Bête Noire: How Race-Based Policing Threatens National Security

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BÊTE NOIRE:† HOW RACE-BASED POLICING THREATENS NATIONAL SECURITY

Lenese C. Herbert*

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“\textquoteleft The enemy of my enemy is my friend.\textquoteright\textquoteright

† The French term, \textit{bête noire}, describes a person or thing especially disliked or dreaded. Translated literally, it means “black beast.” \textit{Random House Webster’s Unabridged Dictionary} (2nd ed. 2001).

* Associate Professor of Law, Albany Law School and former Assistant United States Attorney for the District of Columbia. I would like to thank the deans of Albany Law School, Western New England College School of Law, and American University, Washington College of Law, for their generous support of my research and writing. This Article benefited greatly from feedback provided by the faculties at Albany Law School and The Pennsylvania State University, Dickinson School of Law. Thanks also to Camille Nelson, Assistant Professor of Law, Saint Louis University School of Law, who reviewed an earlier draft of this Article, as well as the organizers of the 2003 Northeast People of Color Legal Scholarship Conference. Finally, I thank Professor Anne Goldstein, Western New England College School of Law, Kimberly Nickelson Tarver, Esq., and Toussaint Tyson, Esq., for reading earlier versions of this Article. This Article is dedicated to my parents, Thomas and Josephine Herbert.

FOREWORD

Shortly after September 11, 2001, African Americans felt a rare freedom from police harassment, abuse, and racial profiling. The seemingly intractable fear and abhorrence for their kind alighted elsewhere, as other groups became the recipients of the public’s scorn and law enforcement’s heightened suspicion. African Americans rushed into this fortuitous


3. Thomas W. Joo, Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11, 34 COLUMBIA HUMAN RTS. L. REV. 1, 2 (2002) (“In the wake of the terrorist attacks of September 11, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty.”).

This eager optimism also rested upon a pre-September 11, 2001, swell that sparked the African-American hope that their time to “melt” had finally arrived: “Before September 11, 2001, a surprising consensus had emerged in our country concerning profiling. At that time, almost sixty percent of the American public—not just African American and Latinos, but all citizens—knew what racial profiling was, and emphatically wanted it stopped.” David A. Harris, Racial Profiling Redux, 22 ST. LOUIS U. PUB. L. REV. 73, 74 (2003). After September 11, however, Professor Harris reports that “over fifty percent of Americans, including members of minority groups who had been most widely victimized by profiling in the past, said they supported the use of profiling, as long as it was targeted at Middle Easterners and Muslims in airports.” Id. (citing Jeffrey M. Jones, Americans Felt Uneasy toward Arabs Even Before September 11, THE GALLUP POLL MONTHLY, Sept. 2001, at 52; Jason L. Riley, Racial Profiling and Terrorism, WALL ST.J., Oct. 24, 2001, at A22).

4. See Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1576 (2002) (citing scores of post-September 11 “incidents of hate violence” reported against “persons who appear Middle Eastern, Arab, or Muslim”). However, Professor Volpp also notes that “[p]ersons of many different races and religions have been attacked as presumably appearing to be of these groups but, were in fact, South Asian, Latino, and African American.” Id.; see also Laurie Goodstein & Tamar Lewin, Victims of Mistaken Identity, Sikhs Pay a Price for Turbans, N.Y. TIMES, Sept. 19, 2001, at A1 (noting vandalism, bombing, threats, and physical attacks on Sikhs and “people who look Middle Eastern and South Asian, whatever their religion or nation of origin”—including an “Indian Catholic”—as well as two deaths, one of “an Egyptian Christian grocer” and “a Pakistani Muslim”); Monica Allen & Joao Ferreira, A Case of Mistaken Identity, STANDARD TIMES, (detailing a community’s apology to an Orthodox Christian Lebanese neighbor and his Saudi Arabian house mate after the community mistakenly identified them as one of the terrorists who crashed planes into the World Trade Center); Sridhar Krishnaswami, Attacks on Sikhs Due to Mistaken Identity, at http://www.hindu.com/thehindu/2001/09/16/stories/03160007.htm (last visited Aug. 22, 2002) (reporting “sporadic attacks” on Indian communities in New York, Cleveland, and Chicago after World Trade Center and Pentagon terror attacks resulting from “mistaken assumption[s] that Sikhs are Muslims”); Volpp, supra note 4, at 1584 (“Persons have been attacked since they ‘appear Muslim,’ which, of course, makes no sense, since Muslims can be of any race.”).
breach, elated at the chance to cleave unto all things American.5 The freedom was heady, alien, yet sublime. It provided these suddenly decontaminated citizens6 an opportunity to hope that their scapegoat role within the United States would end, and that they could finally lay claim to the full rights and privileges of being an American.7

Unfortunately, this freedom coincided with the destruction of New York’s World Trade Center and harrowing damage to the Pentagon. It also came at the expense of Arabs, Saudis, and Muslims8—the ethnicity, nationality, and religion of those held responsible for transmogrifying commercial airliners into weapons of terror and annihilation.9

5. Id. (‘‘Other people of color have become ‘American’ through the process of endorsing racial profiling.’’)

6. See id. (noting that ‘‘post-September 11, a national identity has consolidated that is both strongly patriotic and multiracial’’).

7. See, e.g., Earl Ofari Hutchinson, 911 Volte-Face for Black America, at http://www.alternet.org/print.html?StoryID=14039 (noting that, immediately after September 11, African Americans, in surprisingly large numbers, ‘‘backed profiling and the carrying of identity cards, tighter security measures and shakedowns at airports, and were more willing than in the past to enlist and serve in the armed forces’’) (last visited Sep. 12, 2002); see also Harris, supra note 3, at 73 (citing African American ‘‘cultural critic and MacArthur Foundation ‘genius grant’ recipient,’’ Stanley Crouch, as advocating racial profiling of Arabs: ‘‘[I]f pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation.’’); Gary Kamiya, What the World Thinks of America, at http://www.salon.com/news/feature/2002/07/23/granta/print.html, (last visited July 23, 2002) (recalling how, immediately after September 11, ‘‘a visceral sense of unity, a forged purpose born of a shared wound, allowed all Americans, the secular and the devout, liberals and conservatives, the ironists on the coasts and the straight shooters in the heartland, to come together under a flag that for once meant the same thing to everyone’’).

8. See, e.g., Volpp supra note 4, at 1584 (opining that more generous constructs of ‘‘who is welcomed as American has occurred through its opposition to the new construction, the putative terrorist who ‘looks Middle Eastern’ ’’).

9. See Moustafa Bayouni, Constitutional Ground Has Been Lost Since 9/11, at http://timesunion.com/aspstories/storyprint.asp?storyID=57024 (Sept. 8, 2002) (‘‘Since Sept. 11, more than 1,700 anti-Muslim incidents have been documented by the Council on American Islamic Relations’’ and ‘‘[f]or the past year, Muslims have endured a daily barrage of demagoguery, distortions and outright lies about their faith.’’); see also Joo, supra note 3, at 2 (‘‘In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty.’’). Even having a surname that appears possibly Middle Eastern has been cause for concern since September 11. In July 2003, the United States Transportation Administration disclosed that it maintained two lists of those the agency considers risks to air travel—the ‘‘no-fly’’ and ‘‘selectees’’ lists—which have prevented or slowed flight for those whose surnames fit this description, which include many Arab Americans as well as non-Arab Americans such as Coast Guard Cmdr. Larry Musarra who ‘‘has been stopped several times by Alaska Airlines check-in clerks because his name pops up on the list thanks to the M-U-S that begins his name [which] airline computers apparently flag . . . as a possible Middle Eastern name.’’ Dave Lindorff, Grounding the Flying Nun, at http://www.salon.com/news/feature/2003/07/25/no_fly/print.html (Jul. 25, 2003).
The respite for African Americans was brief. Five short months after September 11, a federal court of appeals overturned three New York Police Department officers' convictions for attempting to conceal evidence regarding fellow officers' torture of Abner Louima, a Haitian immigrant, whom officers rectally and orally violated with the handle of a toilet plunger. The outcry from African Americans was deafening.

Five months later, news of two separate police department beatings of African-American males, one adult and one child, further ravaged these U.S. sons and daughters' sense of nationalism. These beatings thoroughly soured African Americans' post-September 11 elixir of nationalism and patriotism. African American sentiment in chat rooms, on radio stations, and around water coolers across the United States now became: "I don't feel like an American anymore."
Some African Americans are growing convinced that they will never be recognized as full citizens of the United States. With this realization, a number of African Americans mentally withdraw from their social reality. When and where possible, some leave the United States and create a new life abroad. Others remain, but succumb to the paranoia and damage associated with living as a demi-citizen and implode from the "impotent despair" that results when one cannot escape treatment as a member of a lesser caste. A few contort to physical distortions; others latch onto

15. See Charles W. Mills, The Racial Contract 53 (1997) (There are bodies impolitic whose owners are judged incapable of forming or fully entering into a body politic.").


17. See, e.g., Ann M. Simmons, Coming Home to Africa, L. A. Times, Sept. 10, 2002, at A1 (describing how "negatives of racism," "psychological barriers and calluses and bruises" suffered by African Americans "throughout [their] American experience," led them to leave the United States for African countries). The article details stories of several African Americans who have left the United States and are satisfied with the lack of American prejudice in their new homelands. For example, one African-American Harvard Law School alumnus who relinquished a career in corporate law to launch a chain of laundromats and a tourism company in South Africa, noted "[t]he tragedy is, race has blemished the opportunity for African Americans to achieve the American dream." Id. An African-American mother described wanting to give her son "the opportunity to grow into a confident man, without being marginalized in any way." Id. Another expatriate noted that, in Africa, he has "land, whereas America has never given me my 40 acres and a mule," and that "[o]ne needs only to look at the American prisons, American substance abuse programs and the number of premature deaths, and you can see that society is successfully eliminating the African American male. It is hard for a [B]lack man in America, and in particular for a [B]lack man with self-respect." Id.

18. Feagin, supra note 16, at 1323 (noting that "cultural mistrust" or "racism reaction," sometimes mischaracterized as paranoia, "is actually a healthy response to recurring experiences with racial discrimination" and "adopted by African Americans for survival").

19. Id. (asserting the "severe effects that marginalization and dehumanization have on the physical and emotional health of [African Americans] in a variety of settings"). A few employ humor to dull the shearing of self-worth. See, e.g., PSA: How Not To Get Your Ass Kicked By The Police, The Chris Rock Show, (Home Box Office Television, Episode 51), available at http://www.hbo.com/rock/cmp/episodes.html (last visited Nov. 15, 2003) (satirizing largely African American encounters laced with "appropriate" and "inappropriate" responses to the police when stopped).

20. For a discussion of physical distortions, see, for example, Press Release, American Society of Plastic Surgeons, African Americans Maintain Ethnic Identity with Nose Reshaping (April 7, 2003), at http://www.plasticsurgery.org/news_room/press_releases/African-Americans-Maintain-Ethnic-Identity-with-Nose-Reshaping.cfm (quoting Dr. Rod Rohrich, co-author of the American Society of Plastic Surgeons study that determined nose reshaping "has become popular in the African American community"). The press release informs readers:

Standards of beauty infused in our society from mass media are, in general, those of Northern Europe. These nasal aesthetics are characterized by a straight, narrow bridge, a well-defined projecting nasal tip and refined nostrils. The African American nose generally has a wide, depressed bridge, a poorly defined tip and flared nostrils. Id.
varied race-based propositions\textsuperscript{21} in an effort to prove worthy of the apocryphal American melting pot.\textsuperscript{22} Still others crack with the weight of it all via various acts of deception,\textsuperscript{23} self-immolation,\textsuperscript{24} homicide,\textsuperscript{25} or suicide.\textsuperscript{26}

For a discussion of psychological and emotional distortions, see Mills, supra note 15, at 52. Mills cites Ruth Frankenberg's description of the machinations employed by African Americans in maintaining, negotiating, and traversing racial social geography, for example, "the personal 'boundary maintenance' that require[s] that one 'always [maintain] a separateness', a self-conscious 'boundary demarcation of physical space.'" Id. Mills further notes that these "[t]raversals of space are imprinted with domination: prescribed postures of deference and submission for the [B]lack Other, the body language of nonuppitiness (no 'reckless eyeballing'); traffic-codes of priority ('my space can walk through yours and you must step aside'), unwritten rules for determining when to acknowledge the non-white presence and when not." Id.

21. See Darren Lenard Hutchinson, \textit{Progressive Race Blindness?: Individual Identity, Group Politics, and Reform}, 49 UCLA L. Rev. 1455, 1458 (2002) (critiquing "progressive race blind" theories which admonish people of color for "clinging to race as an aspect of individual and group identity which allows for] a construct rooted in domination to define their existence and fail to reconstruct their lives in a way that transcends the language of the dominant culture"). Professor Hutchinson asserts that, despite the allure of true race-blindness and recent scientific evidence that human "race" is a biological fiction, progressive race blindness theories almost universally fail to address the omnipresent and, thus far, intractable role of race in American society. Id.; see also Mills, supra note 15, at 126 ("Race is sociopolitical rather than biological, but it is nonetheless real.").

22. See Volpp, supra note 4, at 1598 ([C]ertain racialized bodies are always marked and disrupt the idea of integration or assimilation.).

23. See, e.g., \textit{The Story}, \textit{Wash. Post}, April 19, 1981, at A12. The article details the story of Janet Cooke, former \textit{Washington Post} reporter, who, was awarded the Pulitzer Prize for a story titled \textit{Jimmy's World} about an 8-year-old heroin addict. Two days later after immense public pressure to release the boy's identity and evidence of fabrications in her credentials, Cooke confessed that there really was no "Jimmy," that he represented a composite of child addicts, and that her story was, in fact, fiction. She returned the Pulitzer and resigned her Post position. Id. More recently, Jayson Blair, former New York Times reporter, resigned under pressure after numerous fabrications were discovered in dozens of stories reported over his four year tenure. See Dan Barry et al., \textit{Times Reporter Who Resigned Leaves Long Trail of Deception}, \textit{N.Y Times}, May 11, 2003, at A1.

24. Feagin, supra note 16, at 1324 ("Silent, all-consuming rage can lead to inner turmoil, emotional or social withdrawal, and physical health problems.").

25. Recall Colin Ferguson, the "Long Island Railroad Shooter," who injured and killed White subway riders on a commuter train, asserting that his acts were the product of "Black Rage." See Patricia J. Falk, \textit{Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage}, 74 N.C.L. Rev. 731, 751–52 (1996). "Black Rage" was first examined by the black psychiatrists and co-authors William H. Grier and Price M. Cobbs. See WILLIAM H. GRIER \& PRICE M. COBBS, \textit{BLACK RAGE} 4 (1968). "Black Rage" posits that some African Americans have endured high levels of race-based oppression and, as a result of the psychological and emotional burden the containment of that rage requires, explode upon encountering "their tormentors [White Americans], filled with rage." Id.

26. See, e.g., Mary-Frances Winters, \textit{What Drives Black Men to Suicide?}, USA TODAY, July 25, 2003, at A15 (citing a study from the Centers for Disease Control and Prevention which found a "114% increase in suicides among [B]lack males aged 10–19 from 1980 to 1995 [and] a 233% increase for [B]lacks age 10–14"). Winters opines that the increase in suicide rates among America's young African American males is a result of "a decreased sense of self
A growing segment, however, views with distaste purposeless self-destruction often associated with such misguided expressions of disaffection.\textsuperscript{27} Inured to the realities of living within the United States' highly-raced society, these U.S. sons and daughters fiercely possess remnants of the American Revolution\textsuperscript{28} and African resistance\textsuperscript{29} and believe that, despite the promise of their U.S. birthright, inferior, revocable citizenship is as good as it will ever get . . . and that will no longer do.\textsuperscript{30}

\section*{INTRODUCTION}

This Article asserts that race-based policing, enabled and exacerbated by race-blind judicial review,\textsuperscript{31} creates an ire with a purpose that promises, and self-worth” as well as “feelings of powerlessness, inferiority, and hopelessness . . . a consequence of feeling overwhelmingly devalued by society.” \textit{Id.}

\textsuperscript{27} See Feagin, \textit{supra} note 16, at 1330 (noting that “[a] too restrained response” to anger originating in racial discrimination or racist treatment “can bring even more suffering because of the feelings of impotence, which in turn can contribute to stress-related illness”).

\textsuperscript{28} Andrew E. Taslitz, \textit{Hate Crimes, Free Speech, and the Contract of Mutual Indifference}, 80 B.U. L. Rev. 1283, 1312 (2000) (noting early American revolutionaries “proclaimed themselves willing to die rather than submit to enslavement by the British, “which was understood, fundamentally, as "the dishonor of being subjected to another's will rather than to the will of God".

\textsuperscript{29} See John W. Blassingame, \textit{The Slave Community: Plantation Life In The Antebellum South} 10 (2d ed. 1979). Blassingame notes:

Africans resisted enslavement at every step in their forced emigration. Conscious of the wrongs they suffered, they began trying to escape on the long march to the coast. Failing this and suicide attempts while still in sight of their native shores, the Africans often mutinied while being transported to the New World and killed their [W]hite captors. In spite of their chains and lack of arms, they rebelled so frequently that a number of ship owners took out insurance to cover losses from mutinies.


\textsuperscript{30} Such a sentiment predates September 11, although the notion of American citizenship has never been so fully experienced after those terror attacks. See, e.g., George Draper, \textit{Prominent San Francisco Negroes View the Militants}, \textit{San Francisco Chronicle}, March 27, 1968, at 1 (quoting African American professionals who indicated that, although they were not “militants,” they would not mind dying—but not foolishly—for fighting racism).

\textsuperscript{31} Feagin, \textit{supra} note 16, at 1320 (citing Steven Keeva, \textit{A Bumpy Road to Equality: Panelists Say Courts Are Backpedaling on Minority Issues}, 82 A.B.A. J. 32 (1996) and African American circuit court judge Nathaniel R. Jones who opines that “it seems that Justice
especially after September 11, to make us all less safe. The illegitimate marginalization of American citizens aggravates an already alienated population and primes them for cooperation with those who seek to harm the United States. Race-based policing guts the expectation of fair-dealing, legitimacy, and justice in the criminal justice system, creating marginalized populations, especially of African Americans. Lack of judicial redress in the face of such policing irrevocably stains already beleaguered African Americans (and others so policed) as inferior citizens. This, in turn, may actualize a catalyst of cooperative opportunity and vulnerability for those who seek to injure the United States, its institutions, and its people.  

This Article focuses on individuals seized within the meaning of the Fourth Amendment, but not formally introduced into the criminal justice system (individuals stopped, but not arrested and, as a result, not prosecuted or subject to appellate review) and, to a lesser extent, those arrested but not prosecuted (and who are also not subject to trial or appellate review). Whether or not the police or prosecutors decide to

Harlan's statement in his dissenting opinion in *Plessy* that 'justice is colorblind,' is now being used against African Americans”).

