at 159; see also *Relocation Commission*, *supra* note 297, at 73.

300. See Shriver, *supra* note 280, at 159.

301. *Relocation Commission*, *supra* note 297, at 265; see also Takaki, *Double Victory*, *supra* note 296, at 138.

302. *Relocation Commission*, *supra* note 297, at 265; see also Takaki, *Double Victory*, *supra* note 296, at 138.

303. *Relocation Commission*, *supra* note 297, at 265; see also Takaki, *Double Victory*, *supra* note 296, at 138.

the United States, had indeed already told Roosevelt in a pre-attaché (11/7/41) report that no uprising was likely because many “local Japanese” were loyal or wanted to “lay low” to avoid concentration camps.³⁰⁴ “Lieutenant Commander K. D. Ringle of the Office of Naval Intelligence found that the large majority [of Nisei] were at least passively loyal.”³⁰⁵ Many business interests supported resistance to relocation, and some local public officials urged restraint; the local press behaved responsibly too, cautioning against the spreading of rumors.³⁰⁶ Nikkei already in the Army showed loyalty by battling enemy planes at Pearl Harbor, while Nikkei civilians rushed to volunteer to defend ports, give blood, and serve in the ROTC.³⁰⁷

Political forces pushing toward mass incarceration were, however, far more powerful. The declaration of war, building war hysteria, and the failure of political leadership to resist the tide soon drowned Nisei hopes.³⁰⁸

2. Higher Tide: First Moves Against Japanese-Americans

Within two weeks of Pearl Harbor, Lieutenant General John DeWitt, head of the Western Command, requested approval to conduct search and seizure operations to prevent alien Japanese from making radio transmissions to Japanese ships.³⁰⁹ The Justice Department refused, however, to seek the warrant without probable cause, and the FBI concluded that the security threat was only a perceived one.³¹⁰ In January, the FCC reported that the Army’s fears were groundless.³¹¹

Public opinion would not support the direction of the Justice Department and the FBI, however, and DeWitt was undeterred.³¹² By January 2, the Joint Immigration Committee of the California Legislature sent a manifesto to California newspapers summing up “the historical catalogue of charges against the ethnic Japanese,” who, said the manifesto, were “totally unassimilable.”³¹³ The manifesto declared that all of Japanese descent were loyal to the Emperor, and attacked Japanese language schools as teaching Japanese racial

304. Relocation Commission, *supra* note 297, at 52-53; *see also* Takaki, *Double Victory*, *supra* note 296, at 144.

305. Relocation Commission, *supra* note 297, at 55; Takaki, *Double Victory*, *supra* note 296, at 144-45.

306. Takaki, *Double Victory*, *supra* note 296, at 140.

307. *See id.* at 140-41.

308. *See* Relocation Commission, *supra* note 297, at 18 (describing the causes of the internment); Yamamoto et al., *supra* note 286, at 97-100; *see also* Shriver, *supra* note, 280 at 155-62.

309. Takaki, *Double Victory*, *supra* note 296, at 145.

310. *See* Relocation Commission, *supra* note 297, at 74.

311. *See id.* at 62-63; Takaki, *Double Victory*, *supra* note 296, at 145.

312. *See* Shriver, *supra* note 280, at 158.

313. Relocation Commission, *supra* note 297, at 67-68.

superiority.³¹⁴ The committee had the support of the Native Sons and Daughters of the Golden West and the California Department of the American Legion, which in January demanded that all Japanese with dual citizenship be “placed in concentration camps.”³¹⁵ By February, Earl Warren, at the time Attorney General of California, and U.S. Webb, a former Attorney General, were vigorously seeking to persuade the federal government to remove all ethnic Japanese from the west coast.³¹⁶

White American farmers admitted that their self-interest required removal of the Japanese. Explained one farmer on behalf of the Grower-Shipper Vegetable Association in the *Saturday Evening Post*: “It’s a question of whether the white man lives on the Pacific Coast or the brown man. They came into this valley to work, and they stayed to take over.”³¹⁷ Fear, combined with prejudice, was also at work, aided by the January release of the Roberts Commission Report, prepared at President Franklin D. Roosevelt’s request. That report concluded that Japanese in America were responsible for espionage, contributing to the Pearl Harbor tragedy.³¹⁸ Columnist Henry McLeMORE reflected growing public sentiment fueled by this report:

I am for the immediate removal of every Japanese on the West Coast to a point deep in the interior. I don’t mean a nice part of the interior either. Herd ‘em up, pack ‘em off and give ‘em the inside room in the badlands. Personally, I hate the Japanese. And that goes for all of them.³¹⁹

California newspapers endorsed mass evacuation. The Los Angeles Times caught the spirit of the times: “A viper is nonetheless a viper whenever the egg is hatched—so a Japanese American, born of Japanese parents—grows up to be a Japanese, not an American.”³²⁰ State politicians joined the bandwagon embraced by Leland Ford of Los Angeles, who demanded that “all Japanese, whether citizens or not, be placed in [inland] concentration camps.”³²¹

Emboldened by further events, General DeWitt in February of 1942 sent a final report to Henry Stimson recommending mass exclusion of Japanese-Americans. Similarly, in testimony before Congress, DeWitt said, “The Japanese race is an enemy race.” He

314. *See id.* at 68.

315. *Id.*

316. *See id.*; *see also* Yamamoto et al., *supra* note 286, at 98.

317. Jacobus Ten Broek et al., *Prejudice, War, and the Constitution* 80 (1954); *see* Takaki, *Double Victory*, *supra* note 296, at 146-47.

318. *See* Relocation Commission, *supra* note 297, at 57.

319. Yamamoto et al., *supra* note 286, at 99 (internal quotations omitted).

320. Gary Y. Okihiro & Julie Sly, *The Press, Japanese Americans, and the Concentration Camps*, 44 *Phylon*, No. 1, at 66-69 (1983) (citation omitted); *see also* Takaki, *Double Victory*, *supra* note 296, at 146.

321. Relocation Commission, *supra* note 297, at 70; *see also* Takaki, *Double Victory*, *supra* note 296, at 147.

continued: “[W]e must worry about the Japanese all the time until he is wiped off the map.”³²²

On February 19, 1942, Roosevelt added his aid to DeWitt’s cause by signing Executive Order No. 9066. That order directed the Secretary of War to prescribe military areas in which the “right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.”³²³

3. The Racial Curfew

DeWitt’s first move against the West Coast Nikkei was a curfew order signed in March, 1942. The order confined all German, Italian, and Japanese aliens, and all U.S. citizens of Japanese (but not of German or Italian) ancestry, to their homes between 8 p.m. and 6 a.m., and required them to get military leave to travel more than five miles from their home.³²⁴ The five mile limit was especially onerous. Those in rural areas needed permission to grocery shop, while truck farmers needed permits to deliver vegetables. In some cases the office where one would seek permission to leave the perimeter was itself outside that perimeter.³²⁵ Getting permission was difficult. In one case, for example, fifteen-year-old Helen Murao had such difficulty getting permission to see her ill sister that, by the time Murao arrived, her sister was dead.³²⁶ Murao explained the inchoate sense of exclusion—of being outside the American community—that this experience fostered:

All I knew was that she was dead, and “they” had done it. And I can’t identify even now who I felt “they” were. It was just, you know, me against everybody, and everybody else had done it to me, or to us. [All I wanted to do] was get out of there, and I was very upset that nobody accorded us any kind of sympathy or any kind of human courtesy at all.³²⁷

Many Nisei similarly recognized the race discrimination in DeWitt’s order. “[T]hey had to sit at home while the American-born children of German and Italian immigrants, many of whom were their school

322. Relocation Commission, *supra* note 297, at 66 (discussing congressional testimony); *id.* at 86-90 (discussing Final Report).

323. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), *reprinted in* 18 U.S.C. § 97(a) (Supp. 1943).

324. *See* Relocation Commission, *supra* note 297, at 101 (citing John L. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942, at 297-98 (U.S. Gov’t Printing Off. 1943)); Muller, *supra* note 292, at 20-21.

325. Muller, *supra* note 292, at 21.

326. *See* John Tateishi, *And Justice for All: An Oral History of the Japanese American Detention Camps 41-42* (1984).

327. *Id.* at 42; *see also* Muller, *supra* note 292, at 21-22 (setting Murao’s plight in historical context).

classmates, were free to walk the streets.”³²⁸ This recognition “offended and angered the Nisei.”³²⁹

4. Race-Based Relocation

The military also embarked, as early as December 1941, on an effort to encourage the voluntary relocation of the Nikkei.³³⁰ That effort failed, for few Nikkei knew anyone in relocation areas, and the handful that did go faced great hostility in their new homes. Furthermore, wrapping up affairs and disposing of property was time-consuming and difficult.³³¹ So DeWitt converted the voluntary program into a mandatory one, being empowered to do so by Executive Order No. 9066.³³² “[T]he military was to empty the West Coast of all ethnically Japanese people, aliens and citizens alike.”³³³ On March 21, 1942, Congress passed Public Law 503, criminalizing violations of certain military orders.³³⁴ Three days later DeWitt began issuing a series of Civilian Exclusion Orders. Japanese communities were given seven days to evacuate to the relocation areas. They were to be shipped to sixteen Army-operated assembly centers. By March 29, the Nikkei up and down the west coast were notified that they must register with the Wartime Civil Control Administration (“WCCA”), a military agency set up by DeWitt to administer the evacuation, and then prepare to be removed to “temporary residence elsewhere.”³³⁵ They were told that they could bring only whatever possessions they could carry.³³⁶

With little time to act, the Nikkei had to sell most of their possessions: their refrigerators, cars, furniture, pianos, farms, and houses.³³⁷ Facing the prospect of no income stream to make mortgage payments, property went on the market. It was a buyer’s market, mostly to whites all too eager to gouge the Nikkei, paying minimal

328. Muller, *supra* note 292, at 22.

329. *See id.*

330. *See* Relocation Commission, *supra* note 297, at 101. *But see* Yamamoto et al., *supra* note 286, at 101 (placing the date of the “voluntary” relocation’s start at March 1942, while the Relocation Commission places the date at February 1941).

331. Muller, *supra* note 292, at 22-23.

332. *See id.* at 23-24.

333. *Id.* at 23-24 (explaining why voluntary evacuation became mandatory); *see also* Yamamoto et al., *supra* note 286, at 101 (discussing the original voluntary nature of the program).

334. Yamamoto et al., *supra* note 286, at 101. *But see* Muller, *supra* note 292, at 25 (placing the criminalization order date at March 29, 1942).

335. Muller, *supra* note 292, at 25-26. General DeWitt’s Final Report permitted evacuees to take with them only what they could carry. *See* DeWitt, *supra* note 324, at 100.

336. *See* Relocation Commission, *supra* note 297, at 135-36; Takaki, *Double Victory*, *supra* note 296, at 154.

337. *See* Takaki, *Double Victory*, *supra* note 296, at 154.

prices for the fruits of a lifetime's worth of work.³³⁸ Families tried to avoid such losses by searching for adequate, affordable storage space. Such space was rarely available, however, forcing families to abandon valuables, heirlooms, and household goods in large quantities. When space was found, families would return years later to find their storage areas ransacked and their belongings stolen.³³⁹

The Nikkei later spoke despairingly of the pain caused by what was in effect confiscation of their property for white advantage. Explained one survivor:

It is difficult to describe the feeling of despair and humiliation experienced by all of us as we watched the Caucasians coming to look over our possessions and offering such nominal amounts knowing we had no recourse but to accept whatever they were offering because we did not know what the future held for us.

. . . People who were like vultures swooped down on us³⁴⁰

Another survivor said it this way:

I went for my last look at our hard work . . . why did this thing happen to me now? I went to the storage shed to get the gasoline tank and pour the gasoline on my house, but my wife . . . said don't do it, maybe somebody can use this house; we are civilized people, not savages.³⁴¹

Survivors also bemoaned the degradation involved in the forced journeys to assembly centers. One family was especially hurt by the assigning of numbers at registration centers to be affixed to baggage and coat lapels. "From then on," this family complained, "we were known as Family #10710."³⁴² Still another survivor poignantly summarized the atmosphere of this ethnic roundup:

On May 16, 1942 at 9:30 a.m., we departed . . . for an unknown destination. To this day, I can remember vividly the plight of the elderly, some on stretchers, orphans herded onto the train by caretakers, and especially a young couple with 4 pre-school children. The mother had two frightened toddlers hanging on to her coat. In her arms, she carried two crying babies. The father had diapers and other baby paraphernalia strapped to his back. In his hands he struggled with duffle bag and suitcase. The shades were drawn on the train for our entire trip. Military police patrolled the aisles.³⁴³

338. Relocation Commission, *supra* note 297, at 131-32.

339. Muller, *supra* note 292, at 27 (describing how the storage space was ransacked).

340. Relocation Commission, *supra* note 297, at 132; *see* Shriver, *supra* note 280, at 160-61.

341. Relocation Commission, *supra* note 297, at 132.

342. *Id.* at 135.

343. *Id.* at 136.

Organized protest against these events did exist. For example, the President of the University of California, the Federal Council of Churches, a number of other church bodies, and a few labor leaders protested the forced relocation.³⁴⁴ The single largest public demonstration was held on February 19, 1942, when a thousand members of the United Citizens Federation protested in Los Angeles. But protest was generally sporadic and slow, doing little to stop DeWitt's momentum.³⁴⁵

5. Privacy, Property, and Free Movement No More: The Relocation Centers

When evacuees arrived at assembly centers, they found that they were to be housed at stockyards, fairgrounds, and racetracks jammed with tiny barracks. The centers were filthy, smelly, and dirty. Two thousand people were packed into one large building.³⁴⁶ Rather than beds, the Nikkei were given gunnysacks that they stuffed with straw. Stables sometimes served as housing.³⁴⁷ Perhaps the worst condition for the detainees was the virtual absence of privacy. Law professor Eric Muller, in a recently-released book,³⁴⁸ told the story of the Nozawa family, who lived in a twenty foot by twenty foot square room, with huge gaps into the rooms of their neighbors on either side. Nearly 19,000 deportees shared but six latrines.³⁴⁹ "Privacy was out of the question; already they could hear their neighbors' conversation from the five other rooms up and down the long barrack."³⁵⁰ No family had its own kitchen, everyone ate in common mess halls, and lines at the washrooms were so long that the eldest member of the Nozawa family went to shave at midnight.³⁵¹ Visitors were greeted at the "zoo," a border of the camp where Caucasian and other guests could be greeted, but only through the fence. Said George Nozawa, "I didn't know whether we were the chimpanzees or they were."³⁵²

After several weeks in the assembly center, evacuees were shipped by train to longer-term internment camps.³⁵³ Here, too, the Nikkei lived in spare barracks devoid of privacy.³⁵⁴ Floor and wallboards soon

344. See Shriver, *supra* note 280, at 160.

345. See *id.*

346. See Relocation Commission, *supra* note 297, at 139.

347. See *id.*

348. See Muller, *supra* note 292, at 28-31.

349. See *id.* at 29.

350. See *id.*; see also Relocation Commission, *supra* note 297, at 140; Tateishi, *supra* note 326, at 19.

351. See Muller, *supra* note 292, at 29.

352. See *id.* at 29-30.

353. Takaki, *Double Victory*, *supra* note 296, at 155.

354. See Muller, *supra* note 292, at 36-38.

warped, exposing the internees to the elements and to “the vermin from below.”³⁵⁵

These “relocation centers” were operated by the War Relocation Authority, a civilian agency created by executive order on March 18. Most of the internees would remain at these camps for several years, daily facing barbed wire and armed guards.³⁵⁶ Internees were forbidden to leave the camp without a pass from the Project Director.³⁵⁷ Guards were told to shoot anyone violating this rule.³⁵⁸

The Issei particularly suffered from the loss of property and enforced idleness, but, again (as earlier, in the assembly centers), even more so from the loss of privacy:

Family life [in the relocation centers] was transformed overnight. There was no privacy, either within a family unit or between a family and its neighbors. Quarters were so cramped that the younger generation typically spent most of the day outside the family home. As the Nisei spent more time with each other and less with their parents, the Japanese tradition of strong parental control began to falter. Issei fathers, accustomed to unquestioned authority as family breadwinners, won no bread and began to lose their authority. Mealtimes, the anchor of family life, were no longer private matters, but communal affairs that often scattered family members across a mess hall by gender and generation, rather than by family unit.³⁵⁹

For many of the young Nisei, who were growing up accustomed to these conditions, there was less of a sense of pain from lost property and privacy. The conditions indeed encouraged enjoyable social contact with the other Nisei children.³⁶⁰ But the loss of free movement and of the accompanying autonomy it brought to many of life’s choices was agonizing. As one young Nisei woman explained: “[T]he overriding feeling that I had, without even being conscious of it at that time, was the deprivation of freedom, and that is a very traumatic thing. You don’t appreciate it until you don’t have it.”³⁶¹

6. The High Court’s Complicity

It does not take a legal education to understand that arresting and imprisoning masses of persons without individualized probable cause, or even reasonable suspicion to believe that any of them had committed or were about to commit a crime, impinges directly on the

355. *Id.* at 36.

