ARTICLES

Whitewashing the Fourth Amendment

DANIEL S. HARAWA*

A conventional critical race critique of the Supreme Court and its Fourth Amendment jurisprudence is that it erases race. Scholars argue that by erasing race, the Court has crafted doctrine that is oblivious to people of color's lived experiences with policing in America.

This Article complicates this critique by asking whether it is solely the Court that is doing the erasing. It explores how race was—or more accurately, was not—litigated in seminal Fourth Amendment cases scholars have targeted for attack: Florida v. Bostick*,* Illinois v. Wardlow*, and* United States v. Drayton*. As the Article shows, race was not raised, let alone litigated, in these important Fourth Amendment cases, even though the defendants in all three cases were Black.*

This Article therefore rounds out the racial critiques of the Court and its Fourth Amendment jurisprudence. Rather than solely blame the Supreme Court, maybe we should hold attorneys partially responsible for the erasure of race. Perhaps by not raising race, the profession has given the Court license to ignore race in its Fourth Amendment case law.

This Article underscores the need to reevaluate how we as a profession choose to address or ignore race. It proves that the profession more broadly is complicit in the whitewashing of the Fourth Amendment. And importantly, the insights of this Article extend beyond criminal law and even beyond race. There is much work to be done to better understand how lawyers contribute to marginalization under law.

TABLE OF CONTENTS

* Associate Professor of Law, Washington University in St. Louis. Many thanks to Rachel Barkow, Jeannine Bell, Evan Bernick, Bennett Capers, Blanche Cook, Travis Crum, Dan Epps, Trevor Gardner, Barry Friedman, Brandon Hasbrouck, Randy Hertz, Alexis Hoag-Fordjour, Renée Hutchins, John Inazu, Yuvraj Joshi, Peter Joy, Emma Kaufman, Andrea Katz, Pauline Kim, Bob Kuehn, Katie Meyer, Martha Minow, Jamelia Morgan, Erin Murphy, Kerrel Murray, Kim Norwood, Ngozi Okidegbe, Rafael Pardo, Daniel Richman, Maneka Sinha, Jonathan Smith, and Kate Weisburd for reading and commenting on earlier drafts of this Article. Thanks also to participants in the Chicagoland Junior Scholars Conference, Clinical Law Review Writers' Workshop, and faculty workshops at Washington University in St. Louis, the University of Maryland, and the University of Oklahoma. Deepest gratitude to David DePriest, Faith Katz, Yaseen Morshed, and Malak Shahin for their research assistance and inspiring conversations. Finally, I am grateful to *The Georgetown Law Journal* editors, who worked hard to make this piece better. This publication was supported in part by a Washington University in St. Louis Center for the Study of Race, Ethnicity & Equity grant. Mistakes are my own.

INTRODUCTION

The policing of Black people[1] is a frequent conversation topic both in and outside the ivory tower. It is easy to tick off the facts. Police stop Black drivers and pedestrians at higher rates than non-Black drivers and pedestrians.[2] After the stop, police are more likely to search Black people than non-Black people.[3] Then, police are more likely to arrest and jail Black people than non-Black people.[4] Moreover, during these stops, officers are more likely to use force, including deadly force, against Black people than non-Black people.[5]

None of this is new. America's racialized policing problem is frighteningly familiar. So familiar, that it may seem quaint to start a law review article with information many people know. How to remedy racial disparities in policing, or whether they can even be remediated, has been a focus of popular,[6] political,[7] and academic discourse.[8]

---

1. I acknowledge at the outset that this Article is mostly framed in the Black–white binary. *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547–48 (2011) (critiquing scholars for ignoring the racial dynamics of Fourth Amendment jurisprudence and policing of Latinos). I do not mean to erase the experiences of other people of color and other marginalized communities. Indeed, much more exploration needs to be done, and one article could not begin to cover all the unique experiences of various people across the country when it comes to interactions with police. However, given the disparate policing of Black people, the singular history of policing Blackness, and that I am a Black man, this is where this Article devotes its attention. *See generally* Angela J. Davis, *Introduction* to POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, xi, xiv–xvii (Angela J. Davis ed., 2017) (explaining why the book focuses on Black men). I hope this Article will inspire further explorations of the whitewashing of race beyond criminal law and beyond the Black–white binary.