32. Those who would relish in this “catalyst of cooperative opportunity and vulnerability” would, no doubt, quote words often attributed to Napoleon Bonaparte: “Never interrupt your enemy when he is making a mistake.” Napoleon Bonaparte, available at http://www.brainyquote.com/quotes/authors/n/napoleonbol30390.html (last visited Nov. 10, 2003).

33. The Supreme Court has determined that formal, custodial arrests “set in motion” the “criminal justice mechanism.” *Tennessee v. Garner*, 471 U.S. 1, 10 (1985); *see also California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (finding that long before and even in the absence of arrest, the Fourth Amendment is implicated whenever there is a governmental “seizure,” which occurs when an individual is either physically brought within the control of law enforcement, or submits to the show of authority).

34. “[I]n a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution.” *Surell Brady, Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 3 (2000). Brady notes that a dearth of analysis regarding potential Fourth Amendment violations that occur when an individual is arrested but not prosecuted. *Id.* In my experience as a former Assistant United States Attorney for the District of Columbia, a vast majority of criminal cases did not result in trial; many were dismissed for either declination or want of prosecution, lack of government preparedness, or plea agreements.

35. *Id.* at 5. Professor Brady notes:

[O]ne potential result of the Fourth Amendment cases selected for Supreme Court review is a perception that the amendment primarily protects guilty persons who challenge their convictions on the ground that procedural errors committed by police officers require that key evidence not be used against them. By contrast, relatively little attention is paid by the public, by courts, or by scholars to the most intrusive seizures—custodial arrests that
pursue formal charges, the individuals they stop are, nevertheless, substantially harmed by both the police and the courts when, under the guise of the Fourth Amendment—but, in actuality on the basis of race—they are, violently “thrust outside of the protective ambit of citizenship and identity.” This Article asserts that these citizens have been left “utterly defenseless against repetitions of unconstitutional conduct” by the Court’s Fourth Amendment jurisprudence, as well as the dizzying amount of deference and respect for the police (that may not be deserved if judges and juries were able to observe law enforcement). The methodology of policing a sizeable segment of American citizens deserves examination, particularly considering the post-September 11 national result in the loss of freedom and consequential economic and social harm to individuals, but which do not follow constitutionally prescribed procedures.

Id. Brady correctly notes that much Fourth Amendment case law focuses primarily on governmental searches of an individual’s person, home, papers, or effects and, “often as an incidental matter” the constitutionality of the defendant’s arrest. Id. at 3–4. Brady also asserts that, in automobile traffic stops and resultant searches, “the Supreme Court has weighed the nature and degree of the seizures against concerns about protecting police officers when they approach vehicles to enforce traffic laws.” Id. at 4. However, “[i]n none of these cases has the Court balanced an individual’s presumptive right to be left alone against whether prosecution is intended or likely to occur.” Id. at 4–5.

36. Volpp, supra note 4, at 1598.
37. Brady, supra note 34, at 67 (quoting Sibron v. New York, 392 U.S. 40, 52–53 (1968) and asserting that the Court’s Fourth Amendment jurisprudence regarding unlawful arrests has left individuals “remediless and defenseless”).
38. See, e.g., Frank Rudy Cooper, The Un-Balanced Fourth Amendment: A Cultural Study of the Dng War, Racial Profiling and Arvizu, 47 VILL. L. REV. 851, 891 (2002) (characterizing the Court’s decisions in Ornelas v United States, 517 U.S. 690, 694 (1996) and United States v Arvizu, 122 S. Ct. 744 (2002) as creating a new standard of judicial review under the Fourth Amendment that makes it “even more difficult for an appellate court” to rule against law enforcement’s determination that criminality is afoot). Professor Cooper further notes:

The Ornelas decision requires appellate courts to give “due weight” to a trial court’s finding of reasonable suspicion. The Arvizu decision requires an appellate court to give “due weight” to the trial court’s decision and emphasize the “totality of the circumstances.” Accordingly, a trial court’s findings of reasonable suspicion is doubly insulated from judicial review by both the trial court and police officers’ drawing of inferences from the facts. In contrast, a trial court’s finding of lack of reasonable suspicion would still be subject to the “due weight” of the officer’s inferences and emphasis on the “totality of the circumstances.”

Id. at 892 (citations omitted).
40. See Brady, supra note 34, at 54 (arguing that Fourth Amendment reasonableness requirements justify scrutiny of arrests).
security ramifications of race-based policing and officer violations of the Fourth Amendment right to be let alone. This Article asserts that such encounters, especially after September 11, create an illegitimate, yet repeatedly deepened, constitutionally violative race-based schism of exclusion at a time when the nation desperately requires unity against external terrorist threats.

Part I discusses the origins of the Fourth Amendment right to be let alone. Part II notes the seminal exclusion of African Americans when contemplating and constructing Fourth Amendment guarantees. This part of the article also addresses why, in light of that exclusion (as well as the history of poor treatment of these citizens), police departments are ill-suited—without Court oversight—to recognize African Americans' Fourth Amendment freedoms. Part III asserts that over-policing innocent Americans based on their race renders the American polity defacto segregated and illegitimately creates two societies: “American” and “not.” Part III further argues how both law enforcement and the Supreme Court have collaborated against African Americans’ right to be let alone by subjecting race-based policing to race-blind judicial review. Part IV explores how race-based policing creates identity, often within the crucible of violence. This part of the article argues that the Court’s refusal to acknowledge or penalize the scourge of race-based policing within its Fourth Amendment jurisprudence may cause those Americans so subjected to the insults and terrors of race-based policing to reclaim some measure of dignity and autonomy by cooperation or collaboration with

41. Cf. id. (noting the comparative populations of the number of arrestees versus “the number of persons who litigate their Fourth Amendment rights after conviction”). Professor Brady finds the smaller number “largely irrelevant,” compared to the numbers of individuals who “never get their ‘day in court’ to challenge the charges and evidence against them and hold the prosecution responsible for proving their guilt.” Id. at 5.

42. Volpp, supra note 4, at 1595 (“[R]ace and other markers appear and reappear to patrol the borders of belonging to political communities.”); see also id. (arguing that “the boundaries of the nation continue to be constructed through excluding certain groups”).

43. Brady, supra note 34, at 45. Professor Brady quotes Dean Edward Barrett:

Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversation with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases. Suddenly, it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.

Id. at 45.
other “outsiders,” all of whom, for different reasons, seek to do harm to the United States. This Article therefore concludes by warning that, unless the Court intervenes, race-based policing of African Americans thwarts the United States’ efforts to combat terrorism and foster world peace.

I. **Couverture:** The Fourth Amendment: Doctrine of the Free

"The fish does not see the water . . . ."\(^{46}\)

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^{47}\)

It is often noted that “oppression gave birth to the Fourth Amendment.”\(^{48}\) The amendment’s roots are anti-imperialistic. It applied initially against the federal government\(^{49}\) and subsequently, against the states\(^{50}\) when police “sometimes conducted searches without first obtaining search warrants from the courts, and they conducted general searches even when their search warrants were limited as to the area and the persons to

44. This Article does not attempt to demonize African Americans. Nor does this Article attempt to minimize the injury suffered by Middle Easterners, Muslims, Latinos, and all other individuals since September 11.


46. MILLS, supra note 15, at 76 (noting the reason for the “invisibility” of a raced society to Whites is because such a structure favors them).

47. U.S. CONST. amend. IV.

48. Amy D. Ronner, Fleeing While Black: The Fourth Amendment Apartheid, 32 COLUM. HUM. RTS. L. REV. 383, 397–398 (2001) (noting that the Fourth Amendment’s origins are traceable to the colonial period in American history and the “significant gripes against the English Parliament in the late 1700s, which gave customs officers unbridled discretion to search and seize”).


50. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949) (holding the Fourth Amendment applicable against the states, noting that “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society”); see also Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying the exclusionary rule remedy against the states). The exclusionary rule prevents the state from utilizing illegally-gained evidence against a defendant in the prosecution’s case-in-chief at a criminal trial. Id. at 643.
be searched.” One scholar deems it “the watchdog of all police conduct throughout the country.” It has been characterized as the main constitutional provision that “stands between us and a police state, for its central premise is that police (or other governmental) conduct that interferes with a person’s liberty, bodily integrity, or right to exclude others from what is hers shall be subject to judicial control.” Individuals are protected; “‘persons’ are the primary consideration.”

The Fourth Amendment protects an individual’s expectations of privacy against the government. It provides that “the right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated.” The Supreme Court has noted that “[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry;” “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons” that “require an objective justification.” According to the Court, a Fourth Amendment seizure does not occur “simply because a police officer approaches an individual and asks a few questions.” As long as the approached “remains free to

52. Ronner, supra note 48, at 399.
54. But see Brady, supra note 34, at 70 (citing Leonard Levy’s characterization of the language of the Bill of Rights as “measuring the powers of government, not the rights of the people”). LEONARD LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS AND HISTORY ix (1995). According to Brady, “[t]he amendment is worded to emphasize the limits of government authority, and not to wax eloquently about the derivation or breadth of the referenced right, or how to ensure that it is not violated.” Brady, supra note 34, at 70.
55. Brady, supra note 34, at 10.
56. Katz v. United States, 389 U.S. 347, 351 (1967) (holding property interests do not factor into the Fourth Amendment analysis, as “the Fourth Amendment protects people, not places”); see also id. at 353 (noting that “the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure”).
57. Id.
58. U.S. CONST., amend. IV. But see Katz, 389 U.S. at 350–351 (“The protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”).
60. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).
disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy."

A Fourth Amendment seizure occurs when an officer has either by physical force restrained the liberty of an individual or that person has submitted to the officer's show of authority. A person is "seized" at the point when either police have physically restrained the individual by force or, in the case of non-physical seizures, a reasonable person believes that he or she is no longer free "to disregard the police and go about his [or her] business." Accordingly, "the touchstone of a seizure is the restraint of an individual's personal liberty 'in some way.'" 

The Supreme Court has applied the Fourth Amendment to all governmental seizures, even those involving only a brief detention of persons. The Amendment's prohibition against unreasonable seizures has long been understood by the Court to include unreasonable seizures of the person, including seizures that involve brief detentions (versus traditional custodial arrests). Necessarily within the amendment's penumbra also lies the right against unreasonable governmental intrusion upon the American's freedom of mobility and locomotion. Freedoms of mobility

63. *Mendenhall*, 446 U.S. at 554; *see also Terry*, 392 U.S. at 32–33 (Harlan, J., concurring).

64. *Hodari D.*, 499 U.S. at 626.

65. *Id.*

66. *Id.* (Stevens, J., dissenting and quoting *Terry*, 392 U.S. at 19 n.16).

67. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (applying the Fourth Amendment "to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest") (citing *Davis* v. Mississippi, 394 U.S. 721 (1969)).

68. *Hodari D.*, 499 U.S. at 624 (citing *Henry* v. United States, 361 U.S. 98, 100 (1959)).


70. The "penumbra of the Fourth Amendment" refers to rights that emanate from Fourth Amendment freedoms that are "necessary in making the express [freedoms] fully meaningful." *Griswold* v. Connecticut, 371 U.S. 479, 483 (1965) (holding privacy in the home and marital relationship protected as within the penumbra of the Fourth Amendment prohibition against unreasonable search and seizure).

71. Liberty includes the right to move "to whatsoever place one's own inclination may direct." *Chicago* v. *Morales*, 527 U.S. 41, 53–54 (1999) (plurality opinion) (Kennedy, J., concurring in part and concurring in judgment) (citing 1 W. Blackstone, Commentaries on Law of England 130 (1765)).

72. "Americans have enjoyed the freedom to walk the streets and move about the country free from unreasonable government intrusion for many years." Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1260 (1990). Professor Maclin notes correctly, however, that: "not all Americans have been able to move freely about the country. In many parts of colonial America, both North and South, Negroes were required to carry 'passes.'" *Id.* at 1337 n.4 (citing A. Leon Higginbotham, Jr., *In the Matter of Color, Race & the American Legal Process: The Colonial Period* 171 (1978)).
and locomotion derive further from the Fourth Amendment right to be let alone.\textsuperscript{73}

In his oft-quoted \textit{Olmstead v. United States}\textsuperscript{74} dissent, Justice Brandeis declared that the Fourth Amendment’s penumbral protections are far broader than the face of the text suggests.\textsuperscript{75} He opined that the drafters of the Constitution:

recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, \textit{the right to be let alone}—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.\textsuperscript{76}

As Ronald J. Bacigal notes, “the right to be let alone—to be free from arbitrary governmental interference with our lives—undeniably qualifies as a fundamental value underlying the amendment’s proscription of unreasonable searches and seizures of both property and persons.”\textsuperscript{77} According to the Court, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{73} They also derive from the right of personal security, found in the plain language of the amendment.
\item \textsuperscript{74} \cite{Olmstead} (Brandeis, J., dissenting).
\item \textsuperscript{75} “Time and time again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it.” \textit{Id.} at 476 (Brandeis, J., dissenting). Furthermore, in Justice Butler’s dissent, he notes that the Court’s construction of the Fourth Amendment’s prohibitions should not be unduly literal:

\begin{quote}
The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.
\end{quote}

\textit{Id.} at 488 (Butler, J., dissenting).
\item \textsuperscript{76} \textit{Id.} at 478 (Brandeis, J., dissenting) (emphasis added).
\item \textsuperscript{77} Bacigal, \textit{supra} note 53, at 152.
\item \textsuperscript{78} Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (emphasis added) (citing Union Pac. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
\end{itemize}
II. *Excluez:* The Face of Those Not Yet Unseen—African Americans and the “Black Bill of Rights”

“Freedom is violence.”

Legal commentators might point to the penumbra of the Fourth Amendment and note that the right to be let alone certainly should provide shelter for those African Americans who feel that the Court has abandoned them on the “black letter” of the amendment. The Supreme Court has not further expounded upon the right to be let alone; however, this is irrelevant to its apparenty. Nothing needs to be added to a concept in a country whose seminal stock is traded in liberty and freedom. There is little to flesh out or even litigate; when one’s country is founded upon freedom, its people are free. The right, characterized as “the most comprehensive of rights and the right most valued by civilized men,” appears quintessentially American and so important that “every unjustifiable intrusion . . . must be deemed a violation of the Fourth Amendment.”

79. “Excluez” is a French noun that translates as “preclusion.” COLLINS ROBERT FRENCH DICTIONARY, supra note 45, at 168. This title is borrowed from Bryon Bain, *Walking While Black,* VILLAGE VOICE, May 2, 2000, at 43-44. Bain asserts that: “there is a special Bill of Rights . . . that applies with particular severity to Black men. It has never had to be ratified by Congress because—in the hearts of those with the power to enforce it—the “Black Bill of Rights” is held to be self-evident.” Id.; see also MILLS, supra note 15, at 11. Mills characterizes “The Racial Contract” as a:

set of formal or informal agreements or meta-agreements (higher-level contracts about contracts, which set the limits of the contracts’ validity) between the members of one subset of humans, henceforth designated by (shifting) “racial (phenotypical/genealogical/cultural) criteria . . . as “[W]hite,” and co-extensive (making due allowance for gender differentiation) with the class of full persons, to categorize the remaining subset of humans as “nonwhite” and of a different and inferior moral status, subpersons, so that they have a subordinate civil standing in the [W]hite or [W]hite-ruled polities the whites either already inhabit or establish or in transactions as aliens with these polities, and the moral and juridical rules normally regulating the behavior of [W]hites in their dealings with one another either do not apply at all in dealings with nonwhites or apply only in a qualified form (depending in part on changing historical circumstances and what particular variety of nonwhite is involved), but in any case the general purpose of the Contract is always the differential privileging of the whites as a group with respect to the nonwhites as a group . . .


83. *Id.*
However, if "[o]ppression gave birth to the Fourth Amendment,"84 then fear of African Americans has accompanied its death. For an overwhelming majority of African Americans, the authority of law that allows for interference with their right to be let alone is far from "clear and unquestionable."85 Moreover, the notion of freedom from governmental—specifically police—interference is as foreign as a Plutonian heat wave. According to Professor Russell, "antebellum and postbellum criminal law stood as the antithesis to a racially just system."86 Russell further argues that "one constant remained as the slave codes became the Black codes and the Black codes became segregation statutes: Blackness itself was a crime."87 Law enforcement complicity with race-based policing is inherently violent and shares responsibility for the derogation of actual and implied rights of African Americans. This creates a different legal measure of citizenship and the rights of citizenship possessed by African Americans.

A. Slavery, Violence, and the Institution of Slavery

"Freedom in capitalist society always remains more or less the same as it was in ancient Greek republics, that is, freedom for the slave owners."88

For several hundred years, the experiences of enslaved and free(d) African Americans contradicted the notion of a free American society; their existence belied the purported liberty, independence, and the right to be free from governmental authority.89 Unlike virtually every other  

84. See Ronner, supra note 48.
85. Contra Terry v. Ohio, 392 U.S. 1, at 9 (1968) (recognizing that the right to be left alone remains "free from all restraint or interference of others, unless by clear and unquestionable authority of law").
87. Id. at 22.
89. See FRANKLIN & SCHWENINGER, supra note 29, at 183 ("[T]hose who had gained their freedom were forced to maintain constant vigilance against being thrust back into bondage."); see also id. at 185. The presumption was that African Americans were slaves unless proven otherwise and, even then, unless Whites vouched accordingly. Id. These "free" men, women, and children were at the mercy of states' police courts (which allowed for "release," sometimes lengthy incarcerations with the condition that the African Americans' "freedom" would not preclude any future claims against him or her that she was, in fact, enslaved), and non-governmental actors who kidnapped these free individuals and sold them into slavery. Id. As a result, "a strange, incongruous group emerged: free runaways." Id. at 189.
member of the United States, the African American presence in the United States by and large did not occur as a result of immigration, political flight, famine, or desire to partake in the American dream. The majority of African Americans did not experience the American Dream, but rather, the American Nightmare. Centuries’ long chattel slavery of millions of Africans made an unapologetic mockery of the lofty notion of freedom. The Founding Fathers’ characterization of the African and his or her American-born descendants was deliberate, leading to the codification of their inferiority on the national, state, and local level while existing within the borders of the United States. Courts followed suit, by creating a race-based slave class, in which members were “legally deemed less than human, for nothing more than the color of their skin ... and giving [W]hite society license to subjugate these ‘others’ at will.” Moreover:

[T]he denial of full citizenship and dignified treatment to [B]lacks was rationalized, explained, and justified under the law, both explicitly and implicitly, by a socially and culturally constructed theory of race. ... [which] posited race as an objective fact, and the [W]hite race as inherently and biologically superior to all others.

As such and pursuant to the centuries’ long ownership of Africans in America, “[W]hites were cast in the role of custodians of this primitive race, ... to hold them in servitude to prevent the type of wanton savagery

90. Indigenous populations of the United States would be one exception.

91. “I see America through the eyes of the victim. I don’t see any American dream; I see an American nightmare.” Malcolm X, The Ballot or the Bullet, in MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 23, 26 (George Breitman ed., 1965).