356. *See* Yamamoto et al., *supra* note 286, at 101.

357. *See* Muller, *supra* note 292, at 33-34.

358. *See id.*

359. *Id.* at 38.

360. *Id.* at 38-39.

361. *Id.*

Fourth Amendment.³⁶² Privacy and free movement were robbed from the Nikkei for years. Though the government generally did not directly confiscate Nikkei property (the government did freeze significant numbers of Issei bank accounts and otherwise sometimes acted directly), the forced sale, abandonment, exposure to theft, and deprivation of use of their property by the Nikkei stemmed directly from government action.³⁶³ The primary justification for these abuses, moreover, was the dangers of the Japanese “racial strain.”³⁶⁴ Yet, Supreme Court opinions arising from these events never once framed the issue as a Fourth Amendment problem,³⁶⁵ and the Court closed its eyes to the racial animus involved, describing the events as justified by legitimate concerns of war rather than race hatred.³⁶⁶

The Court itself embraced in its opinions many of the white public’s racial stereotypes of the Japanese. In one case, for example, the Court interestingly recognized that there was a long history of white prejudice against persons of Japanese descent, but argued that this prejudice, combined with Japanese cultural characteristics, rendered the government’s action eminently sensible:

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public school in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

. . . .

The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon

362. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 150-58 (summarizing standards for the reasonableness of searches and seizures under the Fourth Amendment); see *infra* text accompanying notes 381-441 (discussing the Fourth Amendment’s application to a modern day racial roundup).

363. On the freezing of bank accounts, see Muller, *supra* note 292, at 36-37. On other injuries to Nikkei property, see *supra* text accompanying notes 337-39.

364. See Takaki, *Double Victory*, *supra* note 296, at 147 (quoting General DeWitt).

365. See Yamamoto et al., *supra* note 286, at 96-176 (analyzing, giving historical background of, and reproducing the Supreme Court cases).

366. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); see also John E. Semonche, *Keeping the Faith: A Cultural History of the U.S. Supreme Court 225-30* (1998) (critiquing the internment cases).

the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.³⁶⁷

In its other opinions arising from the internment, the Court similarly generally deferred to the Executive as properly acting pursuant to its war powers.³⁶⁸ In only one case, the *Endo* case, did the Court grant relief. There, the Court did briefly pay tribute to the fact that our "Constitution has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals."³⁶⁹ But the Court limited its decision to *Endo's* circumstances: a citizen whom the Department of Justice and the War Department admitted was loyal and law-abiding, as was true of *Endo*, could not continue to be held in detention.³⁷⁰ Nevertheless, the Court again described the evacuation program as justified by legitimate fears of espionage and sabotage, not by group hostility to a whole class of persons.³⁷¹

The Court's rhetoric of racial color-blindness arguably aided the progressive elaboration of future individual rights doctrine.³⁷² Its embrace of racial stereotyping, dodging of important issues, extreme deference to the Executive, and results in the internment cases, on the other hand, did little to heal the festering wounds of the incident.³⁷³ Japanese-American outrage and exclusion had been making, and long would make, itself felt, however. For example, when the Government had the audacity to draft *Nikkei*—to ask those whom it had wrongly imprisoned to die defending it—many *Nisei* resisted. They did so largely on moral grounds, and their bravery is to be celebrated.³⁷⁴

367. *Hirabayashi*, 320 U.S. at 96-101; see also Semonche, *supra* note 366, at 225-30 (analyzing the racial assumptions underlying the Court's internment opinions); Yamamoto et al., *supra* note 286, at 102-76 (citing critical excerpts from these opinions).

368. See Semonche, *supra* note 366, at 225-30.

369. *Ex Parte Endo*, 323 U.S. 283, 286 (1944).

370. See Semonche, *supra* note 366, at 228.

371. See *id.*

372. See Peter Irons, *A People's History of the Supreme Court 455-56* (1999). But see generally Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 Mich. J. Race & L. 165 (1996) (arguing that the Court has most recently used *Korematsu* to justify reactionary civil rights policy).

373. See Semonche, *supra* note 366, at 229.

In terms of its role within the civil religion, the Court had been derelict in its duty [T]he American experiment necessitated a respect for diversity free of the suspicion that the different were disloyal or a threat to national security [T]o accept the idea that ancestry precluded the full incorporation of individuals within the American community mocks the theological premises that lie at the very heart of the nation.

Id.

374. See generally Muller, *supra* note 292 (documenting the grounds for, and details

Similarly, some sixteen percent of internment camp residents renounced their American citizenship. Most, however, did not truly want to leave, later withdrawing their renunciation, withdrawals accepted in 1948 by United States courts.³⁷⁵ The renunciations were thus not truly expressing commitment to another polity but rather an expression of “rage and alienation.”³⁷⁶ Said Edward Ennis, head of the Alien Enemy Control Unit: “They just threw back their citizenship at us. This was a perfectly honest expression of how they felt.”³⁷⁷ But the broader Japanese-American community’s pain continued as well. Finally, the nation made an important symbolic effort to welcome Japanese-Americans to the American political community: awarding reparations to the survivors in 1988. The scars and indignities of the camps nevertheless continued to be carried, and will be carried, by survivors for the rest of their lives.³⁷⁸

7. The Internment’s Lasting Significance

The wholesale deprivation of Japanese-American rights to privacy, property, and free movement during the internment saga is a powerful reminder of the values protected by the Fourth Amendment. Without freedom of movement, Japanese-Americans lost both their property and their means of acquiring more property. They lost as well their abilities to pursue their individual interests, to maintain certain friendships and community ties, and to pursue an education for their children. Without property, they lacked independence or any significant measure of power over their own fate. They depended on the state for the necessities of survival. The absence of most of their property in turn also meant loss of privacy. These combined losses played havoc with traditional social hierarchies, family life, and self-esteem.

That these deprivations were imposed on each victim *because of* his membership in a perceived racial group magnified the harms done.³⁷⁹ Japanese immigrants and their descendants in America understood that they were neither valued by, nor considered full members of, the American people.³⁸⁰ Their value as individuals became equated to the

of, Nisei draft resistance during World War II); Takaki, *Double Victory*, *supra* note 296, at 156-65 (summarizing the history of the drafting of the internees and their being required to take loyalty oaths).

375. See Shriver, *supra* note 280, at 162.

376. *Id.*

377. *Id.*

378. See *id.* (indignities and scars); *id.* at 164-67 (reparations).

379. See Taslitz, *Racist Personality*, *supra* note 31, at 758-65 (describing the special harm of the insulting messages sent to an individual by society’s actions based on the majority’s perception that that individual belongs to an “inferior” group).

380. See Karst, *supra* note 125, at 90-92; see also Interview by Tom Ikeda with Henry Miytake (Oct. 28, 1999), *reprinted in* Yamamoto et al., *supra* note 286, at 392. Miytake explains:

value of their racial group; but that group's value was negligible in the eyes of white America. Made aliens in their own land, they felt as if the rest of America was a colonizing army. Their pain and anger stemmed directly from race-based search and seizure practices, teaching lasting lessons about the connection between the Fourth Amendment and human respect.

C. Racial Profiling One-By-One: The Oneonta Case

1. The Nature of Modern Profiling

The modern phenomenon of racial profiling—police selecting a person to search or seize based significantly on that person's race³⁸¹—is not as obvious or dramatic as the Japanese internment, where an entire group of people was seized based solely upon their race. Modern profiling usually happens, however, to one person at a time. Thus, police may stop a car driven by an African-American male, conduct an investigation, then release him.³⁸² When police do so repeatedly, however, they impinge on the free movement of many thousands of African-Americans and create a perception in that community that its members are discriminatorily suspected because their skin color marks them as a criminal class.³⁸³ Modern profiling,

if you look at the constitutionality of the issue, to me, if you round up 115,000, 120,000 people, and you put 'em into enforced incarceration process without due process of law, without martial law being declared, we're talking about a constitutional issue. You can't do that. So it becomes, whether you could get 51 or 50+ percent of the 435 Members of the House of Representatives and fifty people in the Senate to go along with this kind of issue. [I]f they can't go along with it, then the Constitution doesn't mean a damn thing to me. And the way they thre[w] us into the camp[s], they disregarded the Constitution. So the monkey's on their back also because they, they wrote Public Law 503, and they banged it through Congress in two days flat. And that's the real bill that put us into the camp.

Id. (alterations in original).

Professor Margaret Raymond has suggested that the expansion of Fourth and Fifth Amendment rights after World War II was partly a conscious judicial effort to distinguish the American nation from the totalitarian regimes against which we had so recently fought. See Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. Rev. 1193 (1998). She argues that this "totalitarian comparison" was often expressly made in the case law. *Id.* at 1197, 1198-1225. Perhaps if the courts had also candidly analyzed and rejected our own flirtations with totalitarian practices, such as the internment, they would also long ago have developed a more racially-inclusive Fourth Amendment jurisprudence, learning the lessons taught by our modern history.

381. See *supra* text accompanying notes 12-28.

382. Meeks, *Driving While Black*, *supra* note 18, at 11-15 (recounting African-American Samuel Elijah's automobile being stopped by the police without any articulable basis).

383. See Lu-in Wang, "Suitable Targets"? *Parallels and Connections Between "Hate" Crimes and "Driving While Black,"* 6 Mich. J. Race & L. 209 (2001) (on group perceptions). See generally Meeks, *Driving While Black*, *supra* note 18 (describing the

unlike the internment, also often involves the use of race as purportedly but one factor among others. A driver may, for example, be stopped because he fits a drug courier profile, with race being but one of the factors in the profile. Moreover, because all the circumstances surrounding the driver's actions are considered, the State may characterize the stop as based on individualized suspicion.³⁸⁴ Yet the fact remains that the driver probably would not have been stopped but for his race, and both race and profiles act as suspicion markers, using very broad generalizations to stigmatize individual citizens.³⁸⁵ Additionally, modern profiling may be entirely denied as the motivation for a police action where some other "objective" ground for the action, such as a defective rear taillight, can be identified.³⁸⁶ Modern profiling is thus often hidden and subtle, working slowly, yet, in a fashion similar to that wrought by the Japanese internment, still corroding minority groups' equality of status and membership in a broader American political community.³⁸⁷

2. Oneonta Case Background

A further case study, *Brown v. City of Oneonta*,³⁸⁸ helps to clarify modern profiling's dangers. In *Brown*, shortly before 2 a.m. on a fall morning, someone broke into a seventy-seven year-old woman's house just outside Oneonta and attacked her. The victim could not identify her assailant's face, but, based on seeing his hand and forearm, and on the speed of his attack, described him as a young black male. The victim also told police that, as she and the male struggled, he cut himself on one of his hands with his knife. A police canine unit tracked the assailant's scent from the crime scene to the

widespread impact and varied nature of the problem of racial profiling).

384. See, e.g., Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 410-13 (summarizing constitutional law on racial profiling specifically and on drug courier profiling more generally); Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that the Infected Spy, as All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. Rev. 417, 420 (1987).

385. See generally Meeks, Driving While Black, *supra* note 18.

386. See, e.g., *Whren v. United States*, 517 U. S. 806 (1996) (holding that traffic stops are reasonable under the Fourth Amendment so long as police have probable cause to believe that a traffic violation has occurred, regardless of whether the stop was in fact motivated by racial stereotyping or racial animus). *Whren* acknowledges that suit may be possible for selective enforcement under the Fourteenth Amendment. *Id.* at 813. The Court, however, has set the standard of proof just to obtain discovery in such a suit so high as to render recovery unlikely. See Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 410-13. This high standard also tends to make police officer "testilying" easy. See Taslitz, *Slaves No More!*, *supra* note 70, at 757-75 ("testilying" and its connection to *Whren*).

387. See Wang, *supra* note 383 (profiling). See generally Karst, *supra* note 125 (arguing that racially discriminatory laws, or those applied in a racially discriminatory fashion, work to lower minority group social status and to exclude them from equal membership in the broader American political community).

388. 195 F.3d 111 (2d Cir. 1999), *vacated*, 221 F.3d 329 (2d Cir. 2000).

7500 student State University of New York College at Oneonta ("SUCO"). SUCO is in the town of Oneonta, a mostly white town of about 10,000 full-time residents. Fewer than 300 African-Americans live in the town, and just two percent of SUCO students are black.³⁸⁹

The police promptly requested and obtained from SUCO officials a list of SUCO's black students. The police tried to find and question every such SUCO student, an effort producing no suspects. Over the next few days, the police swept through Oneonta, stopping and questioning more than 200 non-white persons on the streets, inspecting their hands for a cut, but finding no suspects. The SUCO students whose names were on the list and others questioned during the sweep brought suit against the City of Oneonta, the State of New York, SUCO and certain SUCO officials, and various police departments and officers.³⁹⁰

The case has a complex procedural and legal history unhelpful to understanding the argument of this Article. What matters most is that the United States Court of Appeals for the Second Circuit eventually rejected claims for damages rooted in the Equal Protection Clause of the Fourteenth Amendment and the dictates of the Fourth Amendment. While the court later reconsidered aspects of that decision, both the original opinion and the amended one upon reconsideration shed useful light on how modern courts deal with profiling.³⁹¹

3. The Original Second Circuit Opinion

a. *The Equal Protection Claims*

Regarding the equal protection claim, the Second Circuit in its original opinion concluded that, "plaintiffs' factual premise is incorrect: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime."³⁹² In the court's view, no profile had been used to suggest that the suspect must have been black. Nor had it been alleged that the defendants had a regular policy, based upon racial stereotyping, to stop all black Oneonta residents whenever a violent crime had been reported. Rather, defendants' facially race-neutral policy was to investigate crimes by interviewing the victim, getting a description of the victim's assailant, and seeking out persons matching that description. In this case, said the court, the description "contained not only race, but also gender

389. *Id.* at 116.

390. *See id.*

391. *See supra* notes 12-34 and accompanying text (collecting and commenting on the leading academic literature on racial profiling).

392. *Brown*, 195 F.3d at 119.

and age, as well as the possibility of a cut on the hand. The description is not a suspect classification, but rather a legitimate classification of suspects."³⁹³

Of course, the court conceded, attempting to question every person in a general category may have a disparate impact on small minority groups in towns such as Oneonta. Nevertheless, such an impact may be justified: "If there are few black residents, for example, it would be more useful for the police to use race to find a black suspect than a white one."³⁹⁴ In any event, the Equal Protection Clause reaches governmental action with a discriminatory impact only if it is also proven to have had a discriminatory intent.³⁹⁵ Plaintiffs failed, in the court's view, to allege discriminatory intent. The court did note that the police stopped an African-American woman during the sweep, arguably suggesting that defendants "considered race more strongly than other parts of the victim's description."³⁹⁶ That one incident was, however, insufficient to convince the court that the police acted primarily because of the plaintiff's race; rather, the police "were responding to a description given in a specific case."³⁹⁷

The court, thus, rejected the description of the sweep as racial profiling but recognized the "sense of frustration that was doubtlessly felt by those questioned by the police during this investigation."³⁹⁸ The court further acknowledged that it was "not unmindful of the impact of this police action on community relations."³⁹⁹ Indeed, the court urged law enforcement officials to be "cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness."⁴⁰⁰ The court concluded, however, that this caution was an expression of sound policy, not constitutional mandate. There was a sharp division between the responsibilities of the judiciary and the executive, the court declared: "[O]ur role is not to evaluate whether the police action in question

393. *Id.*

394. *Id.* at 120.

395. *See id.* at 120; Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 410-13 (summarizing the relevant law). There has been some dispute in the lower courts and among commentators whether the high standard of proof for selective prosecution claims under the Equal Protection Clause, articulated in *United States v. Armstrong*, 517 U.S. 456 (1996), in fact governs equal protection claims arising from alleged racial profiling. *See* Elizabeth A. Knight & William Kurnik, *Racial Profiling in Law Enforcement: The Defense Perspective on Civil Rights Litigation*, 30 *The Brief* 16, 19-23 (2001) (summarizing the dispute and the case law). Recently, the most significant federal appellate profiling opinion, coming from the United States Court of Appeals for the Seventh Circuit, held that *Armstrong* indeed governs racial profiling claims. *See Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001).