2. *See* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020) (collecting traffic stop data); Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ (collecting studies about racial disparities in traffic stops and pedestrian stops).

3. *See* Pierson et al., *supra* note 2, at 738.

4. *See* ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 7 (May 2018), https://www.issuelab.org/resources/30758/30758.pdf [https://perma.cc/C4GC-JBBP].

5. *See, e.g.*, Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, NATURE, July 2, 2020, at 22, 22; Susan Scutti, *Police More Likely to Use Force on Blacks than Whites, Study Shows*, CNN (July 12, 2016, 6:08 AM), https://www.cnn.com/2016/07/12/health/police-use-of-force-on-blacks/index.html [https://perma.cc/34VN-CF8X].

6. *See* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 694–95 (2022) (describing the widespread Black Lives Matter protests rallying against police brutality).

7. *See* Nicholas Fandos, *Democrats to Propose Broad Bill to Target Police Misconduct and Racial Bias*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/06/us/politics/democrats-police-misconduct-racial-bias.html.

8. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1788–90 (2020) (explaining that "[l]egal scholarship is undergoing a profound reckoning with the

A core feature of the academic conversation surrounding racialized policing has been an examination of Fourth Amendment doctrine and the role it plays in the problem. For decades, legal scholars using critical race insights have explored how the Supreme Court's Fourth Amendment jurisprudence has (depending on the scholar) led to, blessed, or perpetuated the over-policing of Black people.[9] A crude summary of the scholarly critiques (a more nuanced picture is painted in Part I) is this: Fourth Amendment doctrine gives police license to target and engage Black people for pretextual reasons.[10] The way Fourth Amendment doctrine has evolved gives police increasing dominion over Black bodies (for example, permitting officers to order people out of their cars for the most minor of infractions and allowing them to conduct intrusive frisks with minimal suspicion).[11] In formulating legal standards, the Court's Fourth Amendment jurisprudence elides the lived experiences of Black people and ignores how those experiences may color police interactions.[12] Over the years, the Court has essentially rendered officers' racial biases irrelevant to Fourth Amendment doctrine, which is troubling given the low bar officers must clear to justify seizing someone, including by using force.[13] In short, in many ways, the Court's Fourth

centrality of violence to policing in the United States" and summarizing some of the arguments); *see also* India Thusi, *Policing Is Not a Good*, 110 GEO. L.J. ONLINE 226, 226–32 (2022) (providing a thorough review of policing literature).

9. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246–47 (2010); I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654–55 (2018); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27, 33 (1998); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 149 (2012); Diana R. Donahoe, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 621 (2018).

10. *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 151–62 (2017) (providing hypotheticals that explore the vast discretion of police when conducting stops); Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 251 (2021) (arguing that the Court's Fourth Amendment jurisprudence "excuses" police racism and then "enshrines it within the limits of constitutional protections").

11. *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312–17 (explaining the immense power police have during traffic stops); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 419–20 (2018) (explaining the intrusiveness of frisks).

12. *See, e.g.*, Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991) ("The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion is naive, it produces distorted Fourth Amendment rules and ignores the real world that police officers and black men live in.").

13. *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 428–29 (1997); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1469, 1477 (2018) ("The prescriptive power of the Supreme Court has entrenched a knowledge and discourse around police violence that confines it solely to the territory of what we term the *individualizing* Fourth Amendment, which is a constitutional terrain that stands in opposition to acknowledging the pervasive racialized tensions between police and racial minorities that underlie many violent police interactions." (footnote omitted)); *see also* Davis, *supra*, at 442 ("The race-based

Amendment jurisprudence has "institutionalized racial domination and entrenched tension between the police and minorities."[14]

This Article does not question any of this.

In critiquing the development of Fourth Amendment doctrine and its relationship to the overpolicing of Black people, however, scholars routinely lay the blame at the feet of the Supreme Court. They contend that it is *the Court* that ignores or refuses to discuss race and the racialized realities that flow from its opinions.[15] And some scholars believe that this ignorance is by design.[16]

But what if the erasure of race happens before the Court renders its decisions or before the case ever reaches the Court? Scholars rarely explore how *lawyers* present cases to the Court and what *that* portends for the Court's decisionmaking. This Article engages that discussion. It identifies some of the "worst offenders"—those Fourth Amendment cases that scholars have singled out for their ignoring race[17]—and examines how the cases were litigated. The Article asks whether the Court *is* singlehandedly to blame for the erasure of race, as the literature mostly makes it seem, or whether the blame bleeds more broadly. And if there is blame to go around, the Article contemplates how that should factor into calls for reform and re-envisioning.