92. “Although the Revolutionary War produced some awareness of a possible inconsistency between condemning ‘slavery’ but not chattel slavery, few related their objections to British rule with this latter type of slavery, and most Americans readily resolved the conflict.” Taslitz, supra note 28, at 1312. Taslitz further notes that the “founding generation” distinguished chattel slavery of Africans from slavery of European Americans, which was understood as “the absence of political liberty for a corporate body and loss of economic independence for the individual.” Id.

93. See, e.g., id. at 1313 (“Some Founders acknowledged that they felt the Union was more important than the end of chattel slavery.”).

94. See, e.g., id. at 1311 (noting at least twenty constitutional provisions that preserved and expanded chattel slavery).

95. Norman Redlich, Out, Damned Spot; Out, I Say; The Persistence of Race in American Law, 25 VT. L. REV. 475, 478 (2001) (noting the unprecedented creation of a race-based slave class in American law). According to Dean Redlich, prior to America’s unique version of slavery, such a status was obtained as a result of a population being “vanquished in a war” or contractually “indebted” for a limited period or amount. Id.

that would result from their living freely." In the process, race-based "categories came to be filled with meaning—Blacks were characterized one way, Whites another." Caucasians—American born or not—were the recipients of constitutional freedoms; Blacks were congenitally unfit for civil society and, therefore, its freedoms. This was an American

97. See Redlich, supra note 95, at 479.
98. Even before "the process," the laws—specifically, the Constitution—loaded race-based categories against the enslaved. Five Constitutional provisions clearly sanctioned American chattel slavery:

1. U.S. CONST. art. I, § 2. cl. 3 (the "three fifths clause," which, for the purpose of Southern representation in Congress, counted three-fifths of all slaves);
2. U.S. CONST. art. I, § 9, cl. 1 (prohibited Congress from ending the African slave trade before 1808 (but, did not require Congress to prohibit slave trading afterwards));
3. U.S. CONST. art. I, § 9, cl. 4 (required calculation of federal taxes pursuant to the "three-fifths clause,");
4. U.S. CONST. art. IV, § 2, cl. 3 (the "fugitive slave clause," which prohibited states from emancipating runaways and required that they be returned to their owners "on demand");
5. U.S. CONST. art. V (prohibited pre-1808 amendment of the slave importation or capitation clauses).

See also Paul Finkelman, Affirmative Action for the Master Class: The Creation of the Proslavery Constitution, 32 AKRON L. REV. 423, 428-429 (2002). Professor Finkelman argues:

[N]umerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to 'suppress Insurrections' and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery.

Id. at 432. Finkelman further implicates a sizeable number of additional provisions that indirectly supported American chattel slavery. Id. at 429-432. Finkelman notes that General Charles Cotesworth Pinckney, a purportedly staunch and able defender of slavery, summed for his constituents how slavery fared at the Constitutional Convention: "considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad." Id. at 433.

99. Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1373 (1988); see also Joo, supra note 3, at 2 ("Law helps define the boundaries of racial groups.").

100. See Taslitz, supra note 28, at 1313 (describing how early Americans justified chattel slavery of Africans—deemed "incapable of enjoying political liberty . . . unworthy of it" and "unable to profit from even limited individual liberty").

101. See Redlich, supra note 94, at 1313.
tenet; freedom and liberty were the rights of Americans, not their chattel. The superior race was meant to use their chattel.102

African Americans' inferior status required "cruelty necessary for the systemic extinction of every trace of manhood in the slave"103 and "was etched into the slave's consciousness by the lash and the ritual respect he was forced to give to every [W]hite man."104 Irrespective of legal ownership or other legal obligation, African Americans were at the mercy of all Whites' inclinations, sadism, or sympathy. Every White man was the African American's policeman, whether he regarded himself as a policeman or not.105 This role as policeman resulted in violence against African Americans. As one scholar has noted:

Racial violence was inherent in the very nature of [chattel slavery]. As Southerners well understood, the purpose of the violence was not solely to discipline the slaves, but also to venerate the owner. The honor of the [W]hite man depended upon his lordship over the [B]lack man. That lordship required violence so that slaves understood that they could have no world of their own. They could not work, sleep, or protect their families; they could not rest, or pray, or gossip. They were allowed no existence except for that dictated by the master. Only violence, most often in the form of whipping, but including rape, branding, and murder, among other methods, demonstrated the absolute command of the [W]hite master over the [B]lack slave.106

White occlusion of enslaved African Americans required eternal vigilance, as subordination of those of African descent constituted "the necessary condition for the flourishing of American democracy."107 White American freedom was parasitic; maintaining African American powerlessness, requisite.108 Even after the end of de jure slavery, White Americans remained vigilant, ever ready to divest this natally and

102. See Blassingame, supra note 29, at 257.
103. Id. at 270.
104. Id. at 303.
105. See id. at 261–62 ("Every [W]hite man considered himself the slave's policeman.").
106. Taslitz, supra note 28, at 1287.
108. Loury argues: "Masters derive honor from their virtually unlimited power over slaves, who are radically marginalized because their very social existence is wholly dependent on relations with their masters." GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 69 (2002); see also West, supra note 107, at 98 (noting such subordination of African Americans was "the tragic prerequisite" for a flourishing American democracy).
profundely dishonored population—the overwhelming majority of whose ancestors financed the "American Dream" corporeally—of what was to now be theirs. Abolition alone would prove ineffective in undoing centuries of historical, legal, and cultural stripping of this population's emancipation.

B. Policing "Freedmen"

"Why did God make me a stranger and an outcast in mine own house?"

Given the "color-coded" nature of a "raced" society, African Americans, despite the promises of the Thirteenth, Fourteenth, and Fifteenth Amendments, remained "Untermenschen" or "subhuman creatures." After the Civil War, then, enslaved Africans and African Americans were an interpellated contradistinction. They "gave meaning to freedom by their own lack of freedom, and made unity among Euro-Americans possible by [African Americans'] very 'blackness.'" Conceived of as ordained slaves, African Americans occupied a de facto status of expected servitude, subordination, and inferiority long after the war's end. In and

109. See Loury, supra note 108, at 69 (positing that, in general, those enslaved "are always profoundly dishonored persons"). However, given the United States's race-based slavery, the dishonor that accrues to evidence of African American heritage is exceptional "in the extent to which remnants of this ignoble history are still discernible in the nation's present-day public culture." Id.

110. See id. at 69–70 (noting the impossibility of sufficiently transforming the former enslaved and their progeny from chattel to citizens).


112. See Mills, supra note 15, at 54.

113. See id. at 16–17 (noting that, under "The Racial Contract," freedom and equality are restricted to [W]hites, not "subject races," or, those who "are designated as born unfree and unequal"). "Untermenschen" is a German pejorative that translates as "subhuman creature." Collins German Dictionary 507 (3d. ed. 1998).


115. See, e.g., Taslitz, supra note 28, at 1313 (detailing how Africans were regarded as "natural slaves").

116. See Redlich, supra note 95, at 479 (noting that "[t]he [B]lack person, even if legally manumitted or otherwise 'free,' was always kept in a legal condition of involuntary servitude to the state and his degraded position in society"). Emancipation failed, technically, for a number of the enslaved Americans. On June 19, 1865, General Gordon Granger and Union soldiers reached Galveston, Texas with news, in the form of General Order Number Three, that the Civil War had ended and slavery had been abolished. This official act occurred two and a half years after President Abraham Lincoln's January 1, 1863, Emancipation Proclamation. For a detailed description see Texas State Library and Archives
of itself, emancipation was insufficient, failing "to make slaves and their progeny into full members of society."117 Whites—the descendants of slave owners or the slave-owning class—denigrated and rebuked these new Americans who phenotypically evidenced slave ancestry and the "racial dishonor" associated with their former station.118

The advent of Black Codes in 1865 occurred simultaneously with a steep rise in [W]hite vigilantism and lynching. Over the next century, thousands of African Americans were killed.119 The Codes provided certain limited rights for the newly freed Americans; however, they also punished African Americans either exclusively120 or much more harshly121 and were applied in a racist fashion, ultimately creating a modified version of the pre-Civil War slavery in which African Americans would remain subordinated to Whites.122 Law enforcement controlled and suppressed the new Americans,123 and mob rule was commensurate with the Black Codes. These mobs, which often included law enforcement officers, made regular sport of torturing and ultimately murdering African Americans via lynching or burning (often after they were removed from legal custody)124 in the most macabre and depraved manner.125


117. LOURY, supra note 108, at 69.

118. Id. at 70 (noting that White Americans imbued African Americans via "an entrenched if inchoate presumption of inferiority, of moral inadequacy, of unfitness for intimacy, of intellectual incapacity").

119. RUSSELL, supra note 86, at 19, 21–22 (noting that the estimated lynchings of African Americans in this period may approach ten thousand).

120. See id. at 22.

121. Id. at 20 (detailing harsher criminal penalties for African Americans compared to Whites under the Black Codes).

122. Id. (characterizing Black Codes as counter to the Thirteenth Amendment's intent and express prohibition).


124. See RUSSELL, supra note 86, at 22.

125. Id. at 21 (noting that [W]hite vigilante mobs "included police officers, gathered to take part in the hanging, burning, or shooting") (citation omitted). Even after the completion of the murders, these mobs would further desecrate the African-American corpses, "parceling out the remains of the Black victim. Teeth and other body parts were collected as souvenirs." Id. According to one scholar, [W]hites even cannibalized their African-American victims. See generally Orlando Patterson, Feast of Blood: 'Race,' Religion, and Human Sacrifice in the Postbellum South, reprinted in, PATTERSON, supra note 114, at 171–232.
C. "Petit Apartheid:” 126 Policing “Them” Not “Us”

“How does it feel to be a problem?” 127

One of the unrelenting difficulties in American society, one that persists even in the twenty-first century,128 is “trying to assimilate [B]lack Americans into the body politic.”129 It has been said that in American life, “Black American, African American, is oxymoronic, while White American, Euro-American, is pleonastic.”130 While African Americans are, technically, part of American society, they are often under suspicion or viewed suspiciously, perceived as needing to be policed closely, and treated as mere “provisional members of the polity” whose membership, when deemed necessary, can be withdrawn without notice or apology.131 Professor Volpp argues:

[O]ne may formally be a U.S. citizen and formally entitled to various legal guarantees, but one will stand outside of the membership of kinship/solidarity that structures the U.S. nation. And clearly, falling outside of the identity of the ‘citizen’ can reduce the ability to exercise citizenship as a political or legal matter.”132

The history of law enforcement’s interaction with African Americans is sordid. More recently, “[m]uch of it is rooted in a generation of civil rights demonstrators, who had as much to fear from Southern sheriffs, police chiefs and their deputies, in some cases, as they did from White Citizens’ Councils and Ku Klux Klan members.”133 Recently, criminal profiling has increased, as law enforcement uses criminal profiles to investigate completed crimes and predict potential perpetrators.134 Harris notes:

126. This term was coined by Daniel Georges-Abeyie, who suggests that study of the informal stages of the criminal justice system would reveal such a racial system and that African Americans are policed more vigorously and harshly than White Americans. See generally Daniel Georges-Abeyie, The Myth of a Racist Criminal Justice System?, reprinted in BRIAN MACLEAN AND DRAGAN MILOVANOVIC’S RACISM, EMPIRICISM AND CRIMINAL JUSTICE 11 (1990).
128. See id. (“The problem of the twentieth century is the problem of the color line.”).
130. Id. at 58.
131. Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ was a ‘War on Blacks,’ 6 J. GENDER RACE & JUST. 381, 442 (2002).
132. Volpp, supra note 4, at 1594.
Criminal profiling is designed to help police spot criminals by developing sets of personal and behavioral characteristics associated with particular offenses. By comparing individuals they observe with profiles, officers should have a better basis for deciding which people to treat as suspects. Officers may see no direct evidence of crime, but they can rely on noncriminal but observable characteristics associated with crime to decide whether someone seems suspicious and therefore deserving of greater police scrutiny.”

When the U.S. Drug Enforcement Agency consigned state and local police departments in the federal government’s War on Drugs, criminal profiling begat racial profiling. As Cooper points out, “the problem with racial profiling is not in the mere description of a particular previously identified criminal.” Rather, the problem is the reduction of the individual to a race that is deemed disproportionately and unnaturally criminal by, inter alia, law enforcement—therefore meriting criminal suspicion—as a group.

Today, many African Americans not only recall U.S. law enforcement’s racist history, they have also repeatedly experienced and witnessed such racism. Distrust of a criminal justice system, “rooted in the role police played in enforcing the slave codes, Black codes, Jim Crow segregation, and lynching,” is pervasive. Moreover, African Americans are aware that they are policed and criminally profiled on the basis of their race. Additionally, “[b]ecause racial profiling is based in stereotyping of likely future behavior rather than mere description, racial profiling divides the world into ‘normal’ and ‘suspect’ people.” Race-based profiling ultimately polices and criminalizes race, not criminal activity. Thus, for law enforcement, observing an

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135.  Id. at 11.

136.  See Michael R. Cogan, The Drug Enforcement Agency’s Use of Drug Courier Profiles: One Size Fits All, 41 CATH. U.L. REV. 943, 945–46 (1992) (chronicling the DEA’s initial compilation of characteristics to profile those suspected of illegal transportation of drugs).

137.  Cooper, supra note 38, at 871.

138.  Id. (criticizing racial profiling when police “effectively excise everything but race from the description” of suspects and do so “even for known crimes”).

139.  RUSSELL, supra note 86, at 35.

140.  Id.


142.  Cooper, supra note 38, at 872.

143.  Id. (citing Stuart Hall, The Spectacle of the “Other,” in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES, 258 (1997)) (characterizing racial profiling as a stereotype: “[s]tereotypes take a few of a person’s traits, reduce everything about the person to
African American virtually requires the unsupported, but convenient conclusion: Here stands/drives/walks/rides an actual or burgeoning criminal.

Nearly every major urban area has had its share of infamous profiling headlines. This is due, in great measure, to race-based stereotypes relied upon by law enforcement that African Americans are most likely to be criminals. Quick and cute catchphrases such as—DWB, driving while

those traits, exaggerate and simplify them, and fix them without change or development to eternity”.


“Police officers engage in selective enforcement of the law—‘going after’ people in high-crime areas more than in affluent suburbs. Punitive differential enforcement is clearly aimed at poor people of color. Unquestionably, high-crime area residents and low-socioeconomic status suspects ‘receive harsher treatment from the police’ than wealthy people in middle- and upper-class neighborhoods.”

Id. It may come as a surprise to White residents of “no” or “low crime areas” that Black and Brown men (in particular) of middle and upper-class neighborhoods have virtually identical experiences with the police as their phenotypically similar peers who are poor and frequent or reside in “high crime areas.” See, e.g., David Rudovsky, Law Enforcement By Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause, 3 U. PA. J. CONST. L. 296, 296–298 (2001) (giving examples of aggressive, extensive, and intrusive police stops and searches of a decorated Desert Storm war veteran, a Broadway actor, church attendees, and Black and Latino attorneys); see also Paul Butler, Walking While Black: Encounters with the Police on My Street, LEGAL TIMES, Nov. 19, 1997, at 23 (detailing a Black male law professor’s first-hand experience of while being accosted, questioned, followed, and accused in his affluent neighborhood—without evidence or complaint of criminality).

145. Lyle, supra note 51, at 246 (listing infamous cases and the resultant injuries to Black communities by law enforcement, including murderer Charles Stuart’s false allegations of a Black assailant of his wife and unborn child in Boston, which led to sweeps of Black neighborhoods and the acquittal of New York Police for slaying Amadou Diallo while he reached for his wallet while standing in the door of his home); see also Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. MIAMI L. REV. 425, 438–442 (1997) (discussing people of color who have been the victims of race-based automobile stops). Professor Davis details a case brought by Harvard Law Professor Robert Wilkins against the Maryland state troopers. Specifically, on May 8, 1992, Maryland state troopers stopped Professor Wilkins’s car, driven by his male cousin (and occupied by Professor Wilkins and two elderly family members) for speeding. Id. at 439. Davis details the overreaching and humiliation suffered by Professor Wilkins and his family members, which included being forced to stand in a downpour and wait for troopers to bring a narcotics-sniffing dog to the scene to search his car “while curious motorists passed on the highway” observing the family being detained by the police. Id. at 440. After almost an hour later and upon receipt of a $105 speeding ticket, Professor Wilkins and his family were allowed to return to his car and leave. Id.

146. See, e.g., Joo, supra note 3, at 3 (noting the phenomenon of racial profiling by police against African American motorists or pedestrians).
Black, WIB, idling while Black, WWB, walking while Black, SWB, shopping or standing while Black, and even BWB, "breathing while [B]lack"—are a part of our national dialogue, and minimize the pervasive and devastating effects of race-based policing tactics. Individual African American stories of race-based police harassment, abuse, and unfair dealing are legion. As race is immutable, this translates into an existence of repeated denigration from a young age on the basis of race.

Poverty and blight absolutely exacerbate this already "bad" situation; however, the most noteworthy and initially relevant factor about a person of African descent in this country is not whether they reek of wealth or whether they exist in a "high" or "low crime area." Instead, it is their race. Police officers use so-called "traffic stops" of all African American motorists and their passengers, including those who are of the middle, upper-middle,


148. Katheryn K. Russell, "Driving While Black:" Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 722 (1999). Professor Russell recounts the story of 19-year old Tyisha Miller, a young woman who was shot and killed by Riverside, California police. When responding to an emergency call from Ms. Miller's family that she presented what appeared to be a potential suicide threat while unconscious in her locked car, police broke the car window, shot inside, and killed Ms. Miller with one or more of twelve shots to the back of her head and back. Id.

149. Butler, supra note 144, at 23.

150. See David Cole, Standing While Black, NATION, Jan. 4, 1999, at 24. The reference made by Professor Cole is in response to the now-invalidated Chicago so-called anti-gang loitering statute that was ultimately overturned. See City of Chicago v. Morales, 687 N.E.2d 53 (1997).

151. Lyle, supra note 51, at 245 (quoting Bob Herbert, When Race Defines the Suspects, NEWS & OBSERVER, Nov. 5, 1999, at A25). The phrase was coined to describe the case Brown v. City of Oneonta, 195 F.3d 111 (2d Cir. 1999), amended and vacated by, 221 F.3d 329 (2d Cir. 2000). In Brown, after receiving a description of a criminal suspect hand and forearm by the elderly victim, police, "obtained a list from college officials of every [B]lack male on campus and tried to locate and question them all," and then stopped and questioned "over 200 people of color—including, allegedly, some women." Lyle, supra note 51, at 243. The suspect was never found. Id. at 244.

152. See, e.g., Russell, supra note 86, at 33 (noting African-American men "have an endless supply of police harassment stories").


154. Mills, supra note 15, at 53 ("[T]he nonwhite body is a moving bubble of wilderness in [W]hite political space, a node of discontinuity which is necessarily in permanent tension with it.").

155. See, e.g., Davis, supra note 145, at 431-32 (highlighting the role of race in traffic stops and the disproportionality of such policing suffered by African-American and Latino drivers); see also Ronner, supra note 48, at 386-387 (2001) (noting the practice of disproportionately stopping African-American motorists).
or wealthy classes. These steps occur irrespective of income, car, attire, speech, level of education, mannerisms, fortune, fame, or gender. African Americans are "over-policed," or surveilled, investigated, detained, arrested, prosecuted, and incarcerated more frequently than other Americans, irrespective of illegality. These processes deny the vast majority of this citizenry freedom of locomotion, personal security, as well as the right to be let alone.