396. *Brown*, 195 F.3d at 120.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause [I]t did not."⁴⁰¹

b. *The Fourth Amendment Claims*

The court was only marginally more receptive to the plaintiffs' Fourth Amendment claims. Under that amendment, a suspect may only be stopped if the police have reasonable suspicion of his involvement in criminal activity.⁴⁰² The amendment applies in the first place, however, only if the claimed stop was a "seizure."⁴⁰³ A "seizure" exists if a reasonable person would believe that his freedom of movement had been restrained.⁴⁰⁴ A seizure does not occur simply because a police officer approaches an individual and asks a few questions.⁴⁰⁵

The court did find that two plaintiffs had been seized: Jean Cantave, who was driving a car when a police car sounding sirens and flashing lights pulled Cantave over, ordering him out of the car, and instructing him to place his hands on top of the car; and Sheryl Champen, told by the police at a bus station that she could board her bus only if she first produced some identification.⁴⁰⁶

But, the court found no seizure of the other plaintiffs, even those who had submitted detailed affidavits describing their contacts with the police.⁴⁰⁷ It is enlightening to review these no-seizure cases in detail, starting with Jamel Champen, who, in his affidavit,

alleges that a police officer pointed a spotlight at him and said "What, are you stupid? Come here. I want to talk to you." He was then told to show his hands. Despite the alleged rudeness of this encounter, the district court was correct in determining that this did

401. *Id.*

402. *See* Terry v. Ohio, 392 U.S. 1 (1968) (articulating the reasonable suspicion requirement for stops); Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 318-48 (summarizing the law).

403. *See* Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 335-38.

404. *Id.* A "seizure" also requires that the suspect's movement be restrained by the application of force or by his submission to a police assertion of authority. *See id.* at 337-38 (discussing *California v. Hodari D.*, 499 U.S. 621 (1991)). The free-to-leave test is also modified in situations where it makes no sense. *Id.* at 336-37 (citing *Florida v. Bostick*, 501 U.S. 429 (1991) (describing one form of a seizure test when officers board a bus and begin questioning a passenger is whether he would "feel free to decline the officers' requests or otherwise terminate the encounter")). None of these subtleties were of particular significance, however, in the Oneonta case.

405. *Id.* at 334-35.

406. *See* Brown, 195 F.3d at 122; *see also* Brown v. City of Oneonta, 221 F. 3d 329, 340-41 (2d Cir. 2000) (vacating the original opinion).

407. *See* Brown, 195 F.3d at 122.

not amount to a seizure. The encounter was brief in duration and the police officer only looked at [Jamel] Champen's hands.⁴⁰⁸

Ricky Brown's case seemed even more invasive of free movement than that of Jamel Champen. Three officers on the street stopped Ricky Brown. The court described the encounter:

The police officers questioned him about whether he was a student and where he had been. They asked for his identification card, passed it around, and returned it to Brown. At one point, the officers "formed a circle" around Brown. When Brown asked if he had permission to leave, they told him he was free to go. One officer then asked him to come back and asked to see Brown's hands. Although there were several officers present, none of them had physical contact with Brown, and the officers explicitly told Brown that he was free to leave. While it is a closer case than some, we agree with the district court that no seizure occurred, and affirm the summary judgment for defendants on Brown's Fourth Amendment claim.⁴⁰⁹

Having rejected Champen and Brown's claims, it was then easy for the court to reject Raishawn Morris's claim, alleging that two police officers encountered him in his dorm lobby and asked to see his hands.⁴¹⁰

c. Flaws in the Original Opinion

The *Brown* court's sharp division between equal protection and Fourth Amendment claims is troubling because it distracts attention from equality as an important principle in the law of search and seizure. It also ignores history, in which the adoption of the Fourteenth Amendment for the first time applied the Fourth Amendment to the states, thus forever linking the two amendments and recreating the Fourth Amendment's meaning in the process.⁴¹¹ Furthermore, lumping all equality claims under the Fourteenth Amendment's Equal Protection Clause limits remedies to cases of intentional discrimination, yet there is good reason instead for disparate impact to matter too.⁴¹² Of course, the court defined intentional discrimination so narrowly—apparently meaning that racial stereotyping must be *the* sole motivating factor—and made proving intent so difficult as to render a Fourteenth Amendment remedy extraordinarily unlikely.⁴¹³

408. *Id.*

409. *Id.*

410. *See id.*

411. *See generally* Taslitz, *Slaves No More!*, *supra* note 70; *see also* Taslitz & Paris, *Law on the Street*, *supra* note 60.

412. *See, e.g.*, Maclin, *supra* note 28 (discussing why racially disparate impact alone can sometimes violate the Fourth Amendment).

413. *See* Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 410-

The court conceded that those the police stopped must have felt at least “frustration” and that the sweep surely harmed “community relations,” thus also hampering effective law enforcement.⁴¹⁴ Yet, because the court ignored the history of search and seizure practices during slavery and Reconstruction—both being sets of race-based practices that fostered individual frustration, community distrust, and communal efforts at evading the law—the court was blind to a sound interpretation of the Fourth Amendment.⁴¹⁵ Nineteenth century race-based search and seizure practices are sensibly understood as among the motivating forces behind ratification of the Fourteenth Amendment, and thus, relevant under the Fourth Amendment as well.⁴¹⁶ The court’s vision of a concern for the community’s respect as entirely an executive, not a judicial, function was thus similarly flawed.⁴¹⁷

The court’s conclusion that the police had “not seized” several of the plaintiffs, so that the Fourth Amendment did not apply, further ignored the role of oppressed communities in constitutional reasoning.

12 (summarizing United States Supreme Court case law regarding the Fourteenth Amendment); Knight & Kurnik, *supra* note 395, at 21 (“A person cannot become the target of a police investigation solely on the basis of race. The extent to which race or national origin may be a factor or taken into account in law enforcement practices without causing a violation of the Equal Protection Clause is unknown.”). A few district courts have rejected *Armstrong’s* requirement that the plaintiff demonstrate that similarly situated individuals in a non-protected class were not stopped or arrested in order even to obtain discovery to support an equal protection claim. *See id.* at 19-21; *see also* Chavez v. Illinois State Police, 27 F. Supp. 2d 1053, 1066 (N.D. Ill. 1998), *aff’d*, 251 F.3d 612 (7th Cir. 2001). But, the one Court of Appeals decision on the point comes down in favor of applying *Armstrong*. *See Chavez*, 251 F.3d at 636-37. There is also a relatively untested federal statutory theory, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), that might recognize a disparate impact theory in a civil suit. *See* Knight & Kurnik, *supra* note 395, at 22. Other statutory causes of action in civil cases still require proof of intentional discrimination, *see id.* at 22 (discussing 42 U.S.C. § 1983), but imposing challenging causation requirements. *See id.* at 23 (“[F]rom a damage standpoint, if Section 1983 causation rules are applied, the defense may prevail when it can be shown that the plaintiff would have been stopped, detained, or arrested even in the absence of racial profiling on the part of the officer.”). Statistical evidence may be helpful in certified class actions against a police department or municipality to show a custom, pattern, or practice of discrimination, but face difficult evidentiary hurdles. *See id.* at 22-23. It is unclear whether equal protection violations can also be the basis for exclusion of evidence at a criminal trial. *See id.* at 21. In any event, the burdens of proving the elements of civil claims are substantial. *See id.* at 21-23; *See also* Trende, *supra* note 213, at 350-57.

414. *Brown*, 195 F.3d at 120.

415. *See* Taslitz, *Slaves No More!* *supra* note 70, at 734-56 (providing history of search and seizure practices under slavery and Reconstruction); Taslitz & Paris, *Law on the Street*, *supra* note 60 (addressing similar point in much greater detail and discussing the impact of these practices on first slaves, then freedmen).

416. *See supra* notes 70-78 and accompanying text.

417. *See generally* Taslitz, *Respect*, *supra* note 30; Taslitz, *Bottom Up*, *supra* note 30; Taslitz & Paris, *Law on the Street*, *supra* note 60; *supra* notes 162-63 and accompanying text (addressing inter-branch responsibilities).

It is hard to imagine that the “reasonable African-American male” would not have believed that his freedom of movement had been restrained by the Oneonta police.⁴¹⁸ Surely if African-American males are justified in fleeing at the mere sight of the police under certain circumstances, as I argued concerning the Judge Baer drama, then they are justified in believing that abusive comments, encirclement by multiple police officers, and a police insistence on seeing the males’ hands had restrained the males’ freedom of movement.⁴¹⁹ Reasonableness inquiries must always involve asking, “Reasonable from whose perspective?” Choosing the perspective of those most vulnerable to even well intentioned but nevertheless oppressive police behavior better protects us all.⁴²⁰

The court’s characterization of the police as acting based on individualized suspicion rather than on generalization is also odd. The Constitution usually mandates assessments of *individualized* wrongdoing to avoid citizens being swept up in police investigations based on membership in a class rather than on specific evidence of the individual’s behavior.⁴²¹ That the police knew that the perpetrator of this crime was a black male did not change the reality that the plaintiffs were stopped because of their race and gender alone. In no case was there any other indicator of suspicion.⁴²² Though the court rejected the label, this was profiling of the most blatant sort. To hold otherwise is to judge reasonableness entirely from the perspective of the police—were they intentionally engaging in stereotyping—rather than from the perspective of “the people” aggrieved by police action.⁴²³

418. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 406 (discussing perspective of reasonable African-American male when stopped by police); Taslitz & Paris, *Law on the Street*, *supra* note 60; *cf.* Forell & Matthews, *supra* note 96, at xvii-19 (defending “reasonable woman standard”).

419. See *supra* text accompanying notes 231-75 (addressing flight and Judge Baer’s case).

420. See Taslitz & Paris, *Law on the Street*, *supra* note 60 (detailing a defense of this argument); Forell & Matthews, *supra* note 96 (detailing defense of similar argument concerning the “reasonable woman” standard).

421. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (“We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”).

422. See *supra* text accompanying notes 388-90 (summarizing *City of Oneonta* case facts).

423. The Fourth Amendment speaks of the right of “the people,” and not of a “person” or “persons,” to be free from unreasonable searches and seizures. See U.S. Const. amend. IV. My suggestion here is that this language should best be understood as significant, focusing our attention on how searches and seizures affect broader political communities as well as individuals. See Taslitz & Paris, *Law on the Street*, *supra* note 60; *see also* Taslitz, *Respect*, *supra* note 30 (defining “the People”).

4. Backtracking Forward: The Amended Opinion

The Second Circuit panel, upon plaintiffs' filing a petition for rehearing and for rehearing en banc, filed an amended opinion.⁴²⁴ This new opinion did not change the results of the Fourteenth Amendment claims but did alter the results of the *Fourth* Amendment claims. Specifically, the court now concluded that Jamel Champen and Ricky Brown had been seized, vacating the district court's grant of summary judgment for defendants on both those claims. The court thus continued to find insufficient evidence to survive summary judgment on any claim of intentional racial profiling under the Fourteenth Amendment. The court also continued to ignore both discriminatory intent and discriminatory effects under the Fourth Amendment.

The court did conclude, however, that, given the Fourth Amendment's application, the defendants "would have difficulty demonstrating reasonable suspicion in this case."⁴²⁵ The court recited precisely the same facts as in its original opinion, but summarily altered its conclusions on the seizure question.⁴²⁶ The court offered no explanation for its change of heart, nor did it articulate any reasons whatsoever for its new conclusions.

It is possible, in a reverse of the Judge Baer situation, that the court bowed to political pressure, as this case had by the time of the new decision become a cause celebre in New York State's African-American community.⁴²⁷ Given that all the Oneonta suspects turned out to be innocent, the political dynamics were very different from those facing Judge Baer.

The amended opinion was largely consistent with United States Supreme Court case law declaring racial animus in searches and seizures irrelevant under the Fourth Amendment and suggesting a high standard of proof to recover for racial profiling under the Fourteenth Amendment.⁴²⁸ The high Court has, however, not yet

424. *Brown v. City of Oneonta*, 221 F.3d 329, 333 (2d Cir. 2000).

425. *Id.* at 340.

426. *Id.* at 340-41.

427. See, e.g., U.S. Commission on Civil Rights, *Police Practices and Civil Rights in New York City* (2000), <http://www.usccr.gov/pubs/ny/police/ch5.htm>. The commission seemed to recognize this concern of the black community:

"Although this permissible [at least under the case law] use of race as an identifying characteristic serves as a necessary and efficient means for police to narrow their investigative efforts, police often lower their standards of investigation when a suspect has been described as a minority, thus intruding upon a greater number of individuals who meet the racial description than if the suspect had been described as white."

Id. (quoting *Developments in the Law—Race and the Criminal Process, Section III: Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 Harv. L. Rev. 1472, 1505 (1988), as an apt description of the Oneonta case).

428. See *Whren v. United States*, 517 U.S. 806 (1996) (holding that officer's subjective intent is irrelevant under the Fourth Amendment); *United States v.*

addressed whether discriminatory effects alone matter under the Fourth Amendment.⁴²⁹ It is unclear whether the Second Circuit's amended opinion is consistent with the high Court's precedent on when a "seizure" has occurred, though, in the view of many commentators, the high Court has been all too-willing to evade difficult Fourth Amendment questions by readily finding no search or seizure.⁴³⁰

The amended opinion is a small step in the right direction. But the opinion still entirely disregards the Black community's concerns about the role of race in the police action. The opinion indeed reinforces perceptions of relative judicial indifference to intentional police racial discrimination or racial stereotyping. Furthermore, the opinion offers little guidance to future courts and creates an appearance of simply bowing to political forces because of the opinion's failure to offer any rationale for the court's new decision, much less a coherent guiding sense of principles.

A "good" outcome for minority communities (distributive justice)⁴³¹ is neither necessary nor sufficient to breed a sense of respect, absent procedural and retributive justice.⁴³² The jurisprudence of respect articulated here would have suggested more convincing reasons for the court's amended opinion and would have shown a deeper concern

Armstrong, 517 U.S. 456 (1996) (holding that even obtaining discovery to support a racially selective prosecution claim under the Fourteenth Amendment first requires significant proof both that similarly situated suspects of other races were better treated and that the suspects were intentionally singled out because of their race); Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 393-95, 409-12. *But see* Knight & Kurnik, *supra* note 395, at 21 (arguing that in one respect the amended opinion in *Brown* did seem to embrace a somewhat more lenient Fourteenth Amendment standard than in *Armstrong*, finding it unnecessary for plaintiffs to plead the existence of a similarly situated non-minority group when challenging a law or policy containing an express racial classification).

429. *See Whren*, 517 U.S. 806. I am not suggesting that racially discriminatory impact should automatically establish a constitutional violation, but I am suggesting that it should require stricter reasonableness scrutiny. *Cf.* Amar, *supra* note 180, at 35-37 (hinting at a similar approach); Konvitz, *supra* note 70, at 158 (arguing that Fourth Amendment rights, because they are "fundamental," should always be subjected to a standard of strict scrutiny).

430. *See Cole*, No Equal Justice, *supra* note 158, at 16-34 (critiquing seizure definition as evading Fourth Amendment's central goals); Taslitz & Paris, Constitutional Criminal Procedure, *supra* note 25, at 334-40 (summarizing case law defining "seizure").

431. *See* Alan Calnan, Justice and Tort Law 85-98 (1997) (defining "distributive justice"); Taslitz, *Bottom Up*, *supra* note 30 (re-defining and applying distributive justice principles to the analysis of Fourth Amendment problems).

432. *See* Taslitz, *Bottom Up*, *supra* note 30 (importance of retributive and procedural justice for individuals and groups under the Fourth Amendment); Taslitz, *Inadequacies of Civil Society*, *supra* note 110, at 313-35 (retribution as essential to achieving justice for both individuals and socially salient groups). *See generally* Tom R. Tyler et al., Social Justice in a Diverse Society 43-133 (1997) (collecting social science research on the relative importance to individuals and groups of distributive, retributive, and procedural justice).

with minority perspectives. Of course, such a jurisprudence would have encouraged reader inquiry into racial animus under both amendments and into discriminatory effects under the Fourth Amendment. Even if the decision continued to turn on whether a “seizure” took place, it was incumbent upon the court to define “seizure”—the circumstances under which the “reasonable person” does not feel free to leave—in a more respect-enhancing fashion.⁴³³

It is important too that the *Oneonta* case proved so difficult for the Second Circuit despite the case’s being an easier one than most instances of racial profiling. Profiling rarely involves a “sweep” of many young black males. Rather, profiling is more likely to happen in a fashion in which it is harder to see a pattern so clearly, for example, by police stopping one car at a time (most of the stopped cars being driven by young black males).⁴³⁴ Race-based decisionmaking in such circumstances is harder to prove and easier to deny. It is also likely to be less offensive to many whites than is a racial sweep.⁴³⁵

Furthermore, much profiling probably happens when there is indeed reasonable suspicion to stop apart from race, though unconscious racial stereotyping or conscious animus may be the real reasons for the stop.⁴³⁶ Because the courts usually ignore racial animus and avoid inquiry into discriminatory effects being linked to subconscious bias in searches and seizures, a finding that the Fourth Amendment applies, but that there was reasonable suspicion for the stop, will generally lead to the conclusion that the Amendment was not violated.⁴³⁷

Additionally, most profiling happens in a way that is less obvious to the public, such as a highway roadside stop where the suspect is unlikely to be observed by anyone but the police for any significant

433. See, e.g., Cole, *No Equal Justice*, *supra* note 158, at 16-34 (arguing seizure definition should take into account minority group experiences).