As the Article lays out, the erasure of race in the Fourth Amendment context often happens long before the Supreme Court hands down its opinions. The parties—*through their lawyers*—sidestep issues of race too. In fact, in many of the Fourth Amendment cases that scholars have most heavily critiqued for ignoring race, *none* of the parties focused on race at the Court or in the lower court proceedings. If there was any extended discussion of race, it was by amici. Indeed, in many cases, if you only looked at the parties' briefing, you would not even know the defendant's race (spoiler alert: in many of the seminal cases, the defendants were Black or Latino).[18] What does this mean for the broader racial critique of

---

pretextual traffic stop tears a hole in the fabric of our constitution by allowing discriminatory behavior to invade the criminal justice system. Faced with the opportunity to repair the hole, the Supreme Court chose to ignore it, leaving African-Americans and other people of color without a clear and effective remedy for this discriminatory treatment.").

14. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1551 (2019).

15. Carbado, *supra* note 9, at 976 (describing "the Court's obfuscation of [the] dynamics" of race in police encounters); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 340 (1998) (criticizing the Court for "neglecting racial concerns when constructing Fourth Amendment rules that govern police-citizen interactions").

16. *See, e.g.*, Butler, *supra* note 9 (contending that the Court, by "rarely mention[ing] race," is invested in "a project . . . to expand the power of the police against people of color, especially blacks and Latinos").

17. *See infra* Part I. These cases are also widely taught in law school criminal procedure courses. *See generally, e.g.*, JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, CRIMINAL PROCEDURE: INVESTIGATING CRIME (7th ed. 2020); STEPHEN A. SALTZBURG, DANIEL J. CAPRA & DAVID C. GRAY, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE: CASES AND COMMENTARY (12th ed. 2022); CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, CRIMINAL PROCEDURE: CASES AND MATERIALS (2d ed. 2018).

18. *See, e.g.*, Carbado, *supra* note 10, at 148 fig.1 (providing a table of Supreme Court Fourth Amendment cases involving Black defendants).

the Court's Fourth Amendment jurisprudence? Have scholars been directing blame at the wrong target?

Given the makeup of our profession, maybe we should not be surprised to learn that lawyers share some blame for the erasure of race. Although there is no nationwide data on this point,[19] office-level data (including on federal defender offices), coupled with national statistics on racial diversity within the legal profession more broadly, would lead one to logically conclude that public defender offices are overwhelmingly white.[20] The diversity-within-the-profession problem becomes worse when you look at who litigates cases before the Court.[21] The answers to integral Fourth Amendment questions (for example, whether one feels "free to leave" or voluntarily consents to a search or their reason for avoiding police interaction altogether) can look different depending on someone's race.[22] A white lawyer may not fully appreciate these differences when litigating Fourth Amendment issues. Or a white lawyer may recognize the differences but not feel comfortable raising them.[23] When considering who is litigating the cases, the erasure of race makes more sense. That mostly white lawyers litigate cases before the Supreme Court contextualizes the decision of many Supreme Court advocates to leave the discussion of race to their racial-justice-oriented friends (amici).[24] Although amici may be able to amplify racial arguments or supply necessary context, relegating important issues to amicus briefing is usually unwise litigation strategy.

It would be slightly strange to discuss the development of doctrine without mentioning the courts because who presides undoubtedly makes a difference. As such, even when lawyers fall short in highlighting important issues of race in the Fourth Amendment context, perhaps we should still expect judges, and especially

---

19. *See, e.g.*, Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 CALIF. L. REV. ONLINE 1, 5–6 (2021) (lamenting the lack of comprehensive data on "how race animates the public interest law sector").

20. *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1496–97, 1497 n.20 (2021) (collecting available data to conclude that the indigent defense "system overwhelmingly appoints white lawyers to represent . . . Black clients").

21. *See* Theodoric Meyer & Tobi Raji, *Historically Diverse Supreme Court Hears Disproportionately from White Lawyers*, WASH. POST (Oct. 30, 2022, 5:42 PM), https://www.washingtonpost.com/nation/2022/10/30/supreme-court-justices-diversity-lawyers/; *see also* Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 57–58 (2021) (describing and decrying the lack of diversity among the Supreme Court Bar).