Feelings of anger, estrangement, and dread resonate "deep within the heart of the [B]lack community" as a result of decades of hostile interactions with law enforcement. Capricious and repetitive incidents of race-based policing continue to feed the oft-reported, but seldom appreciated, detachment that a significant portion of those within this society feel. Such a detachment coupled with state conduct unfailingly sanctioned by the courts, guts expectations of fair-dealing, legitimacy, and justice in the criminal justice system. Even African American police officers—who, themselves, were long regarded as "second class" police officers and prohibited from arresting

156. One indicator of the breadth of police abuse against African Americans is the number of famous Black men, allegedly immune from such discriminatory treatment, who report that they have been unfairly stopped and harassed by law enforcement officers. The well-known Black men who have "fit the profile" is impressive: Marcus Allen (athlete), Dee Brown (athlete), LeVar Burton (actor), Calvin Butts (pastor), Johnnie Cochran (lawyer), Christopher Darden (lawyer), Reginald Dorsey (actor), Tony Dungy (football coach), Michael Eric Dyson (professor), Earl Graves, Jr. (businessman), Le-Van Hawking (businessman), Al Joyner (athlete), Wynton Marsalis (musician), Michael McCrary (singer), Joe Morgan (athlete), Edwin Moses (athlete), Walter Mosley (author), Bobby Rivers (television personality), Will Smith (actor and rapper), Wesley Snipes (actor), Brian Taylor (athlete), Blair Underwood (actor), Tico Wells (actor), Cornel West (professor), and William Julius Wilson (professor). Russell, supra note 86, at 36.

157. See Nunn, supra note 131, at 400 (coining the term "over-policing" to describe law enforcement's hyper vigilance against African Americans and the resultant disproportionate representation of these individuals in the criminal justice system). Nunn explains that over-policing not only occurs more frequently against African Americans, but also focuses police "efforts not on illegal activity, but on legitimate citizen behavior with the hope that in the process of investigation some evidence of crime may be uncovered." Id.

158. See id. at 401 (noting how over-policing denies African Americans "freedom of movement to which other citizens are entitled").


160. Lyle, supra note 51, at 245 (quoting Dewayne Wickham, Appeals Court Decision Props Up Institutional Racism, GANNETT NEWS SERVICE, Nov. 11, 1999, available at 1999 WL 6978113) ("It's one thing to be the target of an individual's bigotry. It's quite another to have one arm of government discriminate against an entire race and then have another one give that action legal cover."). Lyle describes how the courts' tendency "to ignore prevailing racial tensions felt by minority victims of police investigations while imposing race-ignorant assumptions in Fourth and Fourteenth Amendment analysis" make courts unresponsive to reality of race-based policing in United States. Id. at 246–47.
Whites\textsuperscript{161}—are not immune from race-based policing at the hands of those law enforcement agents unfamiliar with them or those within their own departments.\textsuperscript{162}

Race-based policing threatens national security in that it deeply rends American society and puts the police and the policed at a perpetual risk of conflict. Victims of race-based policing are rudely and often repeatedly disabused of notions of substantive citizenship. Ultimately, whether African Americans enjoy their right to be let alone rests upon a street or traffic cop’s determination of an individual’s legitimacy and perception of who belongs where and when. What African Americans too often learn at the hands of the police is that their right to be let alone wholly depends on the temperament and training of the particular officer they encounter.

Additionally, when law enforcement polices race, they ultimately assert, without constitutional or other legitimate authority, who is and who is not an American. They accomplish this through violence or the threat of violence. This occurs without any legitimate authority. However, because the Supreme Court has abdicated responsibility for scrutinizing law enforcement by holding this portion of the Executive Branch to the Constitution’s mandates,\textsuperscript{163} the Court refuses to see what the officers are doing—thwarting the enjoyment of constitutional rights and privileges of American citizens, under the guise of respecting the Fourth Amendment and ferreting out crime.\textsuperscript{164}

\textsuperscript{161} Russell, \textit{supra} note 86, at 35–36 (noting how African American officers were limited to policing only other African Americans and only recently “have been allowed to police White communities on a wide scale”).

\textsuperscript{162} According to Russell: “Out of uniform, they are Black, not blue.” \textit{Id.} at 35; see also Petula Dvorak, \textit{Black Officer’s Beating Again Raises Bias Issue}, WASH. POST, Mar. 25, 2001, at C1. Dvorak writes:

\begin{quote}
[For years, D.C. police Officer Robert Byrd says he stoically and a bit cynically endured the allegations of police abuse from [B]lack men arrested by his fellow officers . . . Then, it happened to him [when] his brethren mistook him for a carjacker, pulled him from his van and beat him while he yelled: “I’m a police officer! I’m a police officer!” . . . When someone pulled a badge out of Byrd’s pocket and realized what had happened, the white officers [who had administered the beating] ran back to their cruisers, some of them with their hands shielding their badge numbers.
\end{quote}

\textit{Id.} Similar incidents have occurred in other cities across the United States and have involved not just beating fellow officers, but also shooting them. For example, Officer Thomas F. Hamlette Jr. was shot by another off-duty officer, William F. Hyatt, in July 1998. In December 1995, a pregnant Detective Lani Jackson-Pinkney, an African American female, was shot while on-duty, attempting to stop a carjacking. Detective Jackson-Pinkney’s unborn child was not injured; however, the detective remains paralyzed from the waist down. \textit{Id.}

\textsuperscript{163} Harris, \textit{supra} note 141, at 576–82 (opining on the “vacuum created by the Supreme Court’s abdication of supervisory responsibility” in protecting individuals’ constitutional rights against the police).

\textsuperscript{164} \textit{See generally} Herbert, \textit{supra} note 39, at 161–62 (arguing that police unconstitutionally criminalize First Amendment nonverbal expression under the guise of the Fourth Amendment).
By disrupting African Americans' mobility and right to go their way, police remind these citizens that, at any time deemed fit by any errant or stray officer of the law, they are subject to seizure and officialdom's challenge of their legitimacy, right to travel, and right to exist without obvious (read: phenotypic) authority. This process occurs as if the bondage suffered by their ancestors had not been outlawed. In fact, for some officers, slavery's abolishment is irrelevant to their understanding of what they are charged to do: protect and serve Americans. Africans Americans "may be theoretically entitled to formal rights, but they do not stand in for or represent the nation."\footnote{Volpp, \textit{supra} note 4, at 1594.} As the African American existence in the United States has been mired primarily in noncitizenship or anticitizenship,\footnote{See \textit{Cornel West}, \textit{Race Matters} 103 (1993) (discussing the failure of America's constitutional democracy to protect its African American minority against tyranny of the majority). West notes that the aim of such a governmental structure is to protect the minority against the majority: "Yet the concrete practice of the U.S. legal system from 1883 to 1964 promoted a tyranny of the [W]hite majority...." \textit{Id.} at 103.} they remain targets of that history at any given moment. They also remain targets of individual police officers' race-based presumptions of illegitimacy, in other words, who are not "us?"\footnote{See Davis, \textit{supra} note 145, at 425 (characterizing race-based police stops of African American motorists as so prevalent that driving while African American becomes "a presumptive social offense").} Could anything more be expected when "[t]he consolidation of American identity takes place against them?"\footnote{Volpp, \textit{supra} note 4, at 1593.} Most pernicious about this ability to decide, in essence, who is and is not an American is that the power does not evaporate once exercised by one officer. Rather, officer after officer can "protect and serve" their respective "beats" in this race-based manner,\footnote{\textit{Cf.} Mills, \textit{supra} note 15, at 42 (noting that the racing of space as one belonging to Whites communicates that "[t]his space is our space, a space in which we [we White people] are at home, a cozy domestic space").} ultimately and ironically, to the detriment of national unity and security. So police, irrespective of their pedigree, exercise the unlimited power to divest Americans of their freedom\footnote{See Keith W. Hoskins, \textit{My Life, My BMW Convertible}, \textit{N.Y TiMES}, July 25, 2003, at F9. Hoskins, an African-American author, notes that "[a] car is just an extension of our personal freedom... the freedom to go where I want, when I want." \textit{Id.}} as well as their belonging and identity.\footnote{Federal agencies are not immune from this charge, given what appears to counter-intuitive policies regarding African-American agents. Some policies imply that instead of serving the United States, African Americans only put the country at further risk. For example, Jeffrey Sterling, a former agent for the Central Intelligence Agency, currently is suing the agency, charging, inter alia, that it discourages and prevents Black and Brown agents from succeeding, particularly in the agency's Middle Eastern operations. Specifically, Sterling, an African-American male who spent a year learning Farsi in order to work in the agency's Iran Task Force, was told that "[a]s a big [B]lack man speaking Farsi, you kind of stick out." Amy}
violent traffic and pedestrian stops of famous and not-so-famous African Americans, one message is clear: you are not one of us; you are "other" and not our kind. You are not American.

III. RÉCUPÉRATION: PYGMALION IN THE COURTROOM—OFFICER ODYSSEUS IN THE LAND OF THE CYCLOPS

Despite birthright and generations' long residency in the United States, African Americans are still deemed, at best, "accidental" or "default" citizens. These "accidental citizens" may be entitled formal rights; however, in no way do these individuals represent America or hail as its true progeny. The passion that solidifies images of American identity and

Alexander, Race on the Front Lines of the "War on Terror," March 7, 2002, available at http://www.africana.com/columns/alexander/bl_lines_38.asp (opining that the agency's failure to infiltrate Al Qaeda and other terrorist organization can be attributed to, in part, the agency's super-spy country club for straight-arrow white guys’). Alexander notes that, despite the fact that the agency's "'official' position on race is that of diversity" and African American, Latino, Arab, and other "agents of color . . . might blend more easily than [W]hites into the Byzantine networks of international terrorists," particularly in Middle Eastern, South American, and African nations" the agency is simply "incapable of walking the walk." Id.

172. "Récupération" is French for "recovery." Collins Robert French Dictionary, supra note 45, at 684. My title is a borrowed from a highly regarded educational study. Robert Rosenthal & Lenore Jacobson, Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development (1968). Rosenthal determined that teacher expectations of his or her pupils consistently determined those students' level of achievement. Thus, within a given classroom, those children for whom the teacher held high expectations of intellectual capacity, ability, and growth would, in fact, manifest the teacher's expectations. Similarly, if a teacher regarded and labeled a group of students "uneducable," meaning the teacher had low expectations of the students, the students would show that lack. The experiments conducted under these premises prove that "one person's expectations of another's behavior may come to serve as a self-fulfilling prophecy." Id. at 82.

Rosenthal's inspiration originates in the Greek myth of the sculptor and sworn bachelor, Pygmalion, who hated women as a result of the faults he perceived in the gender. Pygmalion carved a beautiful ivory statue of a woman, adorned it with jewels, bought gifts for his creation, and positioned it on fine bedding. At a festival for Aphrodite, the Goddess of Love, Pygmalion prayed for a wife who would be identical to his sculpture. Perceiving Pygmalion's statue to be in her likeness, Aphrodite was duly flattered and granted Pygmalion his wish. In Greek mythology, the Cyclops were giant creatures fond of human flesh. They were distinct in appearance, possessing one eye centered on their foreheads. The most famous Cyclops was Polyphemus, named after the Greek hero, Odysseus. Odysseus was able to elude Polyphemus and escape death initially by lying to the Cyclops and ultimately blinding it. See generally Homer, The Odyssey 155–74 (Robert Fitzgerald, trans. 1961) (1989).

173. Volpp, supra note 4, at 1594 (arguing that "those who appear 'Middle Eastern, Arab, or Muslim' may be theoretically entitled to formal rights, but they do not stand in for or represent the nation, and instead, they are interpellated as antithetical to the citizen's sense of identity").
citizenship is often the polar opposite of these "accidents." Often, definitions of all things American magnify themselves both on the backs and against the backdrop of them. Now, these accidents of birthright are inescapably cast as suspect and, irrespective of the enemy du jour, perennially suspicious and latently (if not outright) criminal in the eyes of most Americans.

The Court has seldom (if ever) cited the right to be let alone in connection with African Americans. This may be attributed to one of the fundamental building blocks of American wealth and industry, chattel slavery, which the Constitution legitimized and the Court protected. This aspect of the Court's collective unconscious may account for the inability of justices to fathom how, as a general principle, such a right could be extended to these accidental citizens, the posterity of the enslaved.

The law rarely makes explicit reference to race in the twenty-first century. Yet, the absence of such references does not mean that race and reliance upon its appearance have disappeared from American jurisprudence or life. As Judge Higginbotham stated: "[T]here is a nexus between the brutal centuries of colonial slavery and the racial polarization and

174. The African American was "recognized as the human factor placed outside the democratic master plan, a human 'natural' resource who, so that [W]hite men could become more human, was elected to undergo a process of institutional dehumanization." Ralph Ellison, Twentieth Century Fiction and the Black Mask of Humanity, in SHADOW AND ACT 29 (1953).

175. See PATTERSON, supra note 114, at 240. According to Patterson:

The Afro-American lies at the heart of Euro-America's conception of itself as a 'race,' as a culture, as a people, and as a nation. 'Blackness' is the canvas against which 'whiteness' paints itself, the mirror in which the collective eye sees itself, the catalyst in which this great mass culture explosively creates itself. It has been so from the beginning.

Id.

176. Volpp, supra note 4, at 1594 (discussing qualified identity as Americans of those citizens appearing to be Saudi or Middle Eastern after September 11).

177. See, e.g., Taslitz, supra note 28, at 1310–11. Taslitz writes:

It is now widely acknowledged that the Constitution supported slavery in several critical ways, most specifically with the Three-Fifths Clause and the Fugitive Slave Clause. The Three-Fifths Clause counted slaves ... as three-fifths of a person when tallying the population to determine a state's representation in the House of Representatives .... The Fugitive Slave Clause involved the North in Southern efforts to recapture fleeing slaves by requiring runaways to be returned to their owners on claim.

Id. Additionally, Professor Taslitz notes that "[n]o fewer than eighteen other constitutional provisions served to maintain, and even extended, later become known in the North as the Slave Power." Id. at 1311 (citations omitted).

178. See Joo, supra note 3, at 3.
anxieties of today.”179 Even in the twenty-first century, many African Americans suffer from discriminatory racial attitudes and practices, which affect our economic system, our cultural and political institutions, and the daily interactions of individuals.180

Thus, the stigma forced upon African Americans remains entrenched in U.S. society.181 As law reflects societal sensibilities, the stigma within our society lurks therein as well. Police interactions with African-American people in the United States have been and remain almost exclusively influenced by race and the dynamics inherent therein.182

Disdainful American attitudes towards Black, Brown, and other non-White members have not been well-kept secrets. One of the most troubling aspects of human existence acts against these individuals. Through social interaction, law enforcement propaganda, media, and the movies, we have defined Black and Brown people as ones who are not “our kind of people,” not American, or worse, not human. This definition allows for the creation of a “‘stigma-theory,’ an ideology to explain [their] inferiority and account for the danger [they] represent, sometimes rationalizing an animosity based on other differences . . . such as social class,”183 imputing “a wide range of imperfections on the basis of the original one. . . .”184 Under these assumptions, society exercises various forms of discrimination, and in turn, reduces African Americans’ life chances.185 So it seems that “[i]f the past disparities are morally illegitimate, the propriety of the contemporary order must also be called into question.”186

Indeed, race may compel a more explicit constitutional determination of the right to be let alone, since the unbridled policies and practices


181. Id. (“The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained.”).

182. See, e.g., Ellis Cose, The Rage of a Privileged Class 93 (1995) (describing the widespread and facile societal equating “Black” with “criminal” and quoting Daniel Patrick Moynihan: “[i]f [B]lack continues to mean crime in cities, it won’t help you to be a summer intern at Skadden Arps pulling down twenty-three hundred dollars a week just to be taken to lunch”); see also id. at 101 (citing a Black police officer’s reluctance to have his son visit New York City for fear of violence at the hands of the police and noting that, from this officer’s experience when his colleagues encountered “decent” young men: “[t]hose who were beaten first and questioned later were . . . almost always [B]lack or Latino”); id. at 102–104 (recounting violent encounters had by law-abiding Blacks at the hands of the police).


184. Id.

185. Id.

186. Loury, supra note 108, at 103.
of law enforcement with respect to race make the need for such jurispru-
dence all the more important. Race-based policing shows that without
clear and uncompromised protection of this right, the legacies of slavery
and institutionalized racism will render African Americans bereft of any
real notion of liberty or Fourth Amendment protection in this society.

Race should be revisited by the Court as an "essential construct" in
assessing violations of an individual's Fourth Amendment right to be let
alone. In a world where, according to Professor Andrews, "the harms to be
addressed were meted out in explicitly racial terms, and in which the
rules denying access to justice to [B]lacks and others operated explicitly
along racial lines," the right to be let alone, at best, seems apocryphal, a
wraith-like apparition which has been of little use to those who most
require it, given the history of the United States and in the face of race-
based policing. Yet, the Court refuses to tackle race in its Fourth Amend-
ment jurisprudence, preferring instead to employ a colorblind judicial
review of police actions.

Andrews further argues, "race has been, and no doubt continues to
be, the most salient characteristic through which bias, privilege, and op-
pression have been channeled in America." However, as Harris suggests,
"[c]ourts have not only provided little relief; they have encouraged the
activity and even enabled it to continue unaddressed;" instead of pro-
viding even a modicum of relief for the victims of such interactions,
courts repeatedly decide that police actions, no matter how deadly or fla-
grantly laced with race-based impetus, are reasonable under the law.
Instead, the Supreme Court and lower courts seem quite willing "to ac-
cept blindly and without question police officers' accounts of police-
citizen interactions as evocative of criminality." There have been opportunities for the Court to confront and ad-
dress the resultant and attendant circumstances of America's slave-holding
history. The Court has chosen instead to view official action under the
Fourth Amendment colorblind eye, side-stepping the pervasiveness of law
enforcement that is race-based. Despite this history, the Supreme Court
has been unresponsive to victims of race-based policing. The seminal

188. Id.
189. Id. 510–11 (citation omitted).
190. Harris, supra note 3, at 79 (noting that the bases of relief for modern racially
profiled litigants comes from "institutions and methods other than courts and litigation").
191. See Herbert, supra note 39, at 148 (discussing how courts' acceptance of police
testimony without challenge is impossible hurdle for defendants when challenging officer
accounts in suppression hearings).
192. See e.g., Redlich, supra note 95, at 483 (characterizing Reconstruction as "a
historical event that had the potential directly to confront the immorality of slavery and its
attendant statements about race head-on").
weakening of Fourth Amendment challenges to race-based policing in *Terry v. Ohio*\(^{193}\) and, later, the doctrine's obliteration in *Whren v. United States*\(^{194}\) (some could say authorization of race-based policing), show the Court's subtle enmity towards victims of race-based policing. The next part of this Article asserts that in both these cases, as well as *California v. Hodari D.*\(^{195}\) and *Illinois v. Wardlow,* the Court has either declined to address race or skittered away from race's import, particularly within the realm of the Fourth Amendment. This effectively has created a "separate" Constitution that applies to those of color—African American in particular—and a constitutional standard that tacitly excludes these citizens from Fourth Amendment protection.