434. See Meeks, *Driving While Black*, *supra* note 18, at 3-36 (defining and illustrating racial profiling, especially in automobile stops).

435. This is probably so because stopping one person at a time can more easily be assumed to have been based on some kind of evidence of *individual* culpability. But a sweep of all males of a certain race and age is so blatantly race-based that it is hard to ignore the deprivation of individualized justice. Cf. Taslitz, *Racist Personality*, *supra* note 31, at 746-58 (addressing human need for individualized justice).

436. The *Whren* case, indeed, seemed to recognize that individualized suspicion is generally necessary for an automobile stop, but the presence of racial animus will not invalidate such a stop under the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806 (1996); Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 404-06 & n.563 (discussing unconscious police officer processes of racial categorization).

437. See *Trende*, *supra* note 213, at 350-54 (summarizing lower court cases viewing racial profiling as a Fourteenth, not a Fourth Amendment, claim and, even then, reflecting skepticism about profiling claims); cf. *Whren v. United States*, 517 U.S. 806 (1996) (holding racial animus irrelevant under the Fourth Amendment where there was probable cause for a traffic stop).

length of time.⁴³⁸ Damages are usually small, and the commonality necessary for a class action hard to see or prove.⁴³⁹ Innocent suspects therefore rarely seek judicial redress, and even more rarely do so successfully. Profiling claims are thus most likely to be made by the apparently guilty in the context of motions to suppress evidence at criminal trials.⁴⁴⁰ That is a far less emotionally appealing context than that in the *Oneonta* case. While profiling in the abstract may generate political opposition, that opposition is also less likely to successfully bring its forces to bear on a run-of-the-mill case, contrary to the political dynamics at work in *Oneonta*.⁴⁴¹ The amended opinion's reasoning (or lack thereof) and outcome are thus unlikely to benefit civil plaintiffs or criminal defendants in most instances of racial profiling.

D. *Elian's Story*

The *Elain Gonzales* case, the last of the tales examined here, raised a very different issue from the lack of individualized suspicion, racial or ethnic animus, or racially disparate effects considered in the cases reviewed thus far. The issue in *Elian's* case was instead whether it was "unreasonable" for the Immigration and Naturalization Service ("INS") to raid *Elian's* uncle's home, with admitted probable cause, but for the sole purpose of returning the child to his father in a totalitarian regime.⁴⁴² The wisdom of issuing a warrant and the wisdom of the manner in which it was executed involve obvious Fourth Amendment concerns. It is unlikely that *Elian* or any other non-citizen players on American soil in this drama are excluded from

438. See *supra* note 435 and accompanying text. See generally Meeks, *Driving While Black*, *supra* note 18, at 3-36 (illustrating nature of stops).

439. See, e.g., *Trende*, *supra* note 213, at 347-56 (summarizing similar and additional roadblocks to civil suits for racial profiling under current law); *Knight & Kurnik*, *supra* note 395, at 16-23 (class action and other procedural obstacles to a civil suit seeking a remedy for racial profiling).

440. Cf. *Taslitz*, *Slaves No More!*, *supra* note 70, at 757-61 (explaining why motions to suppress by criminal suspects are the remedy most likely to vindicate Fourth Amendment values).

441. On the other hand, the apparent large numbers of run-of-the-mill cases are starting to receive media attention, because of the sheer magnitude of the likely problem and the determined efforts of a number of community activists. See *supra* notes 18-20 and accompanying text.

442. At least this is how most of Miami's Cuban-American community seemed implicitly to view the issue. See *infra* text accompanying notes 458-520. The Court has not recently been receptive to arguments that a Fourth Amendment search or seizure is unreasonable despite the presence of probable cause. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (finding that humiliating arrest of a driver in front of her two young frightened children was reasonable given probable cause to believe that she had committed the fine-only offense of driving without a seat belt); *Whren v. United States*, 517 U.S. 806 (1996) (holding police officer's alleged pretextual reasons for stopping a car driven by an African-American driver were irrelevant given the officer's probable cause to believe that the driver had violated the traffic laws).

the Fourth Amendment's protection because of their citizenship status alone. But immigration decisions such as whether Elian must leave or stay in this country may in themselves have Fourth Amendment implications.⁴⁴³

I will ultimately conclude that the federal government in the Elian case acted in an entirely reasonable fashion. But I will reach that conclusion only after doing my best to see the world through the Miami Cuban-American community's eyes. It is that task to which I now turn.

1. The Miami Cuban-American Perspective

a. *The Gonzalez Family Versus the INS*

On April 22, 2000, every television station in America broadcast the image of a "burly federal officer, helmeted, goggled, wearing a flak jacket, battle fatigues and shooter's gloves," holding a gun.⁴⁴⁴ The gun was a German-manufactured submachine gun, "a black, plastic-shrouded apparition with a bleak little snout . . . containing 32 rounds of what are almost certainly hollow-points, a strange bulge forward under the muzzle, which is but 15 inches from Elian Gonzalez and Donato Dalrymple."⁴⁴⁵

Elian was a Cuban citizen. He and his mother, Elizabeth, along with twelve other Cuban nationals, left Cuba in a small boat in the pre-dawn hours of November 22, 1999. The tiny party hoped to flee what they saw as an oppressive life under the dictatorship of Fidel Castro.⁴⁴⁶ On November 23, the boat capsized "in strong winds and rough seas off the coast of Florida."⁴⁴⁷ Eleven of the fourteen passengers, including Elizabeth, died. Elian survived.⁴⁴⁸

Elian was rescued at sea by Florida fishermen. He was taken to a Miami hospital for medical treatment. While there, his great-uncle, Lazaro Gonzalez, contacted the INS. INS officials decided that they would defer returning Elian to Cuba. They "paroled" Elian into Lazaro's custody.⁴⁴⁹

Soon thereafter, Lazaro filed an asylum application with the INS on Elian's behalf. Federal law permits an alien unlawfully in the country,

443. See *supra* note 186 and accompanying text.

444. Stephen Hunter, *The Gun Seen Round the World*, Wash. Post, Apr. 24, 2000, at C1.

445. Ines Capdevila, *Survivors Urge Citizenship for Elian*, The Wash. Times, Jan. 27, 2000, at A11.

446. *Id.* (why they fled); see Hunter, *supra* note 444 (numbers and persons in the boat); see also *Gonzales ex rel. Gonzales v. Reno*, 212 F.3d 1338, 1344 (11th Cir. 2000) (addressing Elian's citizenship).

447. See *Gonzales*, 212 F.3d at 1344.

448. See *id.*

449. See *id.*

like Elian, to apply for “asylum.”⁴⁵⁰ Asylum is a protection from return to the alien’s home country, because of a justifiable fear that he will face persecution there.⁴⁵¹ Two other asylum petitions were also filed, the second signed by Elian, the third submitted again by Lazaro after a state court awarded him temporary custody of Elian.⁴⁵² The three applications, a court later explained:

were substantially identical in content. The applications stated that Plaintiff [Elian] “is afraid to return to Cuba” . . . [and has] a well-founded fear of persecution because many members . . . of [his] family had been persecuted by the Castro government in Cuba. In particular, according to the applications, . . . [Elian’s] stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of [Elian’s] great-uncles had been imprisoned for their political acts . . . [Elian’s] mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if . . . [Elian] were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.⁴⁵³

Elian’s father, Juan Gonzales, had a very different view of the matter. He was interviewed in his Cuban home on December 13 by INS officials. There, Juan took the position that his son was too young to make his own decisions. Only Juan, as Elian’s father, could do so. And, Juan wanted Elian back in Cuba promptly.⁴⁵⁴

In a later meeting with the INS, Lazaro and Elian’s cousin, Marisleysis Gonzalez, contended that Juan’s request to return Elian to Cuba had been coerced by the Cuban government.⁴⁵⁵ The INS Commissioner, however, on January 5, 2000, rejected the asylum applications: “[S]ix-year-old children lack the capacity to file personally for asylum against the wishes of their parents,” the Commissioner concluded.⁴⁵⁶

Elian, by Lazaro as his “next friend,” filed a complaint in federal district court, seeking to compel the INS simply to consider the merits of the asylum application. The district court rejected this argument and dismissed the complaint. Elian, through Lazaro, appealed.⁴⁵⁷

450. 8 U.S.C. § 1158(a)(1) (1994) (“[A]ny alien . . . may apply for asylum.”). *Gonzales*, 212 F.3d at 1344 (noting Lazaro’s asylum application on Elian’s behalf).

451. § 1158(b); *see Gonzales*, 212 F. 3d at 1344.

452. *Gonzales*, 212 F. 3d at 1344.

453. *Id.* at 1344-45.

454. *Id.* at 1345.

455. *Id.*

456. *Id.*

457. *See id.* at 1346.

b. *Historic Roots of the Cuban-American Community's Outrage: Evoking Castro's Denial of Fourth-Amendment-Style Freedoms*

By this time, the case had become a cause celebre among Miami's Cuban-American community.⁴⁵⁸ To many Americans outside that community, the case was a tale of attempted reunification of a father with his son.⁴⁵⁹ For most of Miami's Cuban-Americans, however, the issue was whether the state could forcibly seize a child happy in his uncle's embrace, returning that child to a life of totalitarian oppression against his will and that of his family.⁴⁶⁰ Moreover, for Cuban-Americans, the matter involved not only Elian and his family but recognition of the larger material and symbolic needs of the exile community.⁴⁶¹

The exile community is not monolithic, but its members do share some common experiences and world views.⁴⁶² Castro's 1959 victory over dictator Fulgencio Batista triggered three waves of emigration, one between 1959 and 1961, one between 1961 and 1977, and a third via the Mariel boatlift in 1980. Tens of thousands have made the journey since, some in rafts.⁴⁶³ Every act of flight had to be done either surreptitiously or at a time when Castro, for political reasons, opened the exit gates.⁴⁶⁴

The first wave to leave feared arrest or imprisonment, perhaps because it consisted of officials in Batista's police force, army, or government. Landowners, managers, industrialists, business employees, and revolutionaries feeling betrayed joined the exodus.⁴⁶⁵ By 1961, Castro started setting up serious roadblocks to flight:

Airline tickets had to be purchased in dollars. At airports, exiles were harassed as their papers were processed by mean-spirited militiamen, who sometimes subjected departing passengers to strip

458. See John Lantigua, *Showdown in Miami*, Salon.com (Apr. 13, 2000) [hereinafter Lantigua, *Showdown in Miami*], at www.salon.com/news/feature/2000/04/13/showdown/index.html.

459. See Laura Parker & Kevin Johnson, *Support Is Strong for Justice but Americans Frown on Tactics in Elian Raid*, USA Today, May 2, 2000, at 13A.

460. See Robert M. Levine & Moises Asis, *Cuban Miami* 63 (2000) ("The INS . . . said Elian should be sent back to his father The reaction in Miami was spontaneous and angry. Many exiles identified deeply with the mother's desperate effort to bring her son to the United States The child custody impasse symbolized the anguish of decades of family divisions.").

461. See *id.*

462. See John Lantigua, *Meet Miami's Cuban Moderates*, Salon.com (Apr. 7, 2000) [hereinafter Lantigua, *Cuban Moderates*], at <http://www.salon.com/news/feature/2000/04/07/movement/index1.html>. In the wake of the Elian incident, the moderate, often younger, members of the community seem to be gaining ground. See Dana Canedy, *Cuban Exile Group Split as Hard-Liners Resign from Board*, N.Y. Times, Aug. 8, 2001, at A1.

463. See Levine & Asis, *supra* note 460, at 3, 22-46, 59.

464. See *id.*

465. See *id.* at 22-23.

searches. The Cuban press ridiculed the exiles, calling them *gusanos* (worms). Young men of army age were detained in Cuba. The Castro government allowed Cubans whom they did permit to go to carry only five dollars in cash and a suitcase; their property in Cuba was immediately confiscated. Nothing stanchd the flow of emigres.⁴⁶⁶

The refugees fled a state in which the police exercised enormous power to invade privacy, take property, and obstruct citizens' free movement.⁴⁶⁷ Indeed, the Cuban constitution expressly declares that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.'"⁴⁶⁸ The oppressive nature of this government, and the difficulty of leaving it, have, in the exiles' views, changed little since 1961. The motivations of many in the later waves of exiles were thus, in this sense, similar to the original refugees'.⁴⁶⁹

466. *Id.* at 33.

467. Professor Cynthia Mabry explains:

Members of Cuba's security forces, led by Raul Castro, Fidel Castro's brother, control all aspects of Cuban citizens' lives. Thus, Cuban citizens' daily activities at home, school and work are subject to government and Communist Party control.

....
 . . . National police harassment is a concern among human rights advocates who monitor living conditions in Cuba. In its report on conditions in Cuba, for instance, the United States Department of State declared that national police used excessive force that caused several deaths.

. . . [B]lack youths" were disproportionately harassed by police . . . Black Cubans are stopped and asked to reveal their papers even though similarly dressed white Cubans are not . . .

. . . Cubans . . . have less freedom of thought and movement than most Americans experience. In Cuba, human rights advocates, independent journalists, demonstrators . . . may be detained for long periods of time . . .

. . . Government representatives conduct surveillance of Cuban citizens' private and family life. Dissidents as well as those who do not openly oppose the government are subjected to surveillance. International telephone calls and correspondence are intercepted and monitored. Electronic mail is censored and access to the Internet is restricted. Citizens are deprived of access to foreign publications . . .

. . . [C]lergymen who receive permission to enter the country suddenly may be ejected and forbidden to return to Cuba.

. . . Likewise, Cubans' foreign travel is restricted. Travel is so hampered that, in some instances, citizens may not go outside their home provinces.

Mabry, *Send the Children Home*, *supra* note 198, at 43-45; *see also* U.S. Dep't of State, *Cuba Country Report on Human Rights Practices for 1998*, at 1-18 (1999) (summarizing Cuban deprivation of Fourth-Amendment-style freedoms).

468. U.S. Dep't of State, *1999 Country Reports on Human Rights Practices: Cuba 6* (2000) (citation omitted); *see also* C.H.R. Res. 2000/25, U.N. Comm'n on Human Rights, 56th Sess., at 1, U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

469. *See generally* Levine & Asis, *supra* note 460.

Although the first wave was largely white and affluent, later waves encompassed a broader social and economic spectrum.⁴⁷⁰ Some flight came about because of spectacular events, like the Pedro Pan Airlift of December 1980, in which 200 children were “rescued” from Havana to Miami. Others were enabled to flee by state policy, such as Castro’s temporarily reopening of the gates for the relatives of exiles in September 1965. Those gates remained partly open until April 1973.⁴⁷¹ Men of military age were still barred from emigrating, “as were people with skills of use to the Castro government, who had to remain at least until replacements were found and trained. Sometimes this meant two or three years of forced manual agricultural labor before visas were granted.”⁴⁷²

The most infamous opening was the Mariel boatlift, in which, to relieve pent-up frustration stemming from a poor economy and the 1970s baby boom, Castro allowed thousands to leave the island. In 1980, Castro announced an airlift to Panama and Costa Rica and opened the port at Mariel. Over 15,000 Miamians registered forms requesting permission to bring relatives to the United States from Cuba.⁴⁷³ Many islanders who never expected to be free to leave were notified that they were on the list to go, and many headed immediately for the docks.⁴⁷⁴ On April 11 of that same year, a Cuban bus driver crashed his vehicle through Havana’s Peruvian embassy gates, asking for asylum.⁴⁷⁵ Press coverage of the incident “ignited waves of protest by Cubans in Miami against Castro’s government.”⁴⁷⁶ Castro chose to add to the flight of ordinary citizens’ that of groups more easily denigrated.⁴⁷⁷ He emptied Cuban jails and mental hospitals onto the vessels at Mariel. “In some cases, the released patients and prisoners sailed to the United States under restraints.”⁴⁷⁸ In his May Day speech of that year, Castro reviled the Marielitos as “the scum of the country—antisocials, homosexuals, drug addicts, and gamblers, who are welcome to leave Cuba if any country will have them.”⁴⁷⁹

Hundreds of boats, many chartered by exiles, left South Florida to rescue relatives and other escapees. Cuban officials forced some of these boats to take strangers aboard. Journalists dubbed the boatlift

470. *See id.* at 39-43.

471. *See id.* at 40-43.

472. *Id.* at 43.

473. *See id.* at 44-45.

474. *See id.* at 45-46.