22. *See, e.g.*, Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys* (describing how Black parents specially educate their children on how to interact with police), *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 1, at 57, 64–65; Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (describing "the talk" that Black parents give their children on how to interact with police to stay alive); United States v. Black, 707 F.3d 531, 541 (4th Cir. 2013) (same); *see also* Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 892 (2020) (arguing that "The Talk" may be ineffective at curbing racialized policing).

23. *See, e.g.*, Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2091 (2005) (giving an example of where a white lawyer did not raise the argument that the client was stopped because of their race).

24. *See, e.g.*, *infra* Section I.B.4.

Supreme Court Justices, to do better. But why? Since *Terry v. Ohio*[25]—viewed by many as the godfather of modern racialized policing[26]—all but three of the Justices have been white (only a year before *Terry* when Justice Thurgood Marshall joined the bench, *all* of the Justices had been white).[27] None of the Justices, save one, had extended experience representing people ensnarled in the criminal legal system.[28] Most Justices came from middle- to upper-class backgrounds.[29] And an overwhelming majority of the Justices' clerks have been white.[30] Social scientists have documented how one's identity and experiences (faux outrage at Justice Sonia Sotomayor's "wise Latina" comment aside)[31] shape one's view of the world.[32] And one's view of the world necessarily shapes one's view of the law.[33] So, then, if Justices do not have lived experiences to draw from

25. 392 U.S. 1 (1968).

26. *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998) (opining that *Terry* "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide"); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 14 (2011) (contending that *Terry* "enabled racial profiling to flourish"); Yankah, *supra* note 14, at 1573 (calling *Terry*'s "sublimation of race in policing . . . the beginning of [the Court's] modern policing case law").

27. Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All but 6 Have Been White Men*, CNN (Sept. 5, 2018, 8:56 AM), https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html [https://perma.cc/9C5V-HMPW].

28. *See* Adrian Blanco & Shelly Tan, *How Ketanji Brown Jackson's Path to the Supreme Court Differs from the Current Justices*, WASH. POST (Mar. 20, 2022), https://www.washingtonpost.com/politics/interactive/2022/ketanji-brown-jackson-school-career/ (noting that Justice Jackson is "the first justice with experience as a federal public defender and the first one since Justice Thurgood Marshall with significant experience as a criminal defense attorney on behalf of poor defendants").

29. *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1537 (2010) (asserting that the Justices are "overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities" (quoting Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189 (1998))).

30. *See* Debra Cassens Weiss, *Supreme Court Law Clerks Are Still Mostly White Men; Which Justices Had the Most Diverse Clerks?*, ABA J. (Dec. 12, 2017, 8:00 AM), https://www.abajournal.com/news/article/supreme_court_law_clerks_are_still_mostly_white_men_which_justices_had_the [https://perma.cc/W88M-4DZ8] (noting that "[s]ince 2005 . . . 85 percent of all the justices' law clerks were white"). Indeed, people of color are underrepresented in clerkships at all levels. *See* Erik Ortiz, *Clerkships Remain Largely White. Can Law Students of Color Shake Up the Status Quo?*, NBC NEWS (July 4, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/clerkships-remain-largely-white-can-law-students-color-shake-status-n1272973 [https://perma.cc/4WCL-8XVG].

31. *See* Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, 32 WOMEN'S RTS. L. REP. 105, 135–36 (2011) (explaining that Justice Sotomayor's comments were not out of step with comments made by other nominees; she was simply reflecting that a judge's background makes a difference in their decisionmaking).

32. *See, e.g.*, Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 130 (1999). This type of identity-based information filtering is often referred to as "experiential bias." *See* Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 125 (2014) ("The meaning of 'experiential bias' is largely self-evident; people make decisions based on what they have learned from their experiences. . . . Myriad individual identity traits inform a person's experiential biases. Race is one of the most obvious . . . .").

33. *See* Rush, *supra* note 32, at 147–48 (describing studies showing that judicial diversity can affect decisionmaking); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44

when understanding how their decisions may influence people of different races, education is necessary. With advocates not doing that educating, the phenomenon of the Court ignoring race becomes much less remarkable.