**A. Terry v. Ohio**

Prior to *Terry*, the Court's Fourth Amendment jurisprudence championed the rights of the individual in encounters between civilians and the police. According to the Court, historically:

> [T]he Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment . . . . The requirement of probable cause, as elaborated in numerous precedents, was treated as absolute."\(^{197}\)

Thus, before interfering with an individual's right to be let alone, police were required to have "probable cause" to believe that an individual had committed or was committing a crime prior to a search or seizure.\(^{198}\) In *Terry*, the facts compelled the Court not only to create a heretofore non-existent "reasonable suspicion" standard, but also lower the prerequisite level of officer suspicion prior to invading an individual's rights against unreasonable searches, seizures, and right to be let alone.\(^{199}\)

The *Terry* Court did not address the role of race in the arresting officer's determination that criminality was afoot and admitted that the actions of the observed individuals, standing alone, were innocent and certainly would fail to give rise to a determination that crime had been or

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193. 392 U.S. 1, 30 (1968).
was about to be committed.\textsuperscript{200} Despite the Court's purported struggle with what they were about to rend,\textsuperscript{201} the majority nevertheless, for the first time, gave constitutional imprimatur to police intrusion upon an individual's right to be let alone on less than probable cause to arrest.\textsuperscript{202} The Supreme Court announced: "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."\textsuperscript{203} In other words, if law enforcement has a reasonable suspicion that a suspect is armed and dangerous, that suspect may be stopped by the police and searched for the weaponry.\textsuperscript{204} The Supreme Court justified its decision as a necessary encroachment upon the Fourth Amendment, given the dangerous nature of policing.\textsuperscript{205}

Instead of requiring the police to engage in substantive policing, thus forcing them to provide courts with more than a race-based hunch or general suspicion, the Court allowed—by specifically jettisoning the concerns of African Americans and those who registered concern regarding the policing of them—race always to be considered, even if only surreptitiously and at the margins. Rejecting expressions of alarm by individuals and groups over the creation of this standard, the Court communicated the unspoken message that such anxieties do not rise to the level of constitutional concern.

The Court, perhaps unconsciously, federalized the notion that certain Americans do not accrue the right to the "sanctity of the person."\textsuperscript{206} By creating the reasonable suspicion exception the Court began the decline of the Amendment and its prerequisite penumbra. The Court announced the exception for a purportedly innocuous and commendable reason—to protect officer lives.\textsuperscript{207} However, it is not surprising that is has become a pernicious weapon of control, subjugation, and humiliation in their hands, wielded against African Americans and other marginalized or disdained communities. The \textit{Terry} Court emphasized that the Fourth Amendment protects "people" and then, in the same decision, essentially set African Americans apart, "treating them

\textsuperscript{200} Id. at 22.
\textsuperscript{201} See, e.g., \textit{Wardlow}, 528 U.S. at 127 (recalling that the Court "reflected upon the magnitude of the departure [they] were endorsing") (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{202} Id.
\textsuperscript{203} \textit{Terry}, 392 U.S. at 22.
\textsuperscript{204} Id. at 27.
\textsuperscript{205} Id. at 23–24.
\textsuperscript{206} Ronner, \textit{supra} note 48, at 407 (noting the unconscious racism and stigmatization leveled against African Americans by the Court's seminal ruling) (citing \textit{Terry}, 392 U.S. at 17).
\textsuperscript{207} \textit{Terry}, 392 U.S. at 27.
as less than fully human, relegating them to some non-people category."\textsuperscript{208}

What was announced as "less intrusive" seizures have now become virtually indistinguishable from custodial arrest or imprisonment, sans trial.\textsuperscript{209}

It seemed apparent that the Court acknowledged the racialized overlay of the situation. Still, the Court attempted to justify its determination to ignore what had been clearly intrusive governmental action, implicitly weighing the race of the African-American suspect and his presence to justify what, heretofore, would have been a violation of the suspect's Fourth Amendment rights. \textit{Terry} has not only eased the government's burden when intruding upon an American's person and mobility, but also when stopping or detaining the person for investigatory purposes, so long as the officer can articulate "a particularized and objective basis for suspecting the particular person stopped of criminal activity."\textsuperscript{210} Even though \textit{Terry} is supposed to allow less than a full search, it has also become pellucidly clear that it constitutes "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."\textsuperscript{211} According to Justice Stevens, "[e]ven a limited search constitutes a severe, though brief, intrusion upon cherished personal security, and it must be an annoying, frightening, and perhaps humiliating experience."\textsuperscript{212}

The \textit{Terry} Court acknowledged race as a factor in "street" investigations by law enforcement.\textsuperscript{213} The Court even acknowledged how a "race equals criminality" matrix can lead to tension, resentment, and hostility, specifically among Americans who "fail" the test.\textsuperscript{214} Instead of delving into the reality of race for the police and Americans who are

\textsuperscript{208} Ronner, \textit{supra} note 48, at 407 (citing Charles R. Lawrence, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317, 350 (1987)).

\textsuperscript{209} See, e.g., Wolf, \textit{supra} note 144, at 723–24 (describing so-called investigatory \textit{Terry} stops where African Americans were forced to lie face down on the ground with interlocked fingers behind their necks). Wolf describes an investigatory traffic stop for a burnt-out tail light that involved demanding the driver out of the car at gunpoint, slamming his head, and choking him until he lost consciousness. \textit{Id.} at 712–20; see also Chevigny, \textit{supra} note 153, at 43–44 (describing investigatory \textit{Terry} stops that involved choke holds leading to the deaths of African Americans).

\textsuperscript{210} United States v. Cortez, 449 U.S. 411, 417–18 (1981); see also United States v. Sokolow, 490 U.S. 1, 7 (1989) (holding that police may "stop and briefly detain a person for investigatory purposes").


\textsuperscript{212} \textit{Id.}


\textsuperscript{214} \textit{Id.}
abused and harassed, the Court not only declined the opportunity to strengthen the Fourth Amendment, the Court subverted it.

Paradoxically, the Terry Court encouraged and gave protection to unchecked officer license to invade Fourth Amendment rights of an individual on the basis of that person's race. African Americans will always be sold short in the United States when "reasonableness" is the yardstick. The court seemed to rely so powerfully on assumed negative connotations associated with the African American suspect's race that the ultimate decision to change the constitutional standard—rather than invalidate the arresting officer's suspicions—screamed both a fear of an African-American man deemed out of his proper place and a compelling desire to provide police the ability to "right" such a wrong or, at the very least, investigate why it occurred.

At the time Terry was decided, the Court was willing, in the name of officer safety, to shrug off "the risk that officers may stop innocent people." Since the Court's decision, and as law enforcement agencies embark upon various crime-fighting and prevention campaigns, that "risk" has become a reality for African Americans. Repeatedly suffering such humiliating confrontations exacts a usurious tax upon African Americans, who "are paying much more than [their] fair share of liberty."

B. Whren v. United States

In Whren v. United States, officers stopped two young men who were driving a vehicle with temporary plates. According to the officers, the driver and passenger were seized after the vehicle made a quick turn and sped away. After stopping the vehicle officers were able to observe what ultimately turned out to be drugs in plain view within the vehicle.

215. Id. at 1278 (arguing that the Court's failure in Terry to examine fully "the consequences for [B]lacks and other disfavored persons most affected" by police investigatory methods, resulted in the Court "los[ing] sight of the larger picture it confronted"). Id. at 1286.

216. See Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 964–68 (1999) (asserting that the Court validated Officer McFadden's race-based suspicion, but then buried race within the bowels of the opinion) (cited in Cooper, supra note 38, at 882 n.209).

217. Maclin, supra note 213, at 1271.


219. Cooper, supra note 38, at 874–75 n.160 (noting that racial profiling "stops law-abiding people ... many times more often than it stops actual criminals" and such a result wreaks a disproportionate amount of interference with African-American freedom).


221. Id.

222. Id at 809.
Since the defendant driver admitted to committing the traffic violation, the police had probable cause to suspect that he had committed a crime.

The Court did not mention race in its statement of the case's facts.\(^\text{223}\) The Court was forced to discuss race, however, when the defendants asserted that their Fourth Amendment rights were violated because of their race (African American) and, as a result, judicial review of the Fourth Amendment seizure compelled a race-based review.\(^\text{224}\) The Court refused the defendants' assertion and flatly rejected all future "Fourth Amendment challenges based on actual motivations of individual officers . . . [because] . . . subjective intentions play no role in ordinary Fourth Amendment probable cause analysis."\(^\text{225}\) Thus, the Court's decision in *Whren* constitutionalized the "pretext doctrine," allowing police to prostitute an objectively reasonable basis for stopping a vehicle as the basis for what would otherwise be unconstitutional governmental intrusion.\(^\text{226}\)

More damaging was the Court's ruling that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."\(^\text{227}\) Thus, despite reasonableness being deemed the touchstone of the amendment's restriction upon police, the Court, has indicated, sub silentio, that flagrantly policing race may offend equal protection of the laws; however, under the Fourth Amendment, race-based policing is de jure reasonable\(^\text{228}\) and does not offend.\(^\text{229}\) Not only did the Court's decision in *Whren* preclude Fourth Amendment review of race-based policing and racial profiling, it also turned a blind eye toward prevalent and acknowledged race-based tactics by law enforcement. By reproaching the African Americans' claim as more appropriate under the Fourteenth Amendment's equal protection guarantee, in essence, the Court turned back the constitutional clock and, simultaneously, crafted not only a notoriously difficult row to hoe,\(^\text{230}\) but


\(^{225}\) *Whren*, 517 U.S. at 813.

\(^{226}\) Cooper, *supra* note 38, at 888.

\(^{227}\) *Whren*, 517 U.S. at 808.


\(^{230}\) Taslitz notes:

[L]umping all equality claims under the Fourteenth Amendment's Equal Protection Clause limits remedies to cases of intentional discrimination, yet
also what could be characterized as a "second track," for African Americans who balk at improper race-based invasions of their purportedly guaranteed individual liberties by police officers.\(^{231}\)

C. Illinois v. Wardlow

In *Wardlow v. Illinois*,\(^ {232}\) the Court held that, pursuant to the Fourth Amendment, police could reasonably seize an individual who flees in reaction to the presence of law enforcement in "high-crime areas."\(^ {233}\) There, the defendant, Wardlow, reportedly ran upon seeing an undercover police caravan passing through a "high-crime area" on its way to stake out a crime scene. After a pursuit, officers seized Wardlow and discovered a loaded gun in his bag.\(^ {234}\) Determining that Wardlow did, in fact, run because of the police presence, the Court found seizure under the Fourth Amendment reasonable, asserting that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation ... that the stop occurred in a 'high-crime area' [is within the] relevant contextual considerations in a *Terry* analysis."\(^ {235}\)

Prior to *Wardlow*, the Court had determined that mere presence in a "high-crime area" did not provide police with a constitutionally sufficient

\(^{231}\) Professor Taslitz makes the point that such parsing of the Fourth and Fourteenth Amendments is not only unnecessarily formulaic, but also unsound, as it extricates the notion of equality from search and seizure doctrines. Moreover, such an analysis ignores the amendments' history, as well as the flagrant divestment of African American citizenship by rampant and violent searches and seizures, practices that "are sensibly understood as among the motivating forces behind ratification of the Fourteenth Amendment, and thus, relevant under the Fourth Amendment as well." *Id.* at 2331. Applying the Fourth Amendment to the states, the Court "forever linked the two amendments and recreat[ed] the Fourth Amendment's meaning in the process." *Id.*


\(^{233}\) *Id.* at 125.

\(^{234}\) *Id.* at 121-24. The search of the bag was not the subject of the party's appeal, and certiorari was granted solely on the question of whether the initial stop was supported by reasonable suspicion. *Id.*

\(^{235}\) *Id.* at 124.
level of suspicion to support a seizure or search. Additionally, flight failed to indicate dangerousness, which would justify a Terry investigatory seizure and frisk. However in Wardlow, the court determined that flight does support a constitutional seizure of the person, but only if it occurs in a "high-crime area." 237

The dissent in Wardlow recognized that race could be a factor considered in a Fourth Amendment reasonableness analysis to assess, subjectively, why an individual would run from the police. The dissenting Justices recognized that claims of race-based policing by those subjected to it are "too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient." 238 Still, the Court did not consider how the subjective use of race by the police may be a relevant or determinative factor in assessing governmental reasonableness in violating an individual's right to be let alone. 239

Given the demographics of race in American society, the Court's decision now invites race-based policing against African Americans in locations both with and without significant numbers of African Americans. 240 In the United States, where African Americans (and other non-Whites, to varying degrees) exist, space is devoid of the American's rights for the disdained; where Whites exist, no matter where they are, space becomes flush with privilege. 241 According to Charles Mills, "this raced space will also mark the geographic boundary of the state's full obligations." 242 Such segregation allows police to disproportionately inveigh excessive levels of criminal investigation and law enforcement

238. Id. at 134 (Stevens, J. concurring in part and dissenting in part).
239. Bender, supra note 229, at 140 ("Though Justice Stevens' dissent rightly noted that minorities often distrust police enough to modify behavior, he did not suggest that race can and should be a factor separately discussed by courts to assess the legitimacy of reasonable suspicion.").
240. See, e.g., Mills, supra note 15, at 42–43 (noting that, under "The Racial Contract," non-White individuals and their spaces "are both defective in a way that requires external intervention to be redeemed [insofar, that is, as redemption is possible]").
241. Id. at 49 (stating that "The Racial Contract demarcates space, reserving privileged spaces for its first-class citizens"). Mills argues that "[p]art of the purpose of the color bar/the color line/apartheid/jim crow is to maintain these spaces in their place, to have the checkerboard of virtue and vice, light and dark space, ours and theirs, clearly demarcated"). Id. at 48; see also David Theo Goldberg, Racist Culture: Philosophy and the Politics Of Meaning 185 (1993) ("Power in the polis, and this is especially true of racialized power, reflects and refines the spatial relations of its inhabitants."), cited in Mills, supra note 15, at 48.
242. Mills, supra note 15, at 50 (noting how the "Racial Contract" "links space with race and race with personhood" and how indigenous people became nonpersons within their own land and denied full or any membership in the [superimposed] political community").
against African Americans. In this way, place becomes race, and race becomes place. This is relevant to race-based policing concerns and so-called race-blind or neutral judicial review, as many American cities are racially segregated: "The decision in Wardlow, in effect, marks further stigmatization and subordination of high-crime neighborhoods with the imprimatur of the nation's highest court." Additionally, in Wardlow, the Court cited its decision in Terry for the proposition that clearly innocent conduct may be, nevertheless, deemed "ambiguous and susceptible of an innocent explanation." More pernicious, in the hands of officers who police race, is the Court's determination that in the absence of criminal indicia—nay, in the face of abject innocence—"officers could detain ... to resolve the ambiguity." Ambiguity is in the eyes of the beholder and certainly, to the extent that virtually any behavior exhibited by African Americans is ambiguous (or not), Terry allows police officers to seize apparently innocent Americans to resolve the "ambiguity." This ambiguity relates not to their portent criminal conduct, but the officer's lack of clarity regarding the African American's ability not to be guilty of something as well as his right to go on his way.

The Court has declined opportunities to tackle race-based policing head on. It has instead preferred the myth-based presumption of a colorblind society. Race neutrality in policing absurdly ignores the ubiquitous presence of de facto racial discrimination utilized by police departments of all stripes. It has been characterized by its critics as a

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243. Ronner, supra note 48, at 386-387 (noting that the segregation of most American cities leads to inequality in law enforcement that "damages our society"); see also Russell, supra note 86, at 32-33. Ronner describes the effect of race-based policing on overrepresentation of African Americans and under representation of White Americans in the criminal justice system:

Police stops of motorists, which constitute an informal stage, determine in large measure who will be arrested and thus who will enter the criminal justice system. ... Law enforcement becomes less a matter of monitoring and responding to representative levels of criminality and more a matter of figuratively (and sometimes literally) shooting fish in a barrel.

Id.

244. Herbert, supra note 39, at 164.


246. Id. (emphasis added).

247. Id. at 123.

248. Cf. Andrews, supra note 96, at 485 (noting the Court's similar approach under the Fourteenth Amendment which, according to Professor Andrews, "severely limit[s] the utility of [that amendment] as a transformative tool for America's disadvantaged racial groups") (citation omitted).

249. See id. at 478 (addressing the need of the Court to recognize "a historical account of race in American" in race-based jurisprudence).
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doctrine that purports fairness but, instead, seeks to oppress those who are already subordinated.250 According to Hutchinson, "one of the most contested doctrines in contemporary constitutional law is the colorblindness principle."251 Similarly, Norman Redlich notes, "in recent years, a race-neutral theory of law has revealed a willingness in many of America's courts and legislatures to patch over the spot of race with ignorance of and abstraction away from an appalling history."252 As Charles Mills observed, "race is made to seem marginal when in fact race has been central."253 In fact, the most flawed aspects of the colorblind approach is that it ignores, or conveniently disregards, this country's centuries' long legal, economical, social, and natal engendering of color-consciousness.254

Historically, color mattered; race mattered. Yet, at the behest of colorblind advocates, American society is to engage in an ahistorical approach, pretending all the while that one of the most singularly defining aspect of an individual's rights in the United States has no import—"[r]ace is made to seem marginal when in fact race has been central."255 Most significantly and unquestionably, race and color not only mattered in gifting or denying many generations' rights and benefits of the nation's laws, they were seminal factors. Accordingly, colorblind constitutionalism forces an unyielding, illogical, and neurotic result: it ignores the race-based governmental action which stokes the mistrust, discontent, cynicism, and animus of African Americans.256 The Court's stubborn and formulaic race-neutrality—which effects "an abstraction away from the moral outrage over slavery and its legacy that animated the passage of the Civil War Amendments"257—protects race-based policing by bowdlerizing history such that the effect of systemic, codified disenfranchisement and total subjugation of African Americans are unseen but still felt.