475. *Id.* (“Within hours, 10,000 more Cubans had entered the embassy grounds, also demanding asylum.”).

476. *Id.* at 46.

477. *See id.*

478. *Id.*

479. *Id.* at 47.

“the Freedom Flotilla.”⁴⁸⁰ A total of 125,000 Cubans came to the United States in this wave.⁴⁸¹

The collapse of the Soviet Empire in the 1990s and the tightening of the United States embargo against Cuba contributed to its worsening economic failures. “Now more and more Cubans tried to escape the island by sea, trusting their lives to decaying boats and crude rafts, some made of inner tubes.”⁴⁸² Although Castro abruptly opened the doors again in August 1994, the United States was not always welcoming of the sheer number of exiles. Tighter United States immigration laws and the Castro government have not halted entirely the continued flow of refugees.⁴⁸³

Most Cuban exiles settled in Miami. Within three years of the Freedom Flotilla, forty-two percent of Miamians were Cuban-Americans.⁴⁸⁴ Arriving refugees often gathered in tightly knit groups, promoting their cultural heritage and politically agitating against Castro.⁴⁸⁵

It was into this mix that Elian Gonzalez arrived on our shores. Elian’s plight reminded Cuban-Americans of separated families and the Cuban regime’s utter disdain of human rights to property, privacy, and free movement.⁴⁸⁶ The INS and federal district court’s refusal even to consider a petition seeking to block the return of Elian to such a regime evoked rage in the Cuban-American community.⁴⁸⁷

c. *The Atypical Nature of Cuban-American Attitudes*

The rest of America did not understand why Cuban-Americans would feel such outrage. The majority of Americans wanted Elian to be reunited with his father in Cuba.⁴⁸⁸ African-Americans felt this

480. *See id.* at 47-48

481. *See id.* at 48-49.

482. *Id.* at 59. This observation has led some human rights activists to complain that “U.S. embargoes have merely kept average Cubans impoverished while failing to accomplish their ostensible goal of weakening Fidel Castro’s hold on power.” William F. Schulz, In Our Own Best Interest: How Defending Human Rights Benefits Us All 101 (2001).

483. *See Levine & Asis, supra* note 460, at 62-68.

484. *See id.* at 68.

485. *Id.* at 58.

486. *See id.*; Mabry, Send the Children Home, *supra* note 198, at 44-46.

487. *See Levine & Asis, supra* note 460 (“Cuban-American organizations engineered public protests, including blocking traffic, and simultaneously worked with state and national politicians to prevent any return by making the boy a U.S. citizen.”).

488. *See* Max J. Castro, A World of Their Own: The Miami Media Recognizes and Helps Perpetuate a Separate Reality for Cuban Exiles, Salon.com (Apr. 21, 2000) [hereinafter Castro, A World of Their Own], at <http://www.salon.com/news/feature/2000/04/21/miami> (summarizing data on other groups’ views) The author is a sociologist and senior research associate in the Dante B. Fascell North-South Center at the University of Miami and a regular op/ed columnist for the Miami Herald.

even more strongly than whites, with some ninety-two percent of African-Americans in one poll favoring Elian's return to Cuba, compared to seventy-six percent of whites holding that view.⁴⁸⁹ African-American dissension from the Cuban-American view of Elian may have stemmed partly from the perception that allowing Elian to stay would reflect discriminatory treatment because many black-skinned illegal immigrants received no such deference to their needs.⁴⁹⁰ "African-American feeling grew so bitter that some blacks were willing to march with whites waving Confederate flags in the hastily organized . . . demonstrations that drew several thousand protestors in the wake of the [later] federal enforcement action to remove Elian from the Little Havana home [of Lazaro Gonzalez]."⁴⁹¹ The seeming inability of the Anglo and African-American communities to understand Cuban-American views fueled further anger in the latter community. Cuban-Americans felt isolated, victimized by anti-Cuban racism, humiliated, and besieged. Worse yet, their voices were stifled by an uncaring judicial system unwilling to give them their day in court.⁴⁹² So deeply did Elian become an almost religious symbol of community identity that the Cuban-American community reacted harshly to its own dissidents, the tiny minority who sided with the Anglos and the African-Americans in this matter.⁴⁹³

Max Castro, a Cuban-American reporter for the Miami Herald, labeled the reaction of his own community "hysteria."⁴⁹⁴ The saga, he said, demonstrated "a tragic tale of two cities" in two entirely different worlds.⁴⁹⁵ This schism was most evident in the very different coverage offered by The Miami Herald and El-Nuevo Herald, the Spanish-language sister publication. In the Miami Herald, the resistance of Elian's Miami relatives to returning him to Cuba was "a sobering tale of defiance of the law."⁴⁹⁶ El-Nuevo Herald readers instead were "treated to a description of mass relief and joy" over

489. See *id.*

490. Mabry, *Send the Children Home*, *supra* note 198, at 66-69 (defending this perspective).

491. Max J. Castro, *After Hurricane Elian: Miami Is a City Asunder Divided by Race, but the Cuban Exiles' Stranglehold on Local and National Power Has Unmistakably Eased*, Salon.com (June 28, 2000) [hereinafter Castro, *Hurricane Elian*], at <http://www.salon.com/news/feature/2000/06/28/miami>.

492. *Id.*; see also Castro, *A World of their Own*, *supra* note 488; *Talk of the Day: Elian! What Do You Think of the Court's Ruling that He Isn't Entitled to Political Asylum Hearing?* (June 6, 2000) [hereinafter *Talk of the Day*], at <http://wellengaged.com/engaged/discussion.cgi?c=sstalkofday&f=0&t=142> (collecting e-mail correspondence, many of which expressed annoyance at Anglo-and-African-American views of Elian).

493. See Castro, *Hurricane Elian*, *supra* note 491; *Talk of the Day*, *supra* note 491; see also Castro, *A World of Their Own*, *supra* note 488.

494. Castro, *Hurricane Elian*, *supra* note 491.

495. Castro, *A World of Their Own*, *supra* note 488.

496. *Id.*

what was construed as a reprieve from deportation when the government initially failed to use force to retrieve Elian.⁴⁹⁷ “Coverage by Miami’s two Spanish-language television stations was relentlessly sympathetic to those who want[ed] to keep Elian in the United States.”⁴⁹⁸ Said Max Castro, “many Cuban-Americans live in a separate reality when it comes to certain issues.”⁴⁹⁹ Yet, other Miamians are “even less attuned” than most Americans “to the Cuban exile view of the world.”⁵⁰⁰

In that view, Elian, the “angel[,] must not be returned to Satan in hell, also known as Cuba.”⁵⁰¹ A lawyer associated with the Cuban-American National Foundation explained: “Cuba is a prison, and if you desire to return to a prison, you don’t get to take your child with you, no matter how good a father you are.”⁵⁰²

Most Cuban-Americans did not accept, however, that Juan indeed wanted “imprisonment for his son.”⁵⁰³ In April 2000, the Cuban-American community awoke to a television report showing a home video of Elian addressing his father, saying, “I don’t want to go back to Cuba I want to stay here.”⁵⁰⁴ Cuban-American singer Gloria Estefan spoke for many in her community: “We stand together as a Cuban-American community and offer the father sanctuary as well He will be safe [from anyone] coming to get this child because we understand that he is also a victim here.”⁵⁰⁵

d. *The Community Resists*

Elian was in fact not safe from government agents coming to get him. Lazaro continued to resist turning Elian over to the INS and entered into negotiations with the Department of Justice.⁵⁰⁶ Many of Lazaro’s supporters, fearing government use of force, set up a vigil outside Lazaro’s home. These supporters seemed ready to confront the INS if its agents appeared to re-take physical custody of Elian.⁵⁰⁷

On April 22, in the middle of the night, while most of the community slept, that is precisely what happened. The INS struck quickly and with an impressive show of force. After blitzing into the home, the agents, in full military gear, located Elian.⁵⁰⁸ A

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*

503. *See id.*

504. Lantigua, *Showdown in Miami*, *supra* note 458.

505. *Id.*

506. *See* Evan Thomas & Martha Brant, *Raid and Reunion*, *Newsweek*, May 1, 2000, at 22.

507. *See id.*

508. *See id.*

photographer, at Lazaro's urging, was in the home awaiting just such a move. It was he who took the now-infamous picture of the frightening-looking INS agent seemingly pointing his weapon at young Elian.⁵⁰⁹ The agents whisked Elian to a waiting van, and headed quickly out of the neighborhood before residents had much chance to react.⁵¹⁰

Protestors blocked Little Havana intersections, destroyed a bus stop, and built bonfires. Other demonstrators waved the Cuban flag and blocked a highway heading to Miami International Airport.⁵¹¹ "Clinton and his people will pay for this," screamed one Cuban exile blocks from Lazaro's house.⁵¹² Angela Perez, a Lazaro supporter, wept. "Both my father and brother were put in prison by the Castro regime," she said. "Cuban state security would break into our house that way to search. When I saw that on television it made it all come back. It's horrible."⁵¹³

A U. S. Magistrate Judge had issued a search warrant authorizing a search of the residence for "THE PERSON OF ELIAN GONZALEZ, DATE OF BIRTH DECEMBER 6, 1993, A NATIVE AND CITIZEN OF CUBA."⁵¹⁴ As was customary, the magistrate did not then write an opinion justifying his approval of the warrant.⁵¹⁵ The Department of Justice, however, had issued a press release explaining that the "authority to recover Elian was based on rule 41(b)(4) of the Federal Rules of Criminal Procedure. That rule provides warrant authority to recover a person who has been unlawfully restrained."⁵¹⁶

That justification seemed weak to Cuban-Americans. Rafael Madan Sr., who joined a demonstration outside the Department of Justice protesting the seizure, put this succinctly: "[t]hey trampled the Constitution. This is much more than Elian. They're breaking the Fourth Amendment."⁵¹⁷ Jay Fernandez, head of Casa Cuba, an organization of exiles in Northern Virginia, said, "I think that the Statue of Liberty should be crying today because of the way Elian was

509. *See id.*

510. *See id.*

511. *See* John Lantigua, *Raid on Little Havana*, Salon.com (Apr. 22, 2000) [hereinafter Lantigua, *Raid*], at <http://www.salon.com/news/feature/2000/04/22/elian>.

512. *Id.*

513. *Id.*

514. Search Warrant, In re the Search of the Residence of Lazaro Gonzales (Apr. 21, 2000) (on file with author).

515. On common warrant procedures, see Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 207-23.

516. Press Release, U.S. Dep't of Justice, Media Advisory: Federal Search Warrant in Elian Gonzales Matter (Apr. 23, 2000) (on file with author).

517. Donna St. George & Jennifer Lenhart, *At Andrews Air Force Base; Personal, Political Dramas Move to Washington Area; Protestors Follow Elian, His Father, Miami Relatives*, Wash. Post, Apr. 23, 2000, at A21.

taken and for forgetting a woman died to make her son free.”⁵¹⁸ Some sympathizers outside the Cuban-American community, including some Republican Congressmen and the well-known liberal academic, Laurence Tribe, also publicly protested the seizure, though most Americans continued to side with the INS.⁵¹⁹ Lazaro Gonzalez and the other Miami relatives of Elian have since sought to air the Cuban-Americans’ view of the Fourth Amendment by filing a lawsuit challenging the constitutionality of Elian’s seizure.⁵²⁰

e. *The Courts Decide*

The United States Court of Appeals for the Eleventh Circuit now stood as Lazaro and the Miami Cuban-Americans’ last hope for their voices to be heard before Elian was deported. That hope was dashed on June 1, 2000, when the appellate court affirmed the federal district court’s dismissal of the asylum petitions.⁵²¹

The appellate court did pay brief lip service to some aspects of the community’s complaint. The court recognized that Cuba violates human rights and fundamental freedoms.⁵²²

Furthermore, the court acknowledged that persons living in a totalitarian state “may” be unable freely to assert their rights and the rights of others.⁵²³ The court even conceded that “some reasonable people” might see a conflict of interest between even a non-coerced parent living in a totalitarian state and a child forced by that parent to return to such a lifestyle.⁵²⁴ But examining the weight to be accorded such views was simply not, in the court’s view, its job. The INS policy did take some account of whether there was evidence of coercion directed at a specific parent. “In addition and more important,” said the court, “in no context is the executive branch entitled to more deference than in the context of foreign affairs.”⁵²⁵ A per se rule

518. *Id.*

519. See *Elian Joins Dad; Was Raid Right?*, Chi. Trib., Apr. 25, 2000, at C3 (quoting House Republican whip Tom Delay, “[t]his is a frightening event, that American citizens now can expect that the executive branch on their own can decide on whether to raid a home”); Parker & Johnson, *supra* note 459 (quoting poll in which sixty percent of Americans approved of federal agents removing Elian Gonzales from the Miami home of his relatives but fifty-three percent disapproved of the raid itself); Laurence H. Tribe, Editorial, *Justice Taken Too Far*, N.Y. Times, Apr. 25, 2000, at A23 (protesting that the Justice Department obtained the wrong sort of warrant, violating “well-established constitutional principles of family privacy”). Though Tribe favored Elian’s return to Cuba, he wished proper procedures were followed. *Id.*

520. See *Gonzalez ex rel. Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (noting filing of the suit which raised the Fourth Amendment claim).

521. *Id.* at 1356.

522. *Id.* at 1353.

523. *Id.*

524. *Id.*

525. *Id.*

prohibiting the return of a child to a totalitarian state would implicate foreign affairs more than any other, more discretionary, rule, concluded the court, ignoring the possibility that, as Cuban-Americans saw things, Cuba was unique.⁵²⁶

Nor was the court willing to explore a more case-specific notion of the best interests of the child. "This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government"⁵²⁷ Congress, in the asylum laws, left the details of the asylum application process to the INS. The INS's chosen policy was thus "the sole prerogative of the executive branch."⁵²⁸ The INS policy was not unreasonable, the court concluded, nor was the INS conclusion that Juan Miguel had not been individually coerced by the Cuban government. Perhaps most painfully for the Cuban-American community, the court conceded that Elian would face less freedom in Cuba than in the United States and that "re-education, communist indoctrination, and political manipulation of Plaintiff [Elian] for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility."⁵²⁹ Nevertheless, the court concluded, "[w]e cannot say that the INS had to treat education and indoctrination as synonymous with 'persecution.'"⁵³⁰

f. *A Community Alienated*

E-mail chat rooms in the Cuban-American community reacted with outrage. Said one writer: "[I]t is hard for many to see that the Florida Straits act as a modern-day Berlin Wall for the Cuban people."⁵³¹ Said another author: "Elian did not have his day in court. . . . Up to now, the only thing that all those judges have done is to negate him (and his family in Miami) his right to go to court."⁵³² A third writer explained:

The essence of a totalitarian regime is that coercion is ubiquitous. Neither the INS nor the courts should have taken Juan Miguel's statements—particularly those made during interviews when he as well as members of his family were still in Cuba—at face value. By denying Elian an asylum hearing, the INS also missed an

526. *See id.* at 1353-54.

527. *Id.* at 1344.

528. *Id.* at 1348 n.10. That policy generally required six-year-old children from Cuba arriving in the United States to act only through their parents in Cuba, absent special circumstances. *See id.* at 1349-50. The INS concluded that the mere fact that a parent lives in a communist-totalitarian state is not a "special circumstance." *See id.* at 1350.

529. *See id.* at 1355.

530. *Id.*

531. *Talk of the Day*, *supra* note 492.

532. *Id.*

opportunity to educate Americans about life in a totalitarian society.⁵³³

Many in the crowd outside the now-empty Little Havana house “said they no longer trusted the United States government or the American judiciary to do what they considered right, and they had not really expected the 11th Circuit Court of Appeals to grant the child an asylum hearing.”⁵³⁴ The house had become “a focal point for frustration and sadness.”⁵³⁵ The general mood of the community was one of painful resignation. Explained Jose Basulto, leader of the exile group, Brothers to the Rescue, “I do not expect any violence at this point,” but “[t]his is going to generate deep resentment.”⁵³⁶

It is arguably unclear whether the current Supreme Court would accept that the Fourth Amendment even applies to undocumented aliens like Elian, whom the Court may not see as part of “the people” protected by the Amendment.⁵³⁷ Noted scholars, however, see the Amendment as unquestionably protecting the Elians of the world.⁵³⁸ Miami’s Cuban-American community consists largely of United States citizens, who are included among “the people” protected by the Fourth Amendment.⁵³⁹ These citizens saw Elian’s plight as their own. If the amendment does apply, a decision to compel Elian either to leave or stay—by limiting his freedom of movement—would itself be a seizure. The entry into Lazaro’s home, and the whisking away of the young boy, certainly constituted a search of a citizen’s home and the seizure of a non-citizen, Elian.⁵⁴⁰ For Miami’s Cuban-Americans, however, the denial of asylum and the search of Lazaro’s home to seize Elian were inseparable: if returning Elian to Cuba was wrong, forcibly entering Cuban-American homes to further that return was wrong—indeed unconstitutional—as well.⁵⁴¹

533. *Id.*

534. See Sue Ann Pressley, *In Little Havana, Mourning; Subdued Crowd Shows Up at House Where Elian Lived*, Wash. Post, June 2, 2000, at A20.