Speaking of education, the academy bears some blame too.[34] For too long, legal education was content with teaching a sterilized version of the law, as if it does not operate within and perpetuate power structures and hierarchies.[35] For instance, even though racial bias is "an unmistakable property of the criminal law that humans have implemented and operated in the United States[,] . . . the curricular model of substantive criminal law is color-blind."[36] If lawyers and judges cannot see or refuse to acknowledge the racialized ways criminal law operates, their erasure of race is in some sense just an outgrowth of their legal education.[37]

Rather than focusing on the Supreme Court or the judiciary, this Article takes aim at the profession. More importantly, it is a plea for us all to do better. By focusing on the Supreme Court, race and Fourth Amendment scholarship has unintentionally minimized the role lawyers and educators have played in the erasure of race. And this erasure extends beyond the Fourth Amendment context. Look under the rock of most colorblind jurisprudence and you will probably find that the profession—academy included—is complicit. But given the scholarly attention to the erasure of race in the Fourth Amendment context and the movement to examine and reimagine the policing of people of color,[38] it is as good a place

STAN. L. REV. 1217, 1217 (1992) (explaining how Justice Marshall's unique experiences and perspectives influenced decisionmaking); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) (asserting that "it is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them").

34. *See, e.g.*, Alice Ristroph, Essay, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635 (2020) (arguing that "American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration"); Bennett Capers, Essay, *The Law School as a White Space*, 106 MINN. L. REV. 7, 33–34 (2021) (asserting that law schools teach "an 'allegiance to a legal system that since its inception has systematically oppressed black people'" (quoting Derrick A. Bell, Jr., *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 TOL. L. REV. 539, 548)); Shaun Ossei-Owusu, Essay, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 414 (2021) ("[L]aw schools are key sites for the reproduction of our penal status quo, yet are relatively ignored in criminal justice scholarship. Legal education perpetuates some of the excesses of our criminal justice system."); Cynthia Lee, *Race and the Criminal Law Curriculum* (noting that "[m]any law professors teach criminal law without any explicit acknowledgement of race and its impact on the criminal law"), *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado et al. eds., 2022).

35. *See, e.g.*, Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), https://inquest.org/making-penal-bureaucrats/ [https://perma.cc/ENL4-MYHB] (contending that the legal academy "has not been fully responsive to longstanding appeals to include legally relevant conversations about social inequality in our teaching").

36. Ristroph, *supra* note 34, at 1671. However, it is important to note that not all professors teach criminal law through such an uncritical lens.

37. *See* Ossei-Owusu, *supra* note 35.

38. *See, e.g.*, Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 632–33 (describing the "new police criticism" of the Black Lives Matter movement); Akbar, *supra* note 11, at 460–73 (explaining "the Vision" of the Movement for Black Lives); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058 (2017) ("The Black Lives Matter era has catalyzed meaningful discussion about the tense relationship between the police and many racially and economically isolated communities.").

as any to conduct a more complete examination of what is really going on when it comes to the whitewashing of the law.[39]

This Article proceeds in three parts. Part I examines an aspect of Fourth Amendment jurisprudence with a particularly racialized valence—the choice to engage with police, including consent and evasion. With this frame in mind, this Part will examine some racial critiques of the development of Fourth Amendment doctrine, in the process highlighting three post-*Terry* cases scholars have identified as some of the most harmful proponents of colorblind jurisprudence: *Florida v. Bostick*,[40] *Illinois v. Wardlow*,[41] and *United States v. Drayton*.[42] This Part then explores how the cases were litigated before the Court, revealing that the critiques are often only half complete. Although it is true that the Supreme Court's colorblind Fourth Amendment doctrine inflicts real harm on communities of color, the Supreme Court is not the only responsible party. Many times, long before the Court hands down an opinion, lawyers have excised race from the case. It also discusses that while not raising race may perhaps have once been a defensible litigation strategy, we know today that the strategy is largely ineffectual. It is time for something new.