250. See Hutchinson, supra note 21, at 1457 (noting that colorblindness "legitimizes racial inequality, because colorblindness treats as acceptable the existing unequal distribution of social resources and weakens efforts to redistribute social resources in a more egalitarian fashion") (citations omitted).
251. Hutchinson, supra note 21, at 1456.
252. Redlich, supra note 95, at 477.
253. See Mills, supra note 15, at 56.
255. See Mills, supra note 15, at 56.
256. See, e.g., Lyle, supra note 51, at 246 (describing how the courts' tendency "to ignore prevailing racial tensions felt by minority victims of police investigations while imposing race-ignorant assumptions in Fourth and Fourteenth Amendment analysis" make courts unresponsive to reality of race-based policing in United States); see also Johnson, supra note 147, at 345 (describing how "profiling, as part of a long history of discriminatory law enforcement, fosters a deep cynicism among racial minorities about the criminal justice system").
257. See Redlich, supra note 95, at 500 (noting White Americans' ability to ignore racial discrimination when race-neutrality is employed).
The Court grants police the opportunity to utilize race on the front end of the encounter yet denies that opportunity to the victim of race-based policing. Had, for example, all of the suspects in Terry been Caucasian, the same behavior—looking, revisiting, bobbing about, glimpsing, and steps retracing—would have certainly taken on a wholly different, more importantly, non-suspicious meaning. No doubt, the arresting officer, Officer McFadden had seen others engage in the same or similar conduct before his arrest of Terry and his companions. The vulnerable store sported a plate-glass window and displayed jewelry for passers by to admire. Additionally, the store’s location was in a neighborhood with a high (nearly exclusive) Caucasian population. The Court equates McFadden’s experience in detecting pick pocketing with relevant experience to detect presciently a potential burglary. The Court’s decision virtually interprets African American as potential criminality: in other words, being African American presaged crime. In short, McFadden reasonably and lawfully portended crime at the presence of an African-American man.

According to Frank Rudy Cooper, “colorblind remedies perpetuate the conditions of deprivation and oppression . . . which maintain the legacies of the racism and racial bias of our past and, to an unacceptable extent, our present.”258 This strained, yet obvious, colorblindness, as one scholar colorfully deems it, is “racism in drag,”259 or at bottom, mere illusion. African Americans, even those that have been the most successful in partaking of the American dream, have been subjected to race-based policing and maintain a chronic, sometimes acute, awareness that they “[can] be subjected to indignity based on . . . race at ANY time.”260 Harris also recognizes the illogical reasoning in Terry noting, “if [B]lacks and Latinos who are stopped as a result of racial profiling are no more likely or are even less likely to be in possession of drugs or other contraband than [W]hites, it simply doesn’t make sense to enforce the law in this way.”261 The Fourth Amendment reasonableness analysis of such encounters becomes mere frippery, a constitutional and juridical gewgaw. Such artifice openly mocks those who have taken to heart or hoped to believe or experience the promise of the Bill of Rights.

The Court’s denouncement of explicit race-based policing does not absolve the Court’s partial responsibility for the practice. As Volpp recognized, “simply because the state does not officially sponsor an activity does
not mean that the state does not bear a relationship to that activity.”

What is not specifically prohibited is often permitted. That is, if the Court grants police broad discretion to enforce the laws and fails to prohibit race-based motivations, such motivations will be employed. The Supreme Court has not only granted law enforcement broad discretion, it has increasingly widened it, essentially ensuring that rampant race-based policing continues and flourishes. Maintaining colorblindness in a racist society—refusing to acknowledge the very real role race plays—is a racial act. When the police employ racial profiling, advertent activities or threats are not policed; instead, the movement of an entire race or groups of people is. What is problematic with Terry and its progeny is that, outside of an individual’s home, the Court seems loathe to seriously weigh the individual’s right to be let alone or go about his or her business as compelling over, or even on equal footing with, the government’s need to interfere. Rather, the Court crafts painstaking, fact-laden discursives to explain law enforcement’s need and specialized abilities to answer those needs.

Increasingly, and since the advent of the most recent War on Drugs, Professor Cooper has noted how the Court’s balancing test actually unbalanced. Professor Cooper’s point is correct; the Court’s decisions have set forth how the government’s need to investigate, seize, and search (unless unarticulated at the time of the suppression hearing on admissibility of the evidence) will invariably trump an individual’s right to be let alone. The Court rarely decides a search and seizure question in terms of our need to be let alone. It is as if the individual’s rights are, at best, ancillary to the Court’s inquiry and the Fourth Amendment is precatory. Rarely does the Court examine the sanctity of the individual’s Fourth Amendment right to be let alone, extolling the importance of being free to walk, run, or exist without governmental intrusion. Nor does the Court provide opinions that carefully and painstakingly detail the care with which individuals have packed their parcels, bagged their goods,

262. See Volpp, supra note 4, at 1583 (noting the conflict between the state’s simultaneously “advocating policies of colorblindness for citizenry while engaging in racial profiling for noncitizens” post-September 11).

263. Joo, supra note 3, at 3.

264. Harris, supra note 134, at 10–11.

265. See Johnson, supra note 147, at 344 (noting that, among other things, racial profiling by the police “punish, embarrass, and humiliate innocent people, whose skin color is used as a proxy for criminal conduct”).

266. See generally Cooper, supra note 38.


268. See, e.g., Morales, 527 U.S. at 53–54 (describing the constitutional right “to remove from one place to another according to inclination” and stating that “an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement ... or the right to move 'to whatsoever place one's own inclination may direct'”).
maintained their cars. The idea of a "balancing test" is a misnomer; in fact, the Court's analysis is wildly skewed in favor of police, seldom reviewing, for example, the individual's experience with the police, evidence of officer biases, or the police department's race-based training of the officer.269

The right against unreasonable searches and seizures should not just fall away when police assert a reason. Indeed, the presumption of the Fourth Amendment seems that the government would engage in unreasonable searches and seizures. Moreover, in American society, there always seems to be a reason to suspect African Americans of criminality.270 Accordingly, living while Black is, in essence, the truth of the matter.271 Once the presence of Blackness is ascertained, the Napoleonic Code is effected: African Americans are, at best, in a position to disprove that criminality has not (yet) attached to their person. Many do not even know that, in all likelihood, their Fourth Amendment rights have already been violated. In fact, "[t]hose who are stopped by the police but released without arrest form no part of the courts' understanding of the validity or reliability of police assessments and characterizations"272 of those they encounter. Judges—unless subjected to such treatment themselves—seldom learn of the Fourth Amendment violations, as these non-dirty (as opposed to clean or innocent) African Americans are never presented to the courts. Thus, the best seat in the house—the presiding judge's—fails to provide a clear view. The fact that those who come before the courts have been found to have contraband or other evidence of a crime in their possession seems to assuage the Court and obviate its role to protect individual rights.

Ultimately, ignoring race-based policing in a race-based society has, counter-intuitively and counter-productively, exacerbated the problem faced by those who are policed because they are non-White. Instead of providing even a modicum of relief for the victims of such interactions, the Court has repeatedly decided that such police actions, no matter how flagrant, excessive, or fatal are not only lawful, but reasonable.

Each of these cases illustrates that, at the time they were decided, the Supreme Court declined to address the impact and import of race in its

269. Cooper, supra note 38, at 894.
270. Nunn, supra note 131, at 385 ("African people constitute a pool of surplus, or inchoate criminals in the collective psyche of white America. In times of crisis, when there is a need to reinforce the solidarity of the white community, these inchoate African American criminals can be turned into fully perceived wrongdoers.").
271. Comedian Dave Chappelle has joked that when police kill an African American, to "account for" the cause death, police sprinkle crack cocaine on and around the deceased's body. Thus, even the notion of "DWB," Dying While Black, is not unconsidered by some of the more cynical—or scarred—members of this society. See Dave Chappelle, KILLIN' THEM SOFTLY (Ventura Distribution 2001).
272. Lenese C. Herbert, supra note 39, at 160.
Fourth Amendment jurisprudence. Perhaps the Court should be provided the benefit of the doubt. At the time of these decisions, the Court may have also luxuriated in the "privilege of unknowing." It may have been unaware of the dangers of its Fourth Amendment precedent, unreasonableness of race-based policing, and the threat of a permanently disaffected class of citizenry. However, this is questionable, given the ample amicus arguments along these exact lines. As Paul Butler argues:

The judiciary is supposed to protect racial minorities from tyranny, but the U.S. Supreme Court allows this protection only when there is persuasive evidence of a racist intent. When the majority disguises its bias, or is not even aware of it, the U.S. Constitution is not offended, and minorities are not protected.

The Court's rigorous attachment to race and colorblind review in a race and color-based realm where unconscious motives and even duplicity reign, continues to preclude Fourth Amendment relief for African Americans and other people of color whose right to be let alone is violated with impunity under color of law, with the assent of the highest court of the land.

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273. See Bender, supra note 229, at 125-26 (comparing the Court's analyses in Terry and Wardlow and determining that despite the thirty-year gap in the decisions, social science research, and jurisprudential discourse on the role of race in investigatory police stops, "the Court has refused to change how it analyzes such stops justified by reasonable suspicion").

274. See Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 BROOK. L. REV. 1141, 1149 (1997) (discussing courts' failure to accurately discuss the armed forces' policy on homosexuality and recognize the subordinating effects of silence on homosexual and lesbian military personnel).

275. See Bender, supra note 229, at 125 ("[T]he Court has refused to change how it analyzes such stops justified by reasonable suspicion.").

276. Id.


278. See Bender, supra note 229, at 125 (asserting that "the Court has effectively precluded Fourth Amendment relief for police action influenced by race").
This final part assesses the spawn of race-based policing: African Americans as resident refugees, politically irrelevant, yet preternaturally suspect denizens whose right to be let alone remains unobvious, even in the twenty-first century. This part initially explains how unchecked race-based tactics by law enforcement divides American society along the lines of “U.S.” vs. them, violently policing those evidencing indicia of African ancestry in order to enforce subordinate status. This part then discusses how such violence repeatedly trumps African Americans’ birthright, disrupts their sense of belonging, and hones disaffection to such a degree that those so policed may ultimately upend society’s disavowal. It may cause African Americans to embrace their outsider status, and find solace or retribution in individuals and ideologies that infuse their frustrating status with redemptive, albeit violent, meaning. Finally, this part warns that the Supreme Court’s Fourth Amendment jurisprudence—in conjunction with race-based policing—so substantively attacks and ultimately destroys African Americans’ birthright, that the creation of an anti-identity that coalesces with other “outsiders” who seek to destroy that which destroyed them is not only logical and predictable, it may be inevitable.

279. “Création” is French for “creation.” Collins Robert French Dictionary, supra note 45, at 101. This heading is a modification of the semi-autobiographical novel, Girl, Interrupted. Susanna Kaysen, Girl, Interrupted (1993). In it, Kaysen discusses her compelled (if not forced) institutionalization in a psychiatric hospital and challenges the social, familial, medicinal, and emotional assumptions regarding an individual’s mental health and hygiene. A relevant passage informs how race-based policing in the United States is more about the country’s need to demonize scapegoats, as opposed to uncovering, admitting, healing, and compensating past and present race-based injury:

Lunatics are similar to designated hitters. Often an entire family is crazy, but since an entire family can’t go into the hospital, one person is designated as crazy and goes inside. Then, depending on how the rest of the family is feeling, that person is kept inside or snatched out, to prove something about the family’s mental health. . . . Most families were proving the same proposition: We aren’t crazy; she is the crazy one.

Id. at 95 (emphasis in the original).
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"In the midst of any community that has been wounded, agitators naturally arise."280

A. Sins of the Father:281 Citizenship, Raced

Unlike the majority of Americans, African Americans of all ages and socio-economic strata have learned convoluted, ritualistic, and life-preserving strategies to employ when they encounter police under even the most mundane, non-threatening circumstances.282 Parents, caretakers, relatives, and family friends warn children and charges (of both genders, but especially boys) against interacting with or talking to police officers, and go so far as to equip them with strategies for both avoiding contact and minimizing the threats that such encounters repeatedly promise and spawn.283 Race-based policing and the violence done under its auspices creates two identities in the United States: “us/we” and “not us/we.”

When officers stop African Americans and investigate them with heightened vigor and urgency, they officially assert citizenship and nationality by virtue of their refusal to respect the stopped individual’s right to be let alone. In doing so, the officer asserts, with the jurisdiction’s imprimatur, who belongs and where they belong. Thus, officers’ "ostensive self-definition by negation"284 defines who is American and who is not.285

In each incident African Americans are reminded that, irrespective of their lawfulness, accomplishments, or goodness, they will remain the targets


281. This principle tells us that the sins of the father are or are not—depending on whether the doctrine operates or not—to be visited upon, or borne by, the father’s posterity. For a discussion of the “corruption of blood” doctrine, see generally Max Stier, Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter, 44 Stan. L. Rev. 727, 729–34 (1992).

282. See, e.g., Russell, supra note 86, at 34 (describing a law professor’s “rules of engagement of [B]lack malehood . . . that ‘at all times [African American males] make no quick moves, remove any possibility of danger and never give offense to official power’”) (citation omitted). It is said that Miles Davis avoided race-based policing by alerting the Beverly Hills police department before he left his home. Id. at 36.

283. See, e.g., Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 700 (1992) (recalling a scolding received at the hands of his mother upon learning that he had merely spoken with a police officer); Ronner, supra note 48, at 397 (“Some [B]lack parents educate their children at an early age about the dangers of police officers and how survival depends on staying away from them.”); Russell, supra note 86, at 34 (offering means by which African-american men employ “a range of adaptive behaviors” to avoid encountering law enforcement officers, including but not limited to, “vanity license plates that indicate professional status,” “traveling at the precise posted speed limit,” and shunning “baseball caps”).

284. See Mills, supra note 15, at 43.

285. Id. (describing the necessity of the “savage” or “Wild Man” in European self-definition: “Who are we? We are the nonsavages.”).
of these indignities. What threatens national security is that the government—not the powerless, stray, and errant bigot about town—reminds African Americans that they are second-class citizens, eligible to be subjected to all manners of personal indignities. Race-based retribution therefore is not illogical, nor should it be unexpected.

The Supreme Court’s Fourth Amendment jurisprudence has an impact on the larger American stage. The jurisprudence impacts the ongoing simulcast of race as a subtext for our interpersonal, social, political, professional, and romantic relationships. Reasonable suspicion becomes a conclusion, not an inquiry, as the Court ascribes lawfulness to it. Thus, the “reasonableness” of even objectionable policing of those “raced” becomes more ingrained into our collective unconscious, embedding acceptance of varying grants of respect, legitimacy, and ultimately citizenship. Sub silentio, it becomes clearer: these people are not “us.” As lower courts are obligated to follow the Court’s precedent, race-based policing becomes “reasonable,” overt indication of African American heritage becomes suspicious, and twenty-first century citizens continue to labor under the stain of dishonor, disenfranchisement, and disrepute levied against their enslaved ancestors, and the Court ignores it all.

Andrew Taslitz notes, “[s]ocial and literary theorists have long believed that, at least in Western culture, and perhaps in much of human history more generally, the construction of valued collective identity requires the construction of an out-group, a hated other... [w]e are ‘us’ because we are not ‘them.’” Identity, then, is inherent in who belongs and who does not. According to Taslitz:

[A] real, threatened, or imagined violence against the other is inherent in the creation of the in-group, the ‘us.’... This violence [is rooted] in ‘a principle of scarcity that pervades most thinking about identity.’ There are perceived shortages of land, food, sex, property, God’s blessings, status, and love. We therefore construct an other as a method of allocating these valuable resources. ‘We,’ of course, get much of what is valued, while ‘They’ get little. But ‘They’ too understand this principle of scarcity, and could invert the natural order, taking what is Ours. Thus “violence is not what we do to the Other. It is prior to that. Violence is the very construction of the Other.”

If oppression is central to the oppressor’s identity, it most certainly is also central to the identity of oppressed. Specifically, chronic external

286. Cooper, supra note 38, at 874–75 n.160.
287. Id.
288. Taslitz, supra note 28, at 1295 (citation omitted).
289. Id. (citation omitted).
destabilization of the citizen's identity based on officialdom's regard for his or her race leads to a vulnerability which increases the ease with which additional external manipulation can be employed. The psychology of entrenched warfare, perpetual fear of disruption, accost, challenge, and attack, as well as the mentality and emotional makeup of those who have suffered post-traumatic stress disorder lead to "desperation of the disaffected." The oppressed's understanding of his inescapable status as subordinate, and therefore less worthy, fester. Ideologies of significant consequence are ultimately born.

Amin Maalouf notes that "the ties that count in people's lives are not always the allegedly major allegiances arising out of language, complexion, nationality, class or religion." An individual's identity is certainly influenced by allegiances—to a community, a sexual preference, a team, village, clan, or any other personalized reference point. However, when the very existence of the African American's body is treated as a crime against humanity and an abominable manifestation, otherwise relevant and even compelling allegiances become subordinated to "spoiled collective identity" and the overt and disguised "ontological wounds, psychic scars and existential bruises" it inflicts and proclaims.

Every time an officer seizes or searches an African American under the Fourth Amendment clearly, largely, or even partially based on the African American's race, the officer is committing violence against that individual, his loved ones, similarly situated persons, and that individual's

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290. According to Semmes: "The African American community, which is habitually conditioned and coerced to accept the definitions and directives of a cultural system outside its own, cannot easily insulate itself from forces that prompt harmful consumption." See CLOVIS E. SEMMES, RACISM, HEALTH, AND POST-INDUSTRIALISM: A THEORY OF AFRICAN AMERICAN HEALTH 128 (1992). Moreover, Semmes notes: "European oppressors found that the systematic disruption and destabilization of African cultures was the most efficient and effective way to control the captive population." Id. at 12. This destabilization tactic was also employed, as Semmes notes, against Native peoples in the United States: "Both groups were assaulted culturally, but the goals were to deprive Native peoples of their land and Africans of their labor." Id.

291. Id. at 128.

292. Taslitz, supra note 28, at 1296.

293. Cf., e.g., Nunn, supra note 131, at 407 (warning that the burgeoning collaboration between law enforcement and the United States military may ultimately encourage a "warrior mentality"). Such a mentality is not limited to law enforcement; those so policed, too, may be similarly motivated.

294. MAALOUF, supra note 280, at 14.

295. LOURY, supra note 108, at 67 (describing the identifying aspects of racial stigmatization).

296. WEST, supra note 107, at 102 (indicating that an inherent part of African American culture in the United States is never to allow the inflicted oppression or its scarring "to have the last word"). One poet has described it succinctly: "The most beautiful word in the American language is resist." Mike Tyler, The Most Beautiful Word in the American Language, reprinted in ALOUD: VOICES FROM THE NUYORICAN POETS CAFÉ 164-168 (1994).
community.\textsuperscript{297} Given the slaughtering of their numbers by police officers without remorse and certainly without penalty,\textsuperscript{298} the victims of race-based policing would be not only ahistorical, but suicidal, to resist or even appear capable or prepared to resist. The reactionary id versus the super-ego's peaceful and moralist raison d'etre can wage a battle royale over the individual's actions and, at times, his fate.\textsuperscript{299}

This culture of violence is certainly not unknown to the United States.\textsuperscript{300} \textit{Random House Webster's Unabridged Dictionary} defines "violence" as follows:

\begin{quote}
\textbf{V.} 1. swift and intense force \ldots 2. rough or injurious physical force, action, or treatment \ldots 3. an unjust or unwarranted exertion of force or power, as against rights or laws \ldots 4. a violent act or proceeding. 5. rough or immoderate vehemence, as of feeling or language. 6. damage through distortion or unwarranted alteration \ldots
\end{quote}

\textsuperscript{297} Taslitz, \textit{supra} note 28, at 1297 ("Because individual identity is closely linked to group identity, attacks on the group are perceived as individual assaults, and attacks on individuals are perceived as group assaults.").