535. *Id.*

536. *Id.*

537. See, e.g., Romero, *supra* note 199 (summarizing the Court’s current, ambiguous views on the Fourth Amendment rights of undocumented aliens, while arguing that they should have such rights). For a contrary view, arguing that the Court’s current Fourth Amendment jurisprudence already clearly protects even undocumented aliens on United States soil, see *supra* note 199.

538. See generally *id.*

539. See Taslitz & Paris, *Constitutional Criminal Procedure*, *supra* note 25, at 143-44 (discussing the various Justices’ views on who constitutes “the people” for Fourth Amendment purposes); *supra* note 199 (similar, plus discussion of the contending views on “peoplehood” and the Fourth Amendment among leading scholars).

540. See Tribe, *supra* note 519 (arguing that the Elian raid involved both an unreasonable “search” of a home and an unreasonable “seizure” of a person).

541. See *supra* text accompanying notes 531-36.

g. *Fostering Disrespect*

Elian illustrates that the Fourth Amendment is not only about the individuals involved. The entire Cuban-American community was affected. The impact on Cuban-Americans was profound, ultimately leaving them feeling betrayed and further isolated from the broader American mainstream.

Their frustration was magnified by the courts' apparent insistence on deference to the Executive branch. To Miami's Cuban-American community, this was a brutal seizure of a child and an invasion of the sanctity of Lazaro's home without adequate justification. The seizure was instead done for evil reasons: to return the child to the hands of a tyrant. The Executive was motivated by politics, not reason, in the community's view, and the courts are expected to intervene to protect individual freedoms in precisely such circumstances. The evidence on which the Executive relied—interviews with Elian and his father—was also weak evidence of voluntariness, in the Cuban-American view. Neither the Executive, nor the court, nor the general American public had sufficient or authentic experience to empathize with the Cuban-Americans' plight. The Cuban-Americans saw the quality and quantity of the justifying evidence through very different eyes. What was unique about them, they believe, was ignored, while their voices were silenced.

But, there are other sides to this story—of efforts made to hear Cuban-American perspectives, of the special competency of the Executive to make these decisions, and of an overriding constitutional and cultural commitment to keeping parents and children together—to which I turn next.

2. An Alternative Perspective: Republican Political Morality and Insult Unjustified

I have presented at some length the Cuban-American perspective on Elian as best as I am able. I believe that, given the life experience of refugees from Castro's totalitarian regime, the Cuban-American reaction was understandable. It was also intractable. Nothing short of a decision effectively severing Elian's father's parental connection to his child would have satisfied Miami's Cuban-Americans.

Yet, the United States government did nothing that can fairly be understood in our political regime as being insulting to Elian or to Miami's Cuban-Americans. Elian's Miami relatives were acting in clear violation of United States law by refusing to turn Elian over to the INS.⁵⁴² The INS had individualized probable cause concerning the thing that was most relevant—the illegal possession of Elian in Lazaro's home by a family and a community from which there was

542. See Mabry, *Send the Children Home*, *supra* note 198, at 33, 36.

every reason to believe resistance to INS efforts to re-take Elian was likely. None of this was done because of any belief or message that the federal government viewed Cuban-Americans as definitionally unfit to raise children or to raise Elian. Nor was the decision done in a fashion discriminating against Cuban-Americans, who were arguably treated better under the immigration laws in this instance than were other racial or ethnic groups.⁵⁴³ Indeed, no one in the government rested its decision even on a belief that Lazaro and Marisleysis were individually unfit as caretakers, though others have argued that this was so.⁵⁴⁴ Furthermore, the Clinton Administration made vigorous efforts to hear and address Cuban-American concerns over the course of seven months of negotiation.⁵⁴⁵ Contrary to the Japanese-American internment, the decision here was, as the courts held, solely under the auspices of the Executive branch.⁵⁴⁶ Perhaps most importantly, the decision was made because of a deeply held American cultural and legal commitment, endorsed by international law, to the sanctity of the family.⁵⁴⁷

The Executive's decision regarding returning Elian to his father is thus best understood as a reaffirmation of human worth, rooted in ideas of parental autonomy and the centrality of the parent-child bond to the flourishing of human personality.⁵⁴⁸ Miami's Cuban-Americans understandably felt insulted, but that is a cost that had to be accepted given their intransigence and an emotion that principles of political morality required be invalidated. Had the INS not executed its

543. See *id.* at 66-67 (“[L]ighter-skinned people, like Cuban and Chinese immigrants, receive favor in the United States Although many Cubans have African [ancestors], they are considered Hispanic rather than African. As such, they are viewed as the ‘cream of their [] societ[y]’ and ‘special favorites of the United States’ upon their arrival.” (quoting respectively *Immigration and Race* 10-11 (Gerald D. Jaynes ed., 2000); Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 *Geo. Immigr. L.J.* 747, 780 (1993) [hereinafter *Haitians Seeking Refuge*])); *Immigration and Race*, *supra*, at 17 (contrasting Cubans to “Caribbean immigrants with African ancestry [who] appear to have much greater difficulty achieving socioeconomic incorporation into American society than do their white counterparts”); see also *Haitians Seeking Refuge*, *supra*, at 765 (noting that as a result of a series of executive orders, Haitians—who are largely of African descent—who have not reached the United States shore are returned to Haiti). Elian, of course, was not summarily returned to Cuba.

544. See Mabry, *Send the Children Home*, *supra* note 198, at 31, 36 (describing Marisleysis as emotionally unstable and Lazaro as irresponsible—quitting his job when Elian entered the scene and displaying an explosive temper); Manny Garcia, *Lazaro v. U.S.*, *Miami Herald*, Apr. 16, 2000 (citing description of Lazaro as “[c]ranked up on adrenaline, applause and shots of Cuban coffee” and noting that Lazaro had four prior convictions for driving under the influence of alcohol), <http://www.rose-hulman.edu/~delacova/elian/lazarovsus.htm>.

545. See Mabry, *Send the Children Home*, *supra* note 198, at 6-7 (describing these negotiations).

546. See *infra* text accompanying notes 550-92.

547. See *infra* Part II.D. 2.b.

548. See *infra* Part II.D. 2.b.

warrant to search for and seize Elian, it would instead have sent the message that the American commitment to human dignity is an empty one.⁵⁴⁹

a. *Deference to the Executive and Its Efforts to Address Cuban-American Concerns*

Congress has plenary power in immigration matters and has

549. The rule of law requires that the state equally protect individual rights, especially those rights that American political culture deems “natural” and “inalienable.” See S. Jonathan Bass, *Blessed Are the Peacemakers: Martin Luther King, Jr., Eight White Religious Leaders, and the “Letter From Birmingham Jail”* 124-25 (2001) (according to Martin Luther King, Jr., a just law is rooted in natural law, the result of open democratic practice, avoids human separation, and must be obeyed because law and order existed to establish justice for all citizens, something ignored by the “devious methods” used to prevent blacks from registering to vote”). Though a detailed discussion of the rule of law and the right to civil disobedience is beyond this Article’s scope, Martin Luther King, Jr.’s classic analysis of these questions is enlightening. King believed that unjust laws should be disobeyed. See *id.* at 124-25. However, he also said:

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Martin Luther King, Jr., *Letter from a Birmingham Jail*, in Bass, *supra*, at 245 (I have deleted language from earlier versions of the letter and Bass’s textual markings).

It is unclear what law the Miami Cuban-Americans meant to protest. Indeed, there is nothing in their rhetoric to suggest that they believed that the immigration laws or the laws governing search and seizure were themselves unjust. At best, they can be understood as saying that the *application* of those laws to Elian and the Gonzales family was unjust. King certainly would have recognized the unjust application of a just law as an appropriate ground for nonviolent direct action. See Bass, *supra*, at 124-25.

But the mere fact that Miami’s Cuban-Americans disagreed with the application of these laws does not render them unjust. There was, for example, no evidence that the immigration laws were passed by an undemocratic Congress that worked to exclude Cuban-Americans from deliberation. The Cuban-American community’s views about the application of these laws were also obviously considered. Furthermore, the application here was rooted in concern for the natural, inalienable right of a fit parent to raise his son. See *infra* Part II.D.2.b. Elian’s seizure aimed at human connection, not separation. Additionally, as the heated rhetoric and the angry crowd surrounding Lazaro’s home showed, the law-violators were not acting “lovingly.” Nor is it clear that they meant to accept imprisonment for their actions, and to do so “willingly.” Under these circumstances, civil disobedience was unjustified. Had the state not acted to protect Juan Miguel’s parental rights because of his ethnicity, his political beliefs, or the government’s fear of the crowd, the state would be acting more like the violent segregationists, or at least the complicitous indifferent moderates of whom King complained. For a general background on civil disobedience, see Henry David Thoreau, *Walden*, and, *Civil Disobedience* (Paul Lauter ed., 2000) (including articles on civil disobedience by eighteen well-known social activists, philosophers, and religious leaders).

appropriately statutorily delegated authority to enforce immigration laws to the Attorney General of the United States, who in turn authorized the INS to administer those laws.⁵⁵⁰ Justice Felix Frankfurter captured the plenary power doctrine's essence in 1952: "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."⁵⁵¹ The high Court has repeatedly stated that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."⁵⁵² The Court's cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."⁵⁵³ One major justification for the doctrine is that "delicate foreign policy issues [are] appropriately resolved by a political branch of government."⁵⁵⁴ By similar reasoning, the Court has expressed a willingness not to second-guess Executive Branch immigration decisions, given that Branch's constitutional authority to conduct foreign policy.⁵⁵⁵

550. See 8 U.S.C. §§ 1103, 1551 (2000); *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1191 (S.D. Fla.), *aff'd*, 212 F.3d 1338 (11th Cir. 2000); U.S. Dep't of Justice Immigration and Naturalization Serv., *Immigration Law and Procedure, Basic Law Manual* 9 (Special Supp. 1995) [hereinafter *Basic Law Manual*]. I am not arguing that the plenary power and related doctrines discussed here are either necessarily applicable in all respects to Elian's case or are wise. See generally Aleinikoff, *supra* note 199 (extended attack on the plenary power doctrine and the frequent constitutional privileging of citizens over non-citizens who are exposed to federal action). I am simply not interested in those questions. Rather, my point is that the logic of judicial deference to the Executive in matters of immigration and foreign policy made sense in Elian's particular case. Even more importantly, that deference was consistent with our modern constitutional culture. Accordingly, the deferential actions of the courts and the active efforts of the Executive in Elian's case are best understood as sending messages about the need for a unified federal voice on foreign policy questions but not about the worth of Cuban-Americans or Cubans resident in America, relative to other groups. Therefore, the judicial and Executive actions in the case cannot support a finding that the searches and seizures involved were "unreasonable" under the Fourth Amendment.

551. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

552. *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787, 792, 799-800 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), and holding that Congress may constitutionally distinguish alien children seeking preference for admission based on their natural mother's being legally in this country from those relying on their natural father's legal residency status); see also *Kleindienst v. Mandell*, 408 U.S. 753, 765-70, 766 n.6 (1972) (explaining that Congress may constitutionally grant the Attorney General discretion to deny visas to aliens advocating Communism); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (Congress can permit deportation of aliens because of past Communist Party membership).

553. *Fiallo*, 430 U.S. at 792 (citations omitted).

554. Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279, 306.

555. *Id.* at 306-07.

Indeed, separate and apart from the plenary power doctrine and immigration law, the Court has deferred to the Executive Branch in the area of foreign policy since the New Deal.⁵⁵⁶ Legal historian G. Edward White credits Justice Sutherland's opinion in the seminal *Curtiss-Wright*⁵⁵⁷ case with first articulating the bases of modern doctrines of deference to the Executive in foreign policy.⁵⁵⁸ White summarized a critical part of the opinion's rationale as follows:

In the foreign affairs realm most broad delegations of power to the national executive branch, or broad encroachments by that branch into the residuum powers, were constitutionally unproblematic. This was because most exercises in foreign relations policymaking by the national government rested not on constitutional enumerations but on inherent powers of sovereignty that were not subject to constitutional constraints at all. The distinction between internal and external affairs, and the existence of inherent national powers in the latter realm, were vital, clarifying jurisprudential concepts.⁵⁵⁹

Furthermore, Justice Sutherland stressed that the President alone negotiated treaties, and it might cause the country serious embarrassment and frustrate delicate discussions if secrets had to be

556. See G. Edward White, *The Constitution and the New Deal* 67 (2000). The plenary power doctrine and the related deference to the Executive in foreign affairs are often said to stem back much further in time, to *The Chinese Exclusion Case*, 130 U.S. 581 (1889). See Johnson, *supra* note 554, at 304-06. There, the Court upheld the constitutionality of the Chinese Exclusion Act, which had sharply limited Chinese immigration into the United States. Justice Field flatly declared that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary." *Chinese Exclusion*, 130 U.S. at 606. The rationale for this deference was that:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . If there be any just ground of complaint . . . it must be made to the political department of our government, which is alone competent to act upon the subject.

Id. at 609. Professor G. Edward White agrees that *The Chinese Exclusion Case* and other early cases played an incremental role in the "dominance of the principle of national executive discretion in foreign affairs." White, *supra*, at 90. But, only during the New Deal did "the momentum of the transformation process . . . take on a life of its own." *Id.* at 91. It is important to stress that White does not see the timing of this transformation in foreign affairs jurisprudence to be causally connected to the New Deal. See *id.* at 91-93.

557. *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).

558. See White, *supra* note 556, at 69-93; see *id.* at 68-69 ("[I]n a series of cases, stretching from 1936 [the date of the *Curtiss-Wright* decision] to 1945 . . . the Supreme Court revisited the starting assumptions of the orthodox regime . . . [and with] . . . related commentary . . . transform[ed] . . . American constitutional foreign relations jurisprudence to a form largely resembling its current state.").

559. *Id.* at 73.

revealed to Congress. Moreover, Congress had, in Sutherland's view, engaged in a longstanding practice of deference to the Executive in the realm of foreign affairs.⁵⁶⁰ Whatever the wisdom of Sutherland's precise reasoning, he properly recognized, as does the contemporary Court, that in a wide range of foreign policymaking, "the complex and dangerous world of twentieth-century international relations required flexible, unencumbered decisionmaking by foreign relations specialists."⁵⁶¹

The Elian Gonzales case had numerous foreign policy implications. The International Child Abduction Remedies Act, to which the United States is a signatory, requires children who are wrongly removed or retained from their parents to be promptly returned to them, absent a few exceptions herein applicable.⁵⁶² Furthermore, a refusal to return Elian to his father might create a dangerous precedent that could affect the fate of American citizens.⁵⁶³ American parents are now seeking to regain custody of approximately 1100 children who were abducted to foreign lands, including Germany and Lebanon.⁵⁶⁴ Strict adherence to the principle that children taken from their homelands should be returned at their parents' request was necessary to maintain American credibility in these negotiations. Additionally, Castro's own heated response to the Elian situation had implications for America's future relationship with Cuba, and for America's credibility regarding its Cuba policies in the eyes of the rest of the world.⁵⁶⁵

Even if it is conceded, however, that whether Elian remained in the United States was primarily an Executive Branch decision, did that include the Executive's forcibly searching and entering a United States' resident's home to seize Elian? The answer is "yes." Importantly, the search was done pursuant to a warrant issued by the Judicial Branch.⁵⁶⁶ There was unquestionably probable cause to believe that Elian was being illegally held in the home of Lazaro Gonzales. Though the existence of probable cause should not necessarily end the Fourth Amendment reasonableness analysis,⁵⁶⁷ unless undue force was used, that further balancing should be, and

560. *See id.* at 73-74.

561. *Id.* at 93.

562. *See* 42 U.S.C. § 11601 (1994); Mabry, *Send the Children Home*, *supra* note 198, at 49 (discussing this Act).

563. *See* Mabry, *Send the Children Home*, *supra* note 198 at 49-50.

564. *See id.*

565. *See id.* at 49-51.

566. *See supra* text accompanying notes 514-16.

567. The Supreme Court has suggested that the presence of probable cause is almost always all that the Constitution requires. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (upholding custodial arrest for fine-only offense of driving without a seatbelt); *Whren v. United States*, 517 U.S. 806 (1996) (holding that officer's motives were irrelevant where there was probable cause for a stop). I have, however, argued otherwise. *See Taslitz, Respect*, *supra* note 30.

properly was, entrusted to the Executive in Elian's case. This is so because such further balancing necessarily implicated political judgments and foreign affairs.