Part II drills down on what lessons we should learn from this tale of widespread whitewashing. Weaving together conversations happening throughout criminal law scholarship and beyond, the findings of this Article bolster the calls for diversity within public defender offices, the Supreme Court Bar, and the judiciary. They support efforts to reform law school criminal law curricula. And they demonstrate that if we want the Court to recognize race and grapple with its influence over the law, then we as a profession must lead the way by engaging in race-conscious lawyering (after adequate training), at some points giving way to allow marginalized communities the ability to tell their own stories.[43]

Finally, Part III will grapple with the important rejoinder: What difference will raising race make? If the Court is hell-bent on blinding itself to race, will lawyers' arguments really matter? As this Part elaborates, it is not at all clear that lawyers raising race *will* be meaningless, especially in lower courts, where there are judges who, when applying malleable Fourth Amendment standards or state constitutional equivalents, are willingly engaging in conversations on

---

39. By using the term whitewashing, I mean to connote some intentionality to the phenomenon of viewing the law through a white lens because treating whiteness as the default *is* a racialized choice. *Cf.* I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 800 (2022) ("It is as if 'White' is not a racial classification. Race has instead become about the marginal status of Black and Brown people rather than the invisible power and punitiveness that Whiteness facilitates."). The same is true when I use the term erasure. I do not mean to suggest that there is some neutral race-less state. Rather, by erasure I mean, again, erasing a person of color's experiences and defaulting to whiteness.

40. 501 U.S. 429, 431–33 (1991) (concerning whether a Black bus passenger was seized under the Fourth Amendment when two armed police officers approached to talk to him).

41. 528 U.S. 119, 121–22 (2000) (concerning whether a Black man's flight from police in a "high crime" neighborhood gave police reasonable suspicion to stop him).

42. 536 U.S. 194, 197 (2002) (concerning whether two Black bus passengers voluntarily consented to a search of their persons when officers asked them in the close confines of a bus).

43. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1648.

race.[44] In support of this, the Part provides examples of lawyers litigating race in the Fourth Amendment context and judges addressing these arguments in their opinions.[45] But even if courts do not adjust their decisionmaking to more honestly account for race, this Part contends that there is expressive value and laden power in insistent and persistent truth telling. In the words of Professor Derrick Bell, if nothing else, "we must maintain . . . a hard-eyed view of racism" and not be deterred in "the struggle against [it or] else the erosion of black rights will become even worse than it is now."[46]

One final note. This Article is in no way blaming criminal defense lawyers for the state of our criminal legal system writ large. And it does not suggest that criminal defense attorneys should be engaged in some broader racial justice mission that is divorced from what is best for their clients.[47] It *is* to say that at times, maybe even *most* times, a client's race is critical to their representation. Fourth Amendment litigation and the cases discussed in this Article are the perfect examples of where this is so.

I. WHO ERASES RACE?

When a police officer walks up to you on the sidewalk, or pulls behind you on the street, race can influence both how you react and what happens next. You may view police presence as benign or potentially dangerous. Depending on who you are, where you are, or both, if you believe you have done nothing wrong, you may shrug off the sight of police as a comforting reminder that they are there to serve and protect.[48] Or, depending on who you are, where you are, or both, if you believe you have done nothing wrong, the sight of police may still inspire dread that you may be stopped, searched, detained, hurt or even killed for no apparent reason other than the color of your skin.

By protecting against unreasonable searches and seizures, the Fourth Amendment establishes the parameters for police–citizen interactions.[49] Or as

44. *See, e.g.*, Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027, 1031–39 (2021) (discussing the race-conscious Fourth Amendment jurisprudence of Fourth Circuit Judge Roger L. Gregory).

45. *See generally, e.g.*, Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022) (discussing judges whose jurisprudence reflects a fight against systemic racial injustice).

46. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364, 378 (1992) (advocating for "Racial Realism," where racial justice advocates "refine the work of the [legal] Realists" by taking a "much narrower" focus on racial inequality); Mario L. Barnes, *Afterword: Everything Old*, 6 U.C. IRVINE L. REV. 243, 244 (2016) (explaining that Critical Race Theory "expanded beyond Legal Realism and [Critical Legal Studies], to focus on racial subordination and the structural dimensions of uneven relationships to power").

47. Here, I agree with Professor Abbe Smith: "To blame criminal defense lawyers for the perpetuation of racism and racial stereotypes exaggerates the influence of the least powerful actors in the criminal justice system." Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1602 (1999).

48. *See* I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 222 (2006) (imagining Supreme Court Justices being the targets of the type of police action they confront in their cases and saying it would never happen).

49. *See* U.S. CONST. amend. IV.