\textsuperscript{298} See, e.g., Lewis & James-Johnson, \textit{supra} note 133, at 1A. The article recounts the death of Raymond Sterling, Jr., in Fort Lauderdale, Florida. According to the police, they pepper sprayed him after he resisted arrest, leading "[h]is red blood cells [to 'sickle'] after physical exertion, preventing oxygen flow." \textit{Id.} Also left dead were 14-year-old Nehemiah Johnson, twenty-year-old Christopher Bryant, Luel Johnson who died death by drowning after running from the scene of an accident, and Jeremy Blount who allegedly dove into a canal during a police chase and drowned. \textit{Id.}

\textsuperscript{299} See MAALOUF, \textit{supra} note 280, at 125 (warning members of "peripheral cultures" against "the temptation to despair \ldots to sink into a permanent state of bitterness, resignation and passivity, from which they emerge only through suicidal violence").

\textsuperscript{300} Patterson notes:

America has always been a violent place. And quite apart from their involvement with slavery, Euro-Americans have always exhibited a perverse fascination with violence. The violence of Euro-American men against other Euro-American men, and against Euro-American women, needs no documentation. The law of the jungle, of an eye for an eye, has played, and continues to play, a central role in the culture. \ldots The experience, and fear of, violence among Euro-Americans is hardly new, even though many analysts erroneously infer, from opinion polls placing fear of crime as the leading concern of Americans today, that this is a modern crisis. In fact, in the cities and frontier towns of nineteenth-century America, the probability of being mugged, beaten, or killed was much greater than in urban America today.

PATTERSON, \textit{supra} note 114, at 242 (citation omitted).

\textsuperscript{301} \textit{Random House Webster's Unabridged Dictionary} 2124 (2d ed. 2001).
History has proven that violence has successfully led to the repeal of disfavored laws;\(^{302}\) it is also replete with examples of violence as a means towards self-worth, identity, and esteem.\(^{303}\) Moreover, after September 11, "the use of violence to achieve a political objective is no longer an abstract concept in the United States."\(^{304}\) Professor Volpp asserts that citizenship is "made up of four distinct discourses: citizenship as formal legal status, citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity."\(^{305}\) However, she argues, "it seems as if the guarantees of citizenship as status, rights, and politics are insufficient to produce citizenship as identity."\(^{306}\) According to Volpp:

In focusing on the question of citizenship as identity, it is imperative to isolate two very different conceptualizations of this idea. The prevalent idea of citizenship as identity focuses on the notion of citizenship as a form of inclusion. Citizenship as a form of inclusion starts from the perspective of a citizen who proceeds to imagine fellow members who are to be included in a network of kinship or membership—those with whom

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\(^{302}\) Butler, supra note 277, at 726 (noting that repealing of offensive and discriminatory U.S. laws occurred, in part, as a result of violence: "[i]n the end, however, the brute force of muskets and bayonets was the most direct cause of the liberation of four million African American slaves") (citation omitted).

\(^{303}\) See Semmes, supra note 290, at 135 (discussing the globalization and prevalence of violence in popular culture).

\(^{304}\) Butler, supra note 277, at 724 (evaluating the use of subversion and violence as tactics to change the law when non-subversive or nonviolent tactics prove ineffective). Violence as a means of asserting identity should not be unfamiliar to Americans after the Oklahoma City bombing by Timothy McVeigh and Terry Nichols. Maalouf's characterization of these bombers is fascinating:

All communities and cultures have a sense that they are up against others stronger than they, a feeling that they can no longer keep their heritage safe. Looked at from the South and the East, it is the West that dominates. Looked at from Paris, it is America that holds sway. But if you go to the United States, then what do you see? You see minorities reflecting all the diversity in the world, all needing to assert their original allegiances. And when you have met all these minorities and have been told a hundred times that power is in the hands of White males, or of Anglo-Saxon Protestants, you suddenly hear the sound of a huge explosion in Oklahoma City. And who are the people responsible? Some White male Anglo-Saxon Protestants who regard themselves as members of the most neglected and despised of minorities, and who believe that globalisation [sic] is sounding the knell of "their" America. In the eyes of everyone else, Timothy McVeigh and his supporters belong to the same ethnic group as those who are supposed to dominate the planet and hold our future in their hands. In their own eyes they are merely an endangered species, with no other weapon available to them but the most murderous terrorism.

Maalouf, supra note 280, at 124.

\(^{305}\) See Volpp, supra note 4, at 1592.

\(^{306}\) Id.
the citizen feels affective ties of identification and solidarity. . . . we must [also] think about a very different idea of citizenship identity, which we could call citizenship as a process of interpellation. . . . [which] starts from the perspective that power both subordinates and constitutes one as a subject. The focus, then, is not initially from the perspective of the citizen who includes, but foregrounds the role of ideology in either one as a citizen or excluding one from membership, and then shifts to the standpoint of the subject.307

Officers use very similar means—be they psychological, physical, or a combination thereof—to create identity, for both the “true” American and the African American. Particularly, since the War on Drugs was “declared,” American law enforcement has made clear that the “other” in the War on Drugs—for “[w]ar is fought against ‘others,’ not against ourselves”308—is the African American, particularly, the African-American male.309

Officers’ arbitrarily exercised ability to interfere with African Americans’ choices, locomotion, effects, and person is reminiscent of the slave owner’s power over the enslaved.310 As was true there, even when the officer’s power is not exercised, both African Americans and the police are aware that if the officer—any officer—chooses,311 he may arbitrarily impose his will, “neither offering reasons for doing so nor necessarily considering [his or her] interests in contrary treatment.”312 Such a reality can lead to internal self-loathing and a seething hostility toward society at large that is “is agonizingly humiliating.”313

307. Id. at 1592 (citations omitted) (emphasis in the original).
308. See Margaret Raymond, Commentary on “The Drug War,” 6 J. GENDER RACE & JUST. 447, 448 (2002) (noting that war requires an “external enemy” and that to the extent and intent that damage is to be done, the war-raging entity “need[s] to know that those to whom [it] intend[s] to do damage are ‘others’”).
309. See Nunn, supra note 131, at 382 (noting the “devastating effect” the War on Drugs on has had on “African American communities nationwide” and opining that “African Americans—and African American males in particular—are the real targets” of the War on Drugs).
310. See Taslitz, supra note 28, at 1302 (describing the psychic hegemony of American chattel slavery).
311. Id.
312. Id.
313. Id.
B. Blood on the Son: Citizenship, Replaced

"Rise up, ye mighty race and accomplish what ye will..."315

Damage begets damage. Moreover, "'[I]ast guys don't finish nice.'"316 "[F]rustration and powerlessness breed violence,"317 as the inability to challenge, defend, or assert on behalf of self, family, or loved ones constitutes a maddening, unanswered violence upon the rights318 and psyches of those so policed, irrespective of visible signs of assault or abuse. Social scientific theory explains the effect of rejection upon humans and the resultant reactionary, yet adaptive, violence. Additionally, the base need to revenge or strike back in anger those who have hurt you and yours may soon prove too tempting a proposition for a psyche seasoned by the collective unconscious chattel slavery experience,319 and serrated with Sisyphean racial realities of the virtually hostile American "system."320

Thus, at the same time law enforcement deems second-class citizenship or non-American status, it simultaneously enshrines personhood and nationality.321 As a result, "it is possible to get away with doing things to sub-persons that one could not do to persons, because they do not have the same rights as persons."322 At any given moment, the labyrinth that typifies federal, state, and local regulation of motor vehicles, vehicular travel, and criminal codes, police are gifted with a virtual grab-bag of reasons to stop any automobile.323

314. See supra note 281.
316. LOURY, supra note 108, at 105.
317. See SEMMES, supra note 290, at 135 (discussing the "culture of violence" and African-American violence in the United States).
318. See Nunn, supra note 131, at 384 (noting that racial profiling and race-based policing "have led to harassment and the curtailment of African American privacy rights").
319. While the personal unconscious is made up of contents which were at one time conscious, but have disappeared from consciousness through regression or forgetfulness, the contents of the collective unconscious have never been in consciousness, and therefore have never been individually acquired. Whereas the personal unconscious consists, for the most part, of complexes, the content of the collective unconscious is made up essentially of archetypes. See generally, CARL JUNG, ARCHETYPES OF THE COLLECTIVE UNCONSCIOUS, in THE COLLECTED WORKS OF C.G. JUNG, Vol. 9.i, 3-41 (Sir Herbert Read et al. eds., 1959) (1936).
320. See Nunn, supra note 131, at 384 (finding race-based policing and racial profiling "can only contribute to the feelings of distrust that African Americans have toward police, courts, and the government generally").
321. See MILLS, supra note 15, at 57 (noting that under the "Racial Contract," "non-white subpersonhood is enshrined simultaneously with white personhood").
322. Id. at 56.
Both race-based policing and conspiring against the United States as an American accomplish much of the same goal: defining identity, particularly after September 11. Identity—its assertion as well as its denial—can easily become an instrument of war, since the concept of identity is often based on a perceived enemy. Wanton police profiling is not merely an extraordinary, once in a lifetime incident; it is a painful way of life. This is what the Court refuses to consider: when you are an African American (primarily male), being the target of wanton police profiling denies you the right to be let alone regardless of who you are and what you are doing.

By virtue of the Supreme Court’s refusal to disrupt race-based policing and officers’ resultant ability to interrupt the coming and going of pedestrians and motorists on a race-based whim, even noncriminal “good” African Americans are reminded that they manifest the congenital stain of appropriation. Those who dare walk and live in neighborhoods deemed beyond their means or race are policed. What stymies the country’s unity is the specter of virulent policing of those who require none. The doctrinal result not only rigidly ignores the often apparent presence of discriminatory policing and racial animus by law enforcement but also

324. See MAALOUF, supra note 280, at 12.
325. Id. at 14.
326. Cooper, supra note 38, at 874–75 n.160 (noting that racial profiling “stops law-abiding people . . . many times more often than it stops actual criminals” and how such a result wreaks a disproportionate amount of interference with African American freedom).
327. See, e.g., PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (discussing “The Good Black,” the African American that White Americans believe models the method by which African Americans should comport their social, educational, professional, and personal behavior). Barrett details the life and times of his college roommate, Larry Mungin, an African American who strove to succeed in the United States. Id. Mungin purportedly ignored race and race-based hostility and was able to rise from a housing project in Queens, NY to Harvard Law School. From there, Mungin went on to practice law at major corporate firms. At the point when his career looked brightest, he was up for partnership consideration in his firm. He not only was not made a partner, he ultimately sued the law firm racial discrimination. Id. The firm claimed it went out of its way to help Mungin because of his race; Mungin insisted that because of his race, the firm went out of its way to thwart his success. Id.
328. Consider the horror of September 11. The justified rage held by many Americans about the thousands of deaths, injuries, and millions of dollars in property damage that occurred (we are told) as a result of young male Muslim Afghans seemed prepared to spill over and scald those who barely presented as Arab, Saudi, Afghan, or Middle Eastern. However, even after September 11, with the increase of racial profiling against those who are of Arab or Saudi descent (or who are mistakenly identified as such), not one has been shot or killed by the police. Since September 11, however, a number of African Americans have been killed by police. Not one of those killed by police was suspected of terrorist activities or ties. However great the abject fear of Arab or Saudi nationals or their descendants in the United States, even after September 11, it still does not eclipse the odiousness held of all those considered African American.
stokes the growing fear mistrust, disconnect, and clear powerlessness of African Americans, feelings that can readily lend themselves to violence as a way of standing against the negative and negating identity forged upon them by such practices.

For far too long, African Americans have maintained calm during the most virulent racist periods, programs, and policies of this country. There is no reason to believe that African Americans will always or ever accept or conform to the atrocity of sub-citizenship. As with their forebearers, warding off both internal and external notions of impotence is at the heart of violence as a tactic. Similarly, the motivation towards violence could also attach itself to the animus and actions of others who are similarly roused against oppression, as would be the case with those African Americans who would conspire with others against the United States. Unlike White Americans, race is never irrelevant for African Americans. To paraphrase Muhammad Ali, who conscientiously resisted serving in the Vietnam War, African Americans have no quarrel with Saudis: they have never disabused African Americans of their American birthright or entitlement. Those African Americans who align themselves in identity and action with enemies of this country may be responding in one of two ways: I am not one of you, or I shan’t be one of you. Either way, the violence can be a means of communicating and forging the identity of the actor as it relates to the acted upon.

Would revolution, a violent overthrow of the current American regime to install another, be a reasonable goal? Paul Butler argues, "[e]very act of insubordination by conscience necessarily condemns a state." Would the unyielding racialized nature of the United States cause some to conspire against the United States? The unquenched longing to enjoy liberty as a full citizen without the chronic anxiety and abject fear of encountering law enforcement may become a catalyst. Quite rightly, Butler notes that "[t]he United States is the most powerful nation in the world, with the mightiest military force ... [and] no

329. See Blassingame, supra note 29, at 284 ("The plantation was a battlefield where slaves fought masters for physical and psychological survival.").

330. See Mills, supra note 15, at 53 (noting that "one can pretend the body does not matter only because a particular body (the White male body) is being presupposed as the somatic norm . . . the body is only irrelevant when it's the [White] male body").

331. As Muhammad Ali said: "I ain't got no quarrel with them Vietcong. No Vietcong has ever called me a [racial epithet]." Dave Anderson, Clay Prefers Jail to Army, N.Y. Times, March 17, 1967, at 50. Ali's 1967 comments upon declaring himself a conscientious objector to the Vietnam War were echoed in many quarters by those who advocated that African Americans not participate in U.S. armed conflicts until they were given the guarantees of full citizenship.

332. Butler, supra note 277, at 737 (quoting Robert Penn Warren, author, letter to Nicole Chiaramonte, editor of TEMPO PERENTE (Rome), reprinted in 50 YALE L. REV. 462, 480 (1961)).
attempted American revolution has ever been successful.\footnote{Butler, \textit{supra} note 277, at 737.} Sobering, too, for those African Americans who would aspire to injure the United States, is the fact that the outcome is not promising: "any minority group that sought to overthrow [the United States government] would be summarily crushed."\footnote{Id. (evaluating the use of subversion and violence as tactics to change the law when non-subversive or nonviolent tactics prove ineffective).} Those who would conspire with enemies of these United States would certainly do so without real hope of immediate or unchallenged victory.

As Butler has queried, "at what point ... is violence acceptable as a tactic for making a political point?"\footnote{Id. at 750 (comparing the "real time" failure of Denmark Vesey's 1822 rebellion against slavery in Charleston, SC with the present day regard Vesey is now held in, as evidenced by a 2001 approval by the city of Charleston to erect a monument in his honor).} Those who would join forces against the United States would most likely answer, especially after September 11, that the point is "now." Early Africans and, later, African Americans, understood the slim chance, at best, of success when weighing rebellion or escape against national institutions.\footnote{See Blassingame, \textit{supra} note 29, at 257 (noting slave owners' reiteration that enslaved Africans were "unfit for freedom, that every slave who attempted to escape was captured and sold further South, and that the [B]lack man must conform to the [W]hite man's every wish").} Slavery's staging ground was the plantation, where those enslaved fought their oppressing owners for not only physical, but also psychological survival.\footnote{Id.} As Blassingame argues, "unlettered, unarmed, and outnumbered, slaves fought in various ways to preserve their manhood."\footnote{Id.} Today, America still fails to see the descendants of these early Americans as full citizens—as "us."\footnote{Id.} Accordingly, America does not ponder the future of African Americans beyond what the major social indicator statistics portend.\footnote{Loury posits:}

\textit{If there were a comparable number of young European-American men on beer-drinking binges, or anorexic teenage girls starving themselves to death, and if these were situations in which the same degree of human suffering was engendered as is being produced in [the case of disproportionate African American incarceration rates], it would occasion a most profound reflection about what had gone wrong, not only with THEM, but also with US.}

\textit{Loury, \textit{supra} note 108, at 82.}

\footnote{Loury notes that: "[O]ut of the 2 million people under lock and key on any given day in the United States, some 1.2 million are [African American], though [they] are only about one-eighth of the national population." \textit{Loury, \textit{supra} note 108, at 137; see also Russell \textit{supra} note 86, at 29 (noting that African Americans "account for more than 30 percent of all arrests").} Additionally, in November 2003, unemployment among Black men...}
realization of basic needs serves as a source of dignity, something no less important or defining in the twenty-first century. Thus, given the daunting rate at which America imprisons African Americans, those who would conspire with enemies of the United States almost certainly understand their, likely smaller, chance of “success.”

History provides support for this thesis. In the past “different battles around the world against slavery, colonialism, jim crow, the ‘color bar,’ European imperialism, [and] apartheid were in a sense all part of a common struggle” against White supremacy and non-White subjugation. History is destiny, and the crucible of White supremacy and African-American inferiority forge transnational empathy, cooperation, support, and reconstituted loyalties of a non-White “us” versus a White “them.”

Charles Mills points out:

In the Spanish American War, [B]lack Americans raised doubts about the point of being a [B]lack man in the army of the white man sent to kill the [B]rown man, and a few [B]lacks actually went over to the side of Emilio Aguinaldo’s Filipino forces. After Pearl Harbor, the ominous joke circulated in the American press of a [B]lack sharecropper who comments to his [W]hite boss, ‘By the way, Captain, I hear the Japs done declared war on you [W]hite folks,’ [B]lack civil rights militants demanded the ‘double-victory,’ ‘Victory at Home as Well as Abroad’; Japanese intelligence considered the possibility of an alliance with [B]lack Americans in a domestic colored front against white supremacy.

rose to twice the overall jobless rate, 12%, a pattern that has held constant for more than forty years. Id. African American infant mortality rate in the United States is 2.5 times higher than of White Americans. Id. “Taken together, these numbers sketch the outlines of a matrix of societal oppression that does not change in its essentials and ultimate outcomes.” See The Black Commentator, http://www.blackcommentator.com/20_brief6.html (Dec. 12, 2002); see also LOURY, supra note 108, at 81 (accounting for American indifference disproportionate rates of African American incarceration as not counterintuitive).

Despite comprising twelve to thirteen percent of the United States' population, African Americans “account for more than 30 percent of all arrests and more than 50 percent of the incarcerated population.” RUSSELL, supra note 86, at 29. Whites, who comprise a approximately seventy percent of Americans, are underrepresented in both arrest and incarceration rates. Id. See LOURY, supra note 117, at 81 (questioning the lack of American response to “nearly 1.2 million African Americans under lock and key” as well as the statistical “norm” that male members of this group “will spend some time in jail”).

MILLS, supra note 15, at 116–17 (discussing rebellion against the “Racial Contract” around the world).