Moreover, the Executive's primacy in foreign affairs even extends to many decisions "to which the constitutional strictures governing domestic issues did not apply."⁵⁶⁸ Specifically in the area of immigration, Congress (and, by delegation and extension, the Executive) may often make rules constitutionally unacceptable in other contexts.⁵⁶⁹ In any event, the Executive's decision that foreign policy and other concerns required Elian's return to his father would have been meaningless without the authority to obtain a search warrant based on probable cause.

That does not mean that the Executive's authority was literally unlimited. In the 1889 *Chinese Exclusion Case*,⁵⁷⁰ to which the current plenary power doctrine's roots are often (if somewhat misleadingly) traced,⁵⁷¹ the Court said that congressional authority was limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."⁵⁷² Recently, the United States Supreme Court relied on this language in *Zadvydas v. Davis*.⁵⁷³ There, the Court in the habeas corpus setting faced the question of whether the INS had authority to indefinitely civilly detain resident aliens with criminal records who were ordered deported to countries that refused to have them. To avoid constitutional problems with the ambiguous authorizing statute, the Court read into the statute a reasonableness requirement. If detention exceeded a period reasonably necessary to secure removal, the detention must end, though release may be subject to certain conditions. The Court emphasized that it was not addressing more difficult situations, such as terrorist threats, where extended detention might be necessary. The Court remanded both aliens' cases for proceedings consistent with the Court's opinion.

In reaching its conclusion, the Court noted that due process, like many other constitutional protections, begins once an alien has entered our borders. Here, there were no serious foreign policy justifications for extended detention. Yet, such detention was a grave infringement on an alien's liberty interests. The Court recognized, furthermore, that the Executive Branch has greater immigration-related expertise, and that there is a need for the Nation to "speak

568. See White, *supra* note 556, at 93. But see *supra* note 199 (discussing contrary views).

569. See Johnson, *supra* note 554 at 306-07.

570. 130 U.S. 581 (1889).

571. See *supra* note 556.

572. *Chinese Exclusion*, 130 U.S. at 604.

573. 533 U.S. 678 (2001).

with one voice”⁵⁷⁴ in immigration matters. But, in the context of the “Great Writ” (Federal habeas corpus), courts could take account of these concerns without “abdicating their legal responsibility to review the lawfulness of an alien’s continued detention.”⁵⁷⁵ To accord the Executive some deference even in this area, however, the Court created a presumption that an alien must be released if detained more than six months, where he provides good reason to believe that there is no significant likelihood of his removal in the reasonably foreseeable future.⁵⁷⁶ But, the presumption may be rebutted by government evidence sufficient to rebut the alien’s showing.⁵⁷⁷

The Elian case is sharply distinguishable. There, unlike in *Zadvydas*, there were significant foreign policy implications in the INS’s actions. Furthermore, no invasion of liberty as extreme as the possibility of permanent civil commitment was involved. The invasion of someone’s home by the state, especially with a substantial show of force, and even if for a brief time, is, of course, significant. However, Lazaro was afforded every opportunity to avoid that outcome during the many months of negotiation. When the raid finally happened, it was swift and no one was injured.⁵⁷⁸ Moreover, the raid was not done for the purpose of the United States government limiting free movement, but rather to protect fundamental American principles of parental autonomy and family unity.

Importantly, Lazaro and the Miami Cuban-Americans had ample opportunity for their voices to be heard. For example, when Lazaro’s attorneys claimed that Juan Miguel Gonzalez (Elian’s father) was not free to express his true desires because of Cuban-government censorship, INS officials flew to Cuba and met with Juan Miguel. “No Cuban official was present.”⁵⁷⁹ “To further thwart possible attempts at eavesdropping at the meeting, some communications were conducted in writing.”⁵⁸⁰ INS officials concluded, from Juan Miguel’s demeanor and writings, that he actually wanted his son to return to Cuba.⁵⁸¹

This did not persuade Lazaro. On January 5, INS officials gave Lazaro nine days to reunite Elian with his father. By April 6, more than three months later, the INS was still conducting “extended discussions with the Gonzales family.”⁵⁸² On April 6, when Elian’s father arrived in the United States, Lazaro refused to let father and son see one another for ten days, permitting only two phone calls. He

574. *Id.* at 700.

575. *Id.*

576. *Id.* at 701.

577. *Id.*

578. *See supra* text accompanying notes 508-10.

579. Mabry, *Send the Children Home*, *supra* note 198, at 7.

580. *Id.* at 7-8.

581. *Id.* at 8.

582. *Id.* at 9 (internal quotations omitted).

also had six-year-old Elian say in a video that he did not want to return to Cuba.⁵⁸³ Marisleysis Gonzalez, Elian's twenty-six-year old cousin, declared herself Elian's "surrogate mother."⁵⁸⁴

Meanwhile, Attorney General Janet Reno engaged in extended negotiations with the Gonzalez family.⁵⁸⁵ These negotiations continued until seconds before the now unavoidable raid.⁵⁸⁶ Lazaro and Marisleysis continued, in one commentator's words, to "scheme . . . to prevent Mr. [Juan Miguel] Gonzalez-Quintana from reclaiming physical custody of his son."⁵⁸⁷ Janet Reno described her frustration with the Gonzalez family's tactics: "Every step of the way the Miami relatives kept moving the goal posts and raising more hurdles After negotiating through the night [before Elian was seized], I informed the parties that time had run out. At that moment, I gave the go-ahead [for taking Elian]."⁵⁸⁸

All this happened in an atmosphere of Cuban-American protests, constant media coverage, and behind-the-scenes politicking.⁵⁸⁹ Lazaro, Marisleysis, and their supporters sought to portray any INS decision to enter Lazaro's home to return Elian to his father as complicity in Castro's totalitarian regime.⁵⁹⁰ It is implausible to believe that the Clinton Administration had not heard and carefully considered the Miami Cuban-Americans' arguments, especially given Democratic Party fears that the whole incident would haunt them in Florida in the upcoming Presidential election.⁵⁹¹ Furthermore, Lazaro had filed repeated petitions to the courts, who considered but ultimately rejected claims that unusual aspects of this case required departure from the usual principles of deference to the legislature.⁵⁹² Under such circumstances, none of the principles of a respect-based jurisprudence can fairly be said to have been violated.

583. *Id.* at 31-32; see also *60 Minutes: Elian's Father Speaks on 60 Minutes* (CBS television broadcast, Apr. 19, 2000). The separation and video led Juan Miguel to accuse Lazaro of abusing Elian by "turning him against his father." *Id.*

584. Mabry, *Send the Children Home*, *supra* note 198, at 34.

585. *See id.* at 9.

586. *Id.*

587. *Id.* at 36.

588. Press Release, U.S. Dep't of Justice, Attorney General's Statement Regarding the Removal of Elian Gonzales (Apr. 22, 2000) (on file with the author).

589. *See supra* text accompanying notes 494-513.

590. *See supra* text accompanying notes 494-520.

591. *See* John Broder & Elaine Sciolino, *How Gonzalez Case Took a Wild Swing*, *Toronto Star*, Apr. 1, 2000, at NE 16 ("[T]he administration's position has hardened, reflecting its interpretation of immigration law and its desire to resolve the matter quickly to avoid lasting political damage to President Bill Clinton and Gore.")

592. *See supra* text accompanying notes 520-30.

b. *America's Fundamental Commitment to Parental Autonomy and Family Unity*

American courts recognize a fundamental right of parents to raise their children as they see fit. Indeed, in liberal legal theory, it is considered one of the most important of inalienable rights.⁵⁹³ “The philosophical origins of th[e] doctrine lie in liberalism’s respect for the individual adult and his (or her) right to be free from governmental intrusions.”⁵⁹⁴ The Wisconsin Supreme Court’s classic statement of the doctrine in 1922 declared that:

[a] natural affection between the parent and offspring, though it may be naught but a refined animal instinct and stronger from the parent down than the child up, has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed.⁵⁹⁵

This fundamental substantive due process liberty interest of the parents “in the care, custody, and control of their children” has repeatedly been recognized by the Court.⁵⁹⁶ Just recently, Justice O’Connor, in *Troxel v. Granville*,⁵⁹⁷ in which the Court rejected paternal grandparents’ efforts to obtain visitation rights, described this particular “liberty interest... [as] perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁵⁹⁸ O’Connor elaborated:

[m]ore than 75 years ago... we again held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and to “control the

593. Doriane Lambelet Coleman, *Fixing Columbine: The Challenge for American Liberalism* 99-100 (2002) [hereinafter Coleman, *Fixing Columbine*].

594. Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 *Duke L.J.* 717, 764 n.211 (1998) [hereinafter *Seattle Compromise*].

595. *Lacher v. Venus*, 188 N.W. 613, 617 (Wis. 1922); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

Our jurisprudence historically has reflected Western civilization’s concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.”

Id. (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

596. Coleman, *Fixing Columbine*, *supra* note 593, at 100-07.

597. 530 U.S. 57 (2000).

598. *Id.* at 65. Although no single rationale in *Troxel* garnered a majority, and three Justices dissented, the Court was unanimous in its view that “the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.” *Id.* at 95 (Kennedy, J., dissenting) (noting that this “beginning point... commands general, perhaps unanimous, agreement in our separate opinions” in this case).

education of their own." . . . [Subsequently,] we held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." . . . [Later still, we emphasized that] "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵⁹⁹

The importance of these rights in a liberal polity like the United States is well-illustrated by the infamous story of the Mortara family, "nineteenth-century Italian Jews ensnared by the power of the Papal States."⁶⁰⁰

In 1853, the Mortara's approximately one-year-old son, Edgardo, contracted a serious illness. Unbeknownst to his Jewish parents, their fourteen-year-old Christian domestic servant, Anna Morisi, fearing that Edgardo would die, sprinkled water on his brow, saying, "I baptize you in the name of the Father, of the Son, and of the Holy Ghost."⁶⁰¹ The Catholic Church had repeatedly forbidden such clandestine baptisms of Jewish children.⁶⁰² If such a baptism happened, however, it was not invalidated by its clandestine nature or by the parents' lack of consent.⁶⁰³

Edgardo recovered, Anna initially ignoring the incident.⁶⁰⁴ But during later years, Anna mentioned what happened to a friend. Gossip sparked by that friend eventually brought the story to the attention of Father Pier Gaetano Feletti, Bologna's inquisitor. Father Feletti believed that the baptism was valid, making Edgardo a Catholic. Accordingly, he was determined that Edgardo not be raised in a Jewish home.⁶⁰⁵

On June 23, 1858, a papal police officer, accompanied by several other of the Pope's carabinieri, knocked at the Mortaras' door, demanding entry. Marshal Lucidi questioned them about their children's names, and then declared, "Your son Edgardo has been baptized, and I have been ordered to take him with me."⁶⁰⁶ Edgardo was seized and, despite subsequent lengthy legal proceedings, was

599. *Id.* at 65-66 (citations omitted).

600. Steven Lubet, *Nothing but the Truth: Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Whole Truth* 27 (2001). I have relied substantially on Lubet's telling of the Mortara story, including my use of quotes from the participants.

601. *Id.* at 28.

602. *Id.* at 29.

603. *See id.* at 28-29. The Mortaras, of course, argued otherwise, but their pleas were ultimately rejected. *See id.* at 31-41. The intricacies of nineteenth-century Papal law need not be recounted, however, for they are not relevant to the point I want to make here. For a more detailed treatment of the Mortara case, see David I. Kertzer, *The Kidnapping of Edgardo Mortara* (1997).

604. *See* Lubet, *supra* note 600, at 28.

605. *See id.*

606. *Id.*

never returned.⁶⁰⁷ Indeed, he was eventually “adopted” by Pope Pius IX himself, becoming Father Pio Edgardo and preaching throughout Europe.⁶⁰⁸

Diplomatic pressure to return Edgardo to his parents was intense. “Jews had already been emancipated in much of Western Europe,” and the continuing submission of some states to Papal authority “was widely viewed as an anachronism.”⁶⁰⁹ Furthermore, “[t]he Church had no particular animus toward the Mortaras,” did not consciously wish to torment them or the Jewish community, and did not make it a practice to deprive Jewish parents of their children.⁶¹⁰ Moreover, the Church followed what it considered to be scrupulously fair and thorough procedures, interrogating the house servant about her baptism procedure and internally debating both her truthfulness and the mandates of Canon Law for over six months, and only then seizing Edgardo.⁶¹¹ These procedures seemed to stem from genuine concern about doing the right thing rather than from overt bias against the Mortaras. Nevertheless, Pope Pius IX resisted both international pressure and the efforts made by the Mortaras to retrieve their child via Papal law.⁶¹²

The Church’s motivation, though intertwined with stereotypes about Jews, centered on protecting Edgardo’s best interest.⁶¹³

Children converted over their parents’ objections would necessarily be tempted to revert to Judaism, a mortal sin. Thus, it was better not to baptize them in the first place. But this did not mean that the baptism was a nullity. In fact, the logical conclusion was that such children had to be removed as much as possible from the corrupting influence of their parents.⁶¹⁴

Apart from concern for Edgardo’s soul, the church worried about his body. Reversion to Judaism would be apostasy, a capital crime.⁶¹⁵ Moreover, Christians believed that Jews would “rather murder their own children than see them grow up to be Catholic.”⁶¹⁶

607. *Id.* Two other well-known cases occurred in the nineteenth century, one in 1844 in Modena and one in Reggio in 1814. Despite the uproar over the Mortara case, including another particularly infamous uproar occurring in Rome in 1864, clandestine baptism continued. *Id.* at 49 n.2.

608. *Id.* at 28.

609. *Id.* at 29; see generally Jacob Katz, *Out of the Ghetto: The Social Background of Jewish Emancipation, 1770-1870* (1973) (tracing the history of Jewish Emancipation).

610. See Lubet, *supra* note 600, at 37.

611. See *id.* at 30-31.

612. See *id.* at 37.

613. See *id.* at 36-37.

614. *Id.* at 35. A similar statement of the Mortara case is implied under the heading *Mortara Case*, in 12 *Encyclopedia Judaica* 354-55 (1972).

615. Lubet, *supra* note 600, at 37.

616. *Id.* at 37-38. The Church had promised to return Edgardo to his parents if they and all their other children converted to Christianity. *Id.* at 50 n.10. Perhaps this

Furthermore, the Catholic Church portrayed Edgardo as happy to leave his parents, reportedly showing immediate interest in Christianity and fearing return to his parents, who might torture and ruin him.⁶¹⁷ The newspaper, *Civilita Catolica*, opined that “[i]t would be inhuman cruelty to . . . [grant the Mortaras’ request], especially when the son has the insight to see the danger himself, and himself begs for protection against it.”⁶¹⁸ *Brevi cenni* declared, “[b]etween the two competing authorities—that of God and that of the parents—God’s must prevail, for was He not the author of the natural rights that parents enjoyed?”⁶¹⁹

The Mortara case has modernly been widely condemned.⁶²⁰ Yet there is little doubt that the Pope, his agents, and “even the Inquisitor, were impelled in their actions by both the law and their good intentions.”⁶²¹ It is fear of just such events that has led American courts to declare that “parents should be the ones to choose whether to expose their children to certain people or ideas.”⁶²² Attorney General Janet Reno later encapsulated this idea thus: “[I]t is not our place to punish a father for his political beliefs or for where he wants to raise his child. Indeed, if we were to start judging parents on the basis of their political beliefs, we would change the concept of family for the rest of time.”⁶²³

In Elian’s case, private parties rather than the Church-as-State, sought to separate Elian from his surviving parent.⁶²⁴ Those private parties (Miami’s Cuban-Americans) understood, however, that state action, likely in the form of a court order, would be necessary to make that separation stand.⁶²⁵ Furthermore, the basis of the dispute *seemed* to be over politics rather than religion. In most other ways, however, the parallels between the Mortara and Elian cases are striking.

Lazaro, his family, and their Miami supporters all maintained that they sought to keep Elian from his father for Elian’s own good. Fidel Castro was Satan-on-Earth, and returning Elian to Juan Miguel in

is why they were later derided for their “blind Judaic obstinacy.” *Id.* (citation omitted).

617. *See id.* at 38-39.

618. *Id.* at 39 (first alteration in original).

619. *Id.* at 36.

620. *See id.* at 38.

621. *Id.*

622. *Hoff v. Berg*, 595 N.W.2d 285, 289 (N.D. 1999) (citation omitted).

623. Press Release, U.S. Dep’t of Justice, Statement of Attorney General Janet Reno (Apr. 7, 2000) (on file with the author).