Justice Louis Brandeis memorably put it, the Fourth Amendment protects the "most valued" "right to be let alone."[50] For almost two centuries, whether a search or seizure was "reasonable" was guided by whether the police had a warrant or probable cause.[51]

Yet in *Terry v. Ohio,* the Supreme Court curtailed this "most valued" right when it sanctioned police conducting "limited" seizures and searches—known as *Terry* stops and frisks—based on mere "reasonable suspicion" that a person may have committed a crime and may be armed and dangerous.[52] *Terry* marked a sea change in Fourth Amendment law. Not because stop-and-frisks were not happening—they were.[53] But because now, after *Terry*, they were constitutionally permissible based on a malleable standard that police officers could easily exploit. *Terry* "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide."[54] And in the decades since *Terry*, the right to be let alone has been continually eroded by the Court, with the Court making the already police-generous reasonable suspicion standard increasingly more generous, and with the Court carving out many police–citizen interactions from the Fourth Amendment's ambit altogether.[55]

This Part engages with the notion that the "choice" to interact with police—or the ability to be "let alone"—is often race-dependent, yet Fourth Amendment doctrine is race oblivious.[56] This Part conducts this examination through the lens of three cases in which the Court failed to engage with the particularized precarity

50. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

51. *See* Dunaway v. New York, 442 U.S. 200, 207–08 (1979) ("Before *Terry v. Ohio*, the 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." (citation omitted)).

52. *See* 392 U.S. 1, 12, 30 (1968); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962–63, 963 n.19 (1999).

53. *See, e.g.*, David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 502 (2018).

54. Maclin, *supra* note 26.

55. *See, e.g.*, Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 1019–20 (2010) (documenting cases in which the Court expanded the scope of permissible stops based on reasonable suspicion); Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 462 (2004) (observing that post-*Terry* "Supreme Court decisions . . . continuously narrow[ed] those situations that are subject to the reasonableness requirement" and that "[t]he effect has been to eliminate very coercive police encounters from the scope of the Fourth Amendment guarantee of reasonableness, freeing the police on those occasions from all judicial oversight"); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1266 (2017) ("[M]any police stops and the accompanying questions—'*Where are you going?*' '*Do you live nearby?*' '*Are you visiting someone here?*' '*Can I see some identification?*'—are no longer categorized as stops regulated by the Fourth Amendment at all but rather are deemed consensual encounters.").

56. Professor Devon Carbado explains it this way: modern Fourth Amendment doctrine "legitimizes and renders invisible a particular kind of precarity: racial insecurity," meaning "a racial sense of exposure, anxiety, and vulnerability that some people experience in the context of police encounters." Carbado, *supra* note 10, at 142; *see also* Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2251 (2017) ("From the civilian's perspective, racial anxiety refers to the fear of being the victim of police racism, leading to worries that one will be subjected to police brutality on the one hand and rude, disrespectful and harassing treatment on the other.").

Black people may feel when dealing with police: *Florida v. Bostick*,[57] *Illinois v. Wardlow*,[58] and *United States v. Drayton*.[59] In conducting this analysis, this Part will provide some sociohistorical context for each case. It will summarize the decision and engage with racial critiques of that decision. Then, for each case, it will illuminate how the cases were litigated, focusing specifically on the way racial arguments were (or were not) briefed before the Court.

Why these three cases? The racial critiques of Fourth Amendment jurisprudence often take two tacks. One critique (just discussed) is that the Court ignores how a person's race may affect their interactions with police, including how they may perceive the coerciveness of the encounter. A second common critique is that Fourth Amendment doctrine gives police officers near-unfettered discretion while ignoring officers' subjective motivations, permitting officers to rely on their racial biases when performing their duties.[60] This Part, and the cases it dissects, focuses on the first critique. It centers these three cases because they were all important to the doctrinal development of how people purportedly experience police, and they all involve Black defendants. Although perhaps litigating a racialized perspective on policing makes little sense in a case involving a white client (more on this in Part III), there is no excuse for such oversight in these cases, especially considering their contexts. If anything, these cases were ideal vehicles for lawyers to highlight the experiences of their Black clients; thus, it is important to explore how the lawyers who litigated the cases told their clients' stories. These cases are therefore uniquely representative because they: (1) have been heavily critiqued in legal scholarship for erasing race; (2) involve situations in which the client's (or a reasonable person in their position's) perception of police is relevant to the Fourth Amendment analysis; and (3) involve Black defendants, making race particularly salient.[61]

Over the course of this Part, one thing should become clear: though the scholarly critiques on the colorblind evolution of Fourth Amendment doctrine are entirely apt, they are far too myopic in their focus on the Supreme Court. As this Part concludes, though there may well have been strategic reasons for not

57. 501 U.S. 429 (1991).