MILLS, supra note 15, at 129 (“A global racial formation that complemented and buttressed the economic and political world-system” generated a “transnational identities of white and nonwhite.”).
The Court has set forth the standard of custodial arrest as probable cause—a showing that the facts and the circumstances would lead the officer to believe that a crime has been committed by the arrestee.\(^{345}\) However, irrespective of subsequent arrest or trial, police stops—seizures—actually serve as the manner and timing by which an individual outside of the Supreme Court's lofty environs often believes that their introduction into the criminal justice system has occurred;\(^{346}\) failure to arrest or declination to prosecute has no bearing on whether a Fourth Amendment seizure occurred. Although the Court considers custodial arrest the manner in which an individual is introduced into the criminal justice system,\(^{347}\) arrest is not the way a vast number of Americans are introduced to it. Non-arrest seizures implicate the Fourth Amendment and its protections: even before and in the absence of arrest, seizures, by definition, “immediately deprive individuals of liberty and freedom of movement.”\(^{348}\)

The Fourth Amendment sought to avoid the evil of the general warrant, a prosecutorial tool utilized by unsavory jurists and law enforcement officials “not with a mind toward an ultimate lawful process, but as harassment or intimidation.”\(^{349}\) Systemic abuses of such discretionary, unchecked governmental power violate constitutionally guaranteed individual freedoms and, arguably, the guarantees of republican government.

As the population shifts in the United States from majority White to majority non-White, “the chasm between a largely [W]hite First World and a largely nonwhite Third World continues to deepen, desperate illegal immigration from the latter to the former escalates, and demands for global justice in a new world order of ‘global apartheid’ grow louder.”\(^{350}\) Even within the United States, as the rates of interracial marriage and children increase, White Americans whose loved ones of mixed race that are subjected to this sort of policing will undoubtedly realize that African Americans are not hypersensitive, but accurate, in their retelling of en-

\(^{345}\) Beck v. Ohio, 379 U.S. 89, 91 (1964) (holding the test for constitutional arrests depends upon “whether, at the moment the arrest was made, the officer had probable cause to make it”). The Court defined “probable cause” as consisting of “facts and circumstances ... of which [the officer] had reasonably trustworthy information ... sufficient to warrant a prudent man in believing” that crime was occurring or had occurred. Id.

\(^{346}\) In fact, an arrest only assures that he or she will remain in that system beyond that time span of the original seizure.

\(^{347}\) See WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 4 (1965).

\(^{348}\) See id.

\(^{349}\) Id. at 57.

\(^{350}\) MILLS, supra note 15, at 132, (quoting ANTHONY H. RICHMOND, GLOBAL APARTHEID: REFUGEES, RACISM, AND THE NEW WORLD ORDER (1994)).
counters with the law. As their darker-hued and somatologically African American children, spouses, in-laws, nieces, nephews, and grandchildren ... are policed because of race, the bedrock layer of patriotism will also begin eroding. Those who cannot accept the “anti-identity” inflicted by encounters with law enforcement—either through reactionary revolution or self-hatred—“may be among the most virulent of those prepared to kill for the sake of identity.”

Law enforcement's techniques of engagement have and continue to amass serious collateral damage, particularly ire. Law enforcement's random killing of African Americans under objectionable circumstances continues to sear. Roots posits: “Well into the twentieth century, violent resistance was considered a remedy for Fourth Amendment violations. Even third-party intermeddlers were privileged to forcibly liberate wrongly arrested persons from unlawful custody.” This right to resist unlawful arrest “stems from the right of every person to his bodily integrity and liberty of movement, among the most fundamental of all rights.” However, since the 1980s, many states eliminated this right and criminalized any sort of resistance to officers acting under the color of their official capacity. The effect? Roots suggests: “resisting arrest, defending oneself, or fleeing may also place an American in danger of being...
killed by police.

Police “appear excused whenever they open fire on an individual who threatens any harm—even utterly nonlethal—against them, such as a verbal threat to punch the officer combined with a step forward.” The police are practically above the law. Because of the race of the vast majority of those killed, this so-called policing of criminals is viewed as what some say it really is: an undeclared race war on African Americans.

The law is crucial in shaping the world as we know it. As Thomas Joo argues, “because of its peculiar position as the official voice of society, law plays an important role in the construction of social institutions and beliefs, even those that are not typically considered ‘legal.’” How the law treats racial groups legitimizes society’s treatment of those groups. Race-based subjugation was the raison d’etre of many American laws on the federal, state, and local levels. White Americans’ total domination of those individuals evidencing the mark of the bondsman (irrespective of “enslaved” or “free” status) spawned today’s race-based animus and suspicion of African Americans. As Joo notes, “when government acts are consistent with historical discriminatory assumptions and are difficult to explain on race-neutral grounds, racialized assumptions should be considered a plausible explanation.” Such race-based policing has illegitimately fostered a presumption of its propriety and has resulted in the Court’s acceptance of race-based policing as “reasonable.”

The legitimacy of race-based policing has now been resurrected. Namely, race-based policing is seen by many as appropriate post-September 11, given that those held responsible for that day’s death and

358. *Id.* at 708 (“Although the law clearly classifies such killings as unlawful, police are rarely made to account for such conduct in court.”).

359. *Id.* at 703, 704 n.107. Roots points out that the American constitutional order grants to every individual a privilege to stand his ground in the face of a violent challenger and meet violence with violence. *Id.* Roots notes:

A “duty to retreat” evolved in some jurisdictions... But with police, the courts have never imposed a duty to retreat... This, combined with the recurring police claim that an attacker might get close enough to grasp the officer’s sidearm, has meant, in practical terms, that an officer may repel even a minor physical threat with deadly force.

*Id.* The effect of this exception for law enforcement officers has been to grant an almost absurd advantage to police in ‘self-defense’ incidents. *Id.* (citing WAYNE R. LAFAVE & AU TIN W. SCOTT, CRIMINAL LAW 461 (2d ed. 1986).

360. Roots, supra note 323, at 703 n.107.

361. Andrews, supra note 96, at 490 (noting that “legal rules have consequences that reach far beyond their intended application from the standpoint of legal analysis” and “play an important part in shaping concrete and metaphysical aspects of the world we know”).


363. *Id.*

364. *Id.* at 4.
destruction were of Arab or Saudi descent or Muslim faith. On those facts, it may appear at first blush more difficult to argue the impropriety of race-based policing; in fact, knowing the ethnicity or religion of those who threaten us seems a factor to consider and respond to. To ignore the race and religious affiliation at this point would be suicidal.

In the United States, the problem with the notion of who is the “enemy” and who is the “enemy of my enemy” can have troubling answers. Certainly, to the foreign terrorist, “my enemy” is the United States; given the history of African Americans in this country, “the enemy of my enemy” is within and could easily be that population, making them the syllogistic friend of those who would do ill to the United States.

The legitimacy of race-based policing is not presumed because of its prevalence; its prevalence does, however, bear on its perniciousness. Given the race-based history of the United States and race-blind judicial review, officers shall always possess a reasonable suspicion of an individual based on race. However, reasonable suspicion is not the sole measure of reasonableness under the Fourth Amendment. Such seizures are unreasonable not only because they are unrelated to any constitutionally permissible outcome, but also because they illegitimately threaten national security by exacerbating already unstable racial fault lines at a time when the country can least afford discord.

CONCLUSION

“Whatever happens ‘the others’ will have deserved it."

Courts have been ineffectual in the need to eliminate race-based policing. In the early 1970s, the Supreme Court started limiting the rights of criminal defendants and, simultaneously, expanded police
discretion and deference. As a result, law enforcement agencies on all levels began to train their personnel to profile, ostensibly for drug couriers. In actuality, the courier profile was, quite naturally, reduced to one factor: a suspect's race.

How best to deal with race-based policing is the challenge of the Court. Colorblind judicial review fails to meet this challenge. As Rhonda Magee Andrews argues, "the color-blind approach, which ostensibly seeks to undermine the salience of race, replaces race-consciousness with an exaggerated individualism and, typically, a marked lack of compassion, and hence, that approach exacerbates the conditions of oppression which are the hallmarks of racially disparate treatment of people in society." Colorblind judicial review of race-based policing mocks juridical earnestness and legitimacy regarding so-called American constitutional values of fair-dealing and neutrality. More dangerously, it gives lie to courts' constitutional interpretation of Fourth Amendment doctrine. It is now common knowledge that, in the realm of race-based policing, what is taken as nigh irrefutable presumptions of prescient policing is, instead, law enforcement lotto, as reliable and predictive as the local evening occurrence of "Pick Four" or "Power ball" drawing.

372. Id.

373. Id. at 77 (noting that the federal Drug Enforcement Agency's "Operation Pipeline" was a "sustained effort" by the agency to train non-federal police to profile via vehicular stops on the nation's highways).

374. See, e.g., id. (noting that such drug courier profiles emphasized race of "typical" trafficker).

375. See Redlich, supra note 95, at 510.

376. Andrews, supra note 96, at 510 (critiquing the effectiveness and efficaciousness of the Supreme Court's colorblind jurisprudence regarding the Civil War Amendments); see also Devon W. Carbado, Erasing The Fourth Amendment, 100 MICH. L. REV. 946, 951 (2002) (noting that colorblindness "is precisely what prevents African Americans from becoming [B]lack no more").

377. In the event of arrest and criminal prosecution, the Fifth and Sixth Amendments necessarily become relevant.

378. See, e.g., Harris, supra note 134, at 13. Harris notes:

Data emerging from studies done over the last few years demonstrate conclusively that hit rates—the rates at which police actually find contraband on people they stop—run contrary to long-held "commonsense" beliefs about the effectiveness of racial profiling. The rate at which officers uncover contraband in stops and searches in not higher for [B]lacks than for [W]hites.... Contrary to what "rational" law enforcement justification for racial profiling would predict, the hit rate for drugs and weapons in police searches of African Americans is the same as or lower than the rate for whites. Comparing Latinos and whites yields even more surprising results. Police catch criminals among Latinos at far lower rates than among whites.

Id.
Clearly, the Fourth Amendment does not govern nor change the hearts and minds of mankind. Instead, the amendment is about the right, sanctity, personal comfort, integrity, privacy, and solitude of the individual. However, with respect to African Americans, the amendment's aegis, even the aegis's penumbra, disappear. Instead of freedom from oppression in the hands of officers who police based on race, it calls forth and triggers the subjugation of the right to be let alone. This collective unconscious should not prick only the former bondsmen's memories. The wraiths of former slavers, too, are summoned, requiring those of that origin to descend into the arch and abject brutality of that era. To adjudicate without regard to race today may seem procedurally sound and egalitarian; upon closer inspection it is not.

Some might argue that policing is not pretty and the elimination of its smash-mouth nature turns an occupation for the tough into one for the effete. These people might say that the very nature of policing requires brutality, violence, and a heaping portion of punishment. These arguments are distressing. More importantly, they are anachronisms. The characterization of the issue obscures the issue of race-based policing, as well as the discussion's validity in the context of constitutional rights, social justice, and moral legitimacy.\textsuperscript{379}

Considered by many as the "final word" in the United States, the Supreme Court is in the unique position of not only reflecting social values and mores, but constructing and actively enforcing them.\textsuperscript{380} Accordingly, American society's regard for race and those who have been "raced" is one of the areas shaped by the Supreme Court's jurisprudence.\textsuperscript{381} As Joo argues, "the legal treatment of racial groups disseminates and legitimates ideas about the supposed characteristics of members of those groups."\textsuperscript{382}

White Americans are comfortable with the notion of the "other." With respect to post-September 11 policing, those of Arab or Saudi descent, can be sacrificed. This allows White Americans the illusion of being protected against "them," not "us." The Court has further abdicated its responsibility in the eradication of racial discrimination because it has been cowed by a citizenry gripped by fear—preceding and certainly after September 11.\textsuperscript{383}

\begin{enumerate}
\item Loury, supra note 108, at 140–41.
\item Cf. Joo, supra note 3, at 2 ("[T]he law not only reflects social institutions but actively constructs them.").
\item See id. ("[R]ace is one of the social institutions shaped by law.").
\item Id.
\item See, e.g., Harris, supra note 3, at 74 (noting the difficulty of avoiding race-based policing and racial profiling post-September 11, "given the climate of fear we now live in and with the Attorney General of the United States declaring that those who raise questions about civil liberties at this juncture do no less than aid the terrorists who want to kill us") (citation omitted).
\end{enumerate}
Race-based policing is laziness of the worst kind. Police demand that they receive deference for their specialized training and experience and, at the same time, argue that they are mere humans, fraught with the occupational hazard of hypersensitivity from performing a dangerous job. Moreover, race-based policing hardens African Americans' suspicion into cynicism, which further corrodes citizens' vested interests in America's well-being. This country needs the opposite. South Africa's recent confrontation with its history of racialized violence provides guidance. In creating the Truth and Reconciliation Commission, South Africa recognized that only after acknowledging the fact of race and its results on the citizenry would the country's stability be ensured.

We, too, can acknowledge that our past is wrong, and change accordingly. In fact, the Supreme Court has recently done just that in the area of gay and lesbian rights. In Lawrence v. Texas, the Court noted the importance of stare decisis and its essentiality "to the respect accorded to the judgments of the Court and to the stability of the law." However, in that same case and while overruling Bowers v. Hardwick, Justice Kennedy reminded that stare decisis "is not, however, an inexorable command." Noting that Bowers no longer had precedential value and was, even at the time of the decision, wrongly decided, Kennedy's plurality noted that the case "does not withstand careful analysis." Noting that "there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in Bowers," the opinion asserted that "an emerging awareness" regarding not only the understanding held by the Court when that case was decided, but also society was relevant in assessing the constitutional issue before it.

384. Id. at 27.
385. See also David A. Harris, Law Enforcement's Stake in Coming to Grips With Racial Profiling, 3 Rutgers Race & L. Rev. 9, 7–19 (2001) (characterizing race-based policing's spawn as, inter alia, "corrosive cynicism" that hampers law enforcement's ability to obtain convictions in drug cases that depend upon fact finders determining testimony from officers credible).
386. Id. (quoting South African Minister of Justice, Dullah Omar: "We recognized that we could not forgive perpetrators unless we attempt also to restore the honor and dignity of the victims and give effect to reparation . . . we need to heal our country if we are to build a nation which will guarantee peace and stability.").
388. Id. at 2483.
390. Lawrence, 123 S. Ct. at 2483 (citations omitted).
391. Id. at 2475 (citing Justice Stevens' dissent in Bowers).
392. Id. at 2478.
393. Id. at 2474.
Unlike the foundation of *Terry*, *Bowers* has "sustained serious erosion," with criticism of the Court's decision characterized by Justice Kennedy as "substantial and continuing, disapproving of its reasoning in all respects, not just as to the historical assumptions." Moreover, the opinion was willing to view values shared with "wider civilization," citing decisions by European and other courts that conflicted with the *Bowers* rationale. In a rare moment of pointed and unabashed apology, Justice Kennedy read his decision from the bench, announcing that the Court's now overruled precedent "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Terry* and *Whren* should be next.

Finally, post-September 11, treatment by federal law enforcement officials of Afghani, Iraqi, Saudi, and other Arab or Muslim individuals creates separate, noteworthy pockets of additional ire that may soon haunt the United States. Specifically, when considering situations in which individuals were rounded up, arrested, and detained without hopes for release at Guantanamo Bay, the injustice detainees experienced is not insubstantial. These injustices ring most similar to the complaints waged by African Americans policed via race. As one prisoner said, "they treated me as guilty, but I was innocent." Like African Americans, this race-based treatment of those who appear to be Arab, Saudi, or Muslim has occurred since September 11 irrespective of citizenship. In fact, Volpp notes, "[m]any of those racially profiled ... are formally citizens of the United States, through birth or naturalization. But they are not considered

394. Id.
395. Id. (noting that five states declined to follow *Bowers*’ interpretation).
396. Id. at 2483 ("When our precedent has been thus weakened, criticism from other sources is of greater significance.").
397. Id.
398. Id. at 2475.
399. See Philip Shenon, Report on U.S. Antiterrorism Law Alleges Violation of Civil Rights, N.Y. Times, July 20, 2003, at A1 (revealing "credible accusations" by Muslim and Arab post-September 11 detainees against Justice Department and Bureau of Prisons officials). The department "made little effort to distinguish legitimate terrorist suspects from others picked up in roundups of illegal immigrants"). Id.
400. See Carlotta Gall & Neil A. Lewis, Inmates Released from Guantanamo Tell Tales of Despair, N.Y. Times, June 17, 2003, at A1 (detailing how prisoners from over forty countries have been held as suspects or material witnesses in the War Against Terrorism at Guantanamo Bay, the conditions suffered by the detainees, and the ambiguous legal status of those confined). Additionally, the United States Transportation Security Administration confirmed in July 2003 that it not only maintains a list of "potential terrorists" who are barred from air travel, but also a list of selectees, "individuals who are subject to strict security checks before they're allowed to board commercial aircraft." See Dave Lindorff, Grounding the Flying Nun, at http://www.salon.com/news/feature/2003/07/25/no_fly/ (July 25, 2003). In addition to a number of political activists, many Arab Americans are listed. Id.
citizens as a matter of identity, in that they in no way represent the nation.\textsuperscript{401}

What would it be like not to have a boogeyman, a bête noire? More importantly, what greatness could come of America if a sizable portion of its population was allowed, nay required, to not exist as the country’s collective bad actors, but as full citizens of measurable worth, men and women of honor? How would that paradigm shift augur for America’s future unity? To reach this vision, an a priori commitment, “a belief in the equal humanity of these sons and daughters of slaves,” is required.\textsuperscript{402} It has been said that, “mastering international communication can only come after we [ha]ve achieved a command of our intra-family dialogue.”\textsuperscript{403} This country “must necessarily commit to redressing the myriad present-day harms that result from the legacy and contemporaneous manifestations of racialist thought and policy.”\textsuperscript{404} A colorblind approach to race-based policing fails to achieve this goal of “corrective justice.”\textsuperscript{405}

The Constitution has to be interpreted in a way that benefits the country in the long run. Our democratic, representative government relies heavily upon the safeguards of judicial review to check and correct abuses of power.\textsuperscript{406} Accordingly, the judiciary is required to act in the interest of the citizenry by prohibiting racial scapegoating, undue and unchallenged deference to law enforcement, and rampant race-based abuses in the name and under the guise of crime fighting or national security.\textsuperscript{407} As Maalouf argues, “for it is often the way we look at other people that imprisons them within their own narrowest allegiances. And it is also the way we look at them that may set them free.”\textsuperscript{408}

In short? Let African Americans alone.

\textsuperscript{401} Volpp, supra note 4, at 1592 (arguing that the “shift in perceptions of racial profiling is clearly grounded in the fact that those individuals who are being profiled are not considered to be part of ‘us’”).

\textsuperscript{402} See LOURY, supra note 108, at 12.

\textsuperscript{403} Warner Lawson & Lateef Mtima, Looking Outside and In, LEGAL TIMES, Dec. 4, 2001, at 53 (discussing the need for Americans to hold fast to the ideals of our society and engage the world community in an exchange of ideas, noting that “technological superiority no longer grants us any special stature in the discourse”).

\textsuperscript{404} Andrews, supra note 96, at 486.

\textsuperscript{405} Compare id. (finding inadequate both race-blind constitutional remedies and intentional harm focus by the Supreme Court’s Fourteenth Amendment decisions).

\textsuperscript{406} Joo, supra note 3, at 4.

\textsuperscript{407} Id.

\textsuperscript{408} MAALOUF, supra note 280, at 22.