624. American family law often recognizes a presumption that the surviving parent should obtain custody of the child unless the parent is unfit. *See, e.g., Ex parte D.J.*, 645 So. 2d 303 (Ala. 1994); *Taylor v. Becker*, 708 A.2d 626, 627-28 (Del. 1998); *Peterson v. Riley*, 597 N.E.2d 995, 997-98 (Ind. 1992); *see also In re Michael B.*, 604 N.E.2d 122, 128 (N.Y. 1992) (unless he is unfit, the biological parent’s right to custody is superior to the rights of all others).

625. *See supra* text accompanying note 457.

Cuba, therefore, condemned Elian to Hell. Having tasted freedom in the United States, letting Elian return to the land of communist ideology was a sort of apostasy, a rejection of the sacred beliefs of the Cuban-American community that Elian had joined. That Elian did not originally choose to join did not matter. He was irrevocably a member and obviously now wanted to stay one, as he himself declared on videotape.⁶²⁶ Returning him would also expose him to physical danger. He would live in poverty, be persecuted for his membership in a family of dissidents, and be exposed to a father who, they alleged (without substantiation) would beat him.⁶²⁷ For Lazaro and Miami's Cuban-American community, Cuban-Americanism was a secular religion seeking to protect its own from its infidel secular-religious competitor: Castro-style Communism.

Taken in its best light, therefore, the Miami Cuban-American position was that political ideology trumps the parental bond. However reprehensible Cuban Communist Party ideology may be to most Americans, a liberal state cannot tolerate severing the parental bond for that reason. Parents must be free to choose their own political beliefs without fear that some government will then steal their child. Parents must also be free (within very broad limits)⁶²⁸ to raise their children as they see fit, promoting the autonomy and diversity that liberal states so value.⁶²⁹ It is true that Castro might penalize both his subjects' political ideology and their "undue" parental autonomy in raising their children. But, two wrongs do not make a right. The United States must not become Castro in the process of fighting him.⁶³⁰

The Department of Justice's May 11, 2000, statement just after oral arguments before the Eleventh Circuit in the Elian case expressed the true message of the government's action:

[T]he bond between parent and child is recognized not only in our own constitutional order, but in the international community.

626. See *supra* text accompanying notes 488-505 (reviewing the Cuban-American community's continuing reaction to the Elian case); see also Mabry, *Send the Children Home*, *supra* note 198, at 31-32 (describing the videotape of Elian in which he stated that he did not want to return to Cuba).

627. See Mabry, *Send the Children Home*, *supra* note 198, at 32-33, 41-42, 48, 57-58.

628. See Coleman, *Fixing Columbine*, *supra* note 593, at 102 ("However, for those individuals who agree with the relatively few and specific restrictions that are imposed by virtue of the abuse and neglect laws . . . parental autonomy is otherwise virtually unlimited").

629. See *supra* text accompanying notes 593-600. On the importance of parents raising informed, independent, autonomous children in a liberal state, see generally Gillian Brown, *The Consent of the Governed: The Lockean Legacy in Early American Culture* (2001).

630. See Friedrich Nietzsche, *Beyond Good and Evil* § 146 (R.J. Hollingdale trans., Penguin Books 1990) (1886) ("He who fights with monsters should look to it that he himself does not become a monster.").

Nothing in the text of the Immigration and Nationality Act—the law that governed the Commission’s decision—suggests that Congress intended to depart from these principles in immigration matters.

....

... We will now await the Court’s decision in this matter and hope that the special bond that exists between Juan Miguel Gonzalez and his son will be upheld.⁶³¹

c. *Taking Stock*

My argument that the “true” meaning of the government’s seizure of Elian was to express respect for Juan Miguel’s equal humanity as a father, who is, therefore, entitled to care for his son, may seem to smack of majoritarianism. After all, Miami’s Cuban-American community perceived a very different message, one of political exclusion and diminishment.

But, I did not argue for the view that I have because it was the overwhelming attitude among the American people. Rather, I argued that *in this instance* majority conceptions are the closest to the ideals embodied in the Fourth Amendment as mutated by the Fourteenth. The evidence is that state actors intended only to vindicate the rights of the biological father, rights at the core of the American system of government. This was not an instance in which minority perspectives should be honored.⁶³² Moreover, the state still gave the Cuban-Americans a voice, acted only on solid individualized evidence of Lazaro’s wrongdoing, and displayed no evidence of ethnic-based decision making or stereotyping. Indeed, the INS sought to protect Elian’s growing bond with the Miami branch of the Gonzalez family without compromising his connection to his father. Thus, in a letter to Lazaro, the INS Commissioner stated that he “would be happy to facilitate continuing contact between Elian, his father, and your family. If Elian and his immediate family wished to apply for tourist visas at some point in the future, the Consular Section at the U.S. Interest Section in Havana would, of course, consider them very favorably.”⁶³³ Indeed, the INS also offered Lazaro the opportunity to escort Elian back to Cuba.⁶³⁴ In sum, the Executive engaged in months of good faith negotiation, expanded investigation at the

631. Press Release, U.S. Dep’t of Justice, Statement by the Department of Justice Following Oral Arguments in the 11th Circuit Court of Appeals on the Elian Gonzalez Case (May 11, 2000) (on file with author).

632. See Taslitz, *Respect*, *supra* note 30, at 19-20 (on hyper-sensitive groups).

633. Letter from Michael A. Pearson, Executive Associate Commissioner for Field Operations, INS, to Lazaro Gonzalez 2 (July 5, 2000) (on file with author).

634. Press Release, U.S. Dep’t of Justice, INS Decision in the Elian Gonzalez Case (Jan. 5, 2000) (on file with author).

Gonzalez's requests, made repeated efforts at compromise to avoid the necessity of a search warrant and a seizure, and ultimately resisted the Gonzalez's most extreme position only to protect the over-riding values of liberal autonomy and of the bond of love between a father and son.⁶³⁵ A respect-based jurisprudence requires no more.

CONCLUSION

The four stories recounted here suggest the themes that would be embodied in a Fourth Amendment jurisprudence of respect. In three of these instances—only excluding Elian—police failed adequately to individualize justice. It is impossible to reason without using some generalizations. There is therefore no sharp distinction between individualized and generalized assessments. There is rather a continuum from judgments largely driven by generalizations to those largely driven by individual circumstances.⁶³⁶ In each of these tales, the decisionmakers leaned too heavily toward the generalization end of the spectrum. “Anyone fleeing the police admits his guilt,” “[a]ll Japanese-Americans are disloyal saboteurs,” and “[a]ll young black men in Oneonta are to be suspected” of a violent crime were the sorts of judgments at work. These judgments may further be challenged not only because of their degree of individualization but also because of their shaky normative foundations. All three ignored minority perspectives on reality, and two (the internment and Oneonta cases) relied primarily on explicitly race-based judgments, choices inconsistent with constitutional equality values.⁶³⁷

In all four cases, decisionmakers were at least perceived to be ignoring, or at least minimizing, group justice. The treatment of each of the individuals involved—Elian, Carol Bayless, the internees, and the Oneonta students—had broad implications for the salient social groups to which they belonged, respectively, Cuban-Americans; poor, inner city African-Americans; Japanese-Americans; and African-American males in higher education. The procedures followed arguably had the effect of reducing these groups' social status and increasing their sense of isolation from the broader American political community. The Oneonta court, at least in its first opinion, candidly recognized these dangers but sadly saw addressing them as outside the purview of constitutional law. The courts in the Elian Gonzales case, on the other hand, wisely and necessarily sidestepped these issues. The trial court in the Bayless case and the United States Supreme Court in the internment case ultimately either ignored the problems

635. See Taslitz, *Myself Alone*, *supra* note 157, at 24-25.

636. See Taslitz, *Racist Personality*, *supra* note 31, at 746-58.

637. Cf. *id.* (republican equality values justify hate crimes legislation); see also Taslitz, *Rape and Culture*, *supra* note 142, at 134-51 (discussing how constitutional expressive and equality values are involved where substantive and procedural rape laws effectively silence rape victims voices).

or denied their existence in the cases before them. The result in each case has been angry, alienated sub-communities, a more balkanized American community, and, in all but the Elian case, a reduced respect for the rule of law.

In most of the cases, the decisionmakers also ignored minority voices. "Reasonableness" was viewed as an empirically determinable, perspective-less truth to be "discovered." No prevailing decisionmaker recognized that truths may differ for different groups, or at least that each may have a different perspective on, or perhaps see a different portion of, the one "truth." The trial judge's second opinion in the Bayless case, and the United States Supreme Court's opinions in the internment case, respectively ignored African-American attitudes toward the police and Japanese-American attitudes toward, and experiences in, the American polity. The Oneonta court recognized that its initial actions would breed community resentment but never explored why that would be so, nor defined the community, nor weighed its perspectives against counter-views. This divisive suppression of minority voices undermined expressive and equality values central to a republican polity.⁶³⁸

Crowding out those dissenting voices also hampered the ability of a diverse citizenry to monitor police overreaching. Had those voices been heard and seriously considered, the actions of the police and the military in, for example, sweeping up young black males and rounding up Japanese-Americans might have more quickly been viewed in a different light. The colorblind aspirations used to justify this sort of reasoning must go. A racially and ethnically conscious jurisprudence would do a better job of unifying the American community and deterring police misconduct. The unification claim may seem counterintuitive to some, for example, to opponents of affirmative action, who argue that it is divisive because it "takes jobs away" from whites and gives them to "less qualified" minorities.⁶³⁹ Without commenting on the wisdom of this position, it is important to note that the voice concerns expressed here are very different. Hearing minority voices does not mean silencing the majority. Moreover, a jurisprudence protective of the most vulnerable among us will be even more protective of the rest of us.⁶⁴⁰

Each of these tales also highlighted the point that the Fourth Amendment binds all three branches of government. The legislative and executive branches might see themselves as constitutionally bound to a higher standard than the courts. Certainly legislative and executive policy decisions can often affect more people more quickly

638. See Forell & Matthews, *supra* note 96, at xvii-19.

639. See generally Charles R. Lawrence, III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (1997) (summarizing and refuting similar arguments against affirmative action).

640. See Forell & Matthews, *supra* note 96, at xvii-19.

than can judicial action.⁶⁴¹ Legislatures and chief executives also have more resources at their disposal than do judges. But, the judiciary's special role is to enforce some agreed-upon minimum of constitutional protection.⁶⁴² It cannot serve that role if it unduly defers to the other branches, especially to the executive branch, which is the only branch actually carrying out searches and seizures. Political pressures, racial and ethnic prejudice, and competitive efforts to ferret out crime may often prod the executive toward an increasingly narrow vision of the Fourth Amendment.⁶⁴³ In the *Elian* and internment cases, the courts expressly deferred to executive judgments, an unwise move in the first instance but not the second. In Carol Bayless's case, the court, by in effect largely viewing events through the officers' eyes, again deferred to the executive.⁶⁴⁴ The original court opinion in the *Oneonta* case did so as well by too easily finding the Fourth Amendment inapplicable, thus leaving the police to act as they pleased.⁶⁴⁵

These stories also stress the importance of decision makers relying on both an adequate quality and quantity of evidence to justify invasive state conduct. Carol Bayless's fate was determined by the court's willingness to find "reasonable suspicion" on no more evidence than flight from police in a poor black community. That was a paltry quantity of evidence of doubtful reliability, especially when viewed from the very different African-American perspective on the meaning of flight.⁶⁴⁶

The Japanese-American internees were, of course, rounded up on no more evidence than their race and ethnicity.⁶⁴⁷ That was considered ample evidence of their disloyalty and dangerousness. The police sweep in *Oneonta* similarly relied only on race and gender, inadequate indicia of suspicion.⁶⁴⁸ A jurisprudence of respect requires far more.

All four stories also illustrate the importance of the interests in privacy, property, and freedom of movement that the Fourth Amendment protects.⁶⁴⁹ The INS agents in the *Elian* situation impinged upon all three interests by forcing their way into *Elian*'s caretaker's home in the dead of night. They were justified in doing so, but *Lazaro* and the Cuban-American community nevertheless viewed

641. See Taslitz, *Rape and Culture*, *supra* note 142, at 148-51 (defending the "legislative constitution"); Taslitz, *Slaves No More!*, *supra* note 70, at 776-79 (illustrating why some Fourth Amendment problems are best handled by the legislature).

642. See generally Luna, *Sovereignty and Suspicion*, *supra* note 45.

643. See *supra* Parts I.A., II.A.

644. See *supra* text accompanying notes 237-49.

645. See *supra* Part II.C.

646. See *supra* Part II.A.

647. See *supra* text accompanying notes 286-308.

648. See *supra* text accompanying notes 388-91.

649. The social functions served by Fourth Amendment protection of each of these interests are addressed in detail in Taslitz, *Bottom Up*, *supra* note 30.

the action as an invasion of sacred space. Additionally, most Americans view their cars as mini-homes on wheels, important symbols of autonomy and achievement, as well as necessities in a public-transportation poor world.⁶⁵⁰ Yet, Carol Bayless's car was summarily halted and searched, an invasion whose power would be clearer were she found to be among the many innocent citizens in similar circumstances.⁶⁵¹ The Japanese internees, who were indeed innocent of any crime, lost their homes, cars, and most other possessions to spend years incarcerated in open human zoos, with little privacy protection for family life.⁶⁵² The Oneonta students suffered the humiliation of being caught up on the street, probably while going to class, shopping, or seeing friends, in a "sweep" for black males.⁶⁵³

The emotional power of these invasions of privacy, property, and free movement is magnified, because the invasions are perceived as group, as well as individual, harms.⁶⁵⁴ Those group harms stem partly from the messages sent by these state actions: your group is not valued, not sufficiently "one of us," to merit our protection.⁶⁵⁵ Ignoring the disrespect inherent in some police conduct is done at the polity's peril.

Nevertheless, while dissenting views on Fourth Amendment issues must be heard with a receptive ear, that does not mean that the dissenters should always prevail. In Elian's case, there were strong reasons to defer to the Executive's judgment to reunite Elian with his father in Cuba: foreign affairs concerns were implicated; many Cuban-Americans acted in defiance of the rule of law; and our constitutional culture had long given heavy weight to keeping parents with their children. There was an important and sad emotional cost paid in the Cuban-American community's perception of exclusion and insult. But, in this case, those perceptions were unjustified. The Executive's repeated good faith efforts at listening and negotiating, combined with the factors just noted above, establish that the only fair meaning to be given to the government's actions was that it sought to vindicate parental autonomy without insulting the Cuban-American community's value or its understandable outrage and pain.

A jurisprudence of respect does not, therefore, become a jurisprudence of minority rule. But it does replace current jurisprudence with a greater willingness to listen to varied voices, an

650. See Harris, *Car Wars*, *supra* note 99, at 576-78.

651. See *supra* notes 234-40 and accompanying text.

652. See *supra* text accompanying notes 359-61.

653. See *supra* text accompanying notes 388-90.

654. See *supra* text accompanying notes 123-24.

655. See *supra* text accompanying notes 125 ("The status of being human requires . . . honoring . . . our right to belong."), 138 ("Unfitting treatment turns on the meaning given to human action.").

expanded sense of the social costs as well as the social benefits of search and seizure, and an overriding commitment to honoring the equal humanity of *all* the American people.⁶⁵⁶

656. This Article was first written before our nation declared a War on Terrorism when hijackers crashed two planes into the World Trade Center towers, killing thousands of people, on September 11, 2002. See Taslitz, *Twenty-First Century*, *supra* note 48, at 157-58 (describing the events of September 11 and their significance). The jurisprudence of respect articulated here has relevance to many of the changes in American life in the wake of September 11. For example, alleged racial profiling of persons “appearing to be” Arab or Arab-American (as if such ethnicity can readily be detected by sight) has increased. See David A. Harris, *Racial Profiling Now: “Just Common Sense” in the Fight Against Terror?*, __ Crim. Just. __ (forthcoming Summer 2002) (describing racial profiling of Middle Easterners as suspected terrorists after the World Trade Center collapse). Talk of “individualized justice,” “voice,” and significant evidentiary constraints on police conduct may seem foolishly utopian and naïve in a world of potential mass destruction and terror. I have chose not to address in any detail here the implications of the War on Terrorism for a jurisprudence of respect because that would merit its own article-length treatment. Nevertheless, I note that appearances of any inconsistency between respect, full governmental conduct and citizen safety are misleading. To the contrary, the approach urged here is more, not less, likely to protect American citizens’ lives than does the current approach. See *id.* at 13-19 (profiling of Middle Easterners reduces the attention paid to the behavioral clues that are better predictors of danger, diverts resources from more focused and effective policing methods, encourages a community distrust that cuts police off from their best sources of reliable information, underestimates terrorist sophistication, and otherwise has effects “opposite of what we might think” so that “our anti-terrorism cause will be set back, not advanced”); Taslitz, *Twenty-First Century*, *supra* note 48, at 157-63 (suggesting ways to minimize the invasion of civil liberties by new anti-terrorism surveillance technologies while maximizing public safety).

Notes & Observations