58. 528 U.S. 119 (2000).

59. 536 U.S. 194 (2002).

60. Professor Anthony Thompson calls this the "raceless world of Fourth Amendment jurisprudence," when the Court refuses to "consider illicit racial motivation as a factor that can undermine the validity of a search, seizure, stop, or frisk that rests on facts sufficient to satisfy the applicable quantum of suspicion." Thompson, *supra* note 52, at 962, 980–81. Cases that would fall into this bucket include *Whren v. United States*, 517 U.S. 806, 810, 813 (1996); *see* Thompson, *supra* note 52, at 978–81, and *Atwater v. City of Lago Vista*, 532 U.S. 318, 324, 354–55 (2001).

61. It is important to note that although this Part focuses on cases involving Black defendants, many landmark Fourth Amendment cases involve Latino defendants. *See generally* Carbado & Harris, *supra* note 1 (discussing, among other cases, *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984), *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)). As discussed briefly in Section I.D, *infra*, the lawyers in these cases did proactively litigate race.

litigating race, a more fulsome accounting shows that race was minimized, ignored, or trivialized before the Court even heard the case.

A. THE FREEDOM TO LEAVE AND *FLORIDA V. BOSTICK*

1. The Context

In October 1982, President Ronald Reagan declared a War on Drugs,[62] which escalated over the ensuing decade. According to the Reagan Justice Department, the "urban communities" were "besieged by illegal drugs," with the most "pressing" problem being the "violence associated with street-level drug dealing—particularly crack cocaine," the use of which was widely associated with Black people.[63] In the words of Reagan, "drugs are bad," and he was "going after them." [64] And as the War on Drugs raged on, the number of Black people in prison exploded.[65]

Of the many weapons in the War on Drugs' arsenal, there was a "common tactic" that federal and local law enforcement deployed: bus interdictions.[66] Law enforcement would "board a commercial bus at an intermediate stop and, with the permission of individual passengers, ask questions, examine identifications and tickets, and conduct searches."[67] Bus interdiction programs were purportedly designed "to assure the safety of passengers and to prevent public transport from becoming a haven for narcotics trafficking."[68] A bus interdiction was at the center of *Florida v. Bostick*.[69]

2. The Case

In the summer of 1985, Terrance Bostick, then a twenty-nine-year-old Black man, boarded a Greyhound bus in Miami heading to Atlanta.[70] Mr. Bostick was

---

62. President Ronald Reagan & Nancy Reagan, Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982) (available at https://www.reaganlibrary.gov/archives/speech/radio-address-nation-federal-drug-policy [https://perma.cc/5NQE-8TY4]). Or maybe it is more accurate to say that Reagan vowed to continue the "war on drugs" that President Nixon started. *See* Benjamin T. Smith, *New Documents Reveal the Bloody Origins of America's Long War on Drugs*, TIME (Aug. 24, 2021, 12:49 PM), https://time.com/6090016/us-war-on-drugs-origins/.

63. Mark H. Moore & Mark A.R. Kleiman, *The Police and Drugs*, PERSPS. ON POLICING, Sept. 1989, at 1, 1–2; *see* William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1811 (1998) (discussing the association of crack with Black communities).

64. Reagan & Reagan, *supra* note 62.

65. *See, e.g.*, Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 58–65.

66. United States v. Lewis, 921 F.2d 1294, 1295 (D.C. Cir. 1990).

67. *Id.*

68. United States v. Flowers, 912 F.2d 707, 710 (4th Cir. 1990).

69. 501 U.S. 429, 431 (1991) ("Drug interdiction efforts have led to the use of police surveillance at airports, train stations, and bus depots. Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions. Broward County has adopted such a program. County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage.").

70. *See* Initial Brief of Petitioner at 3, Bostick v. State, 554 So. 2d 1153 (Fla. 1989) (No. 70,996); Brief of Respondent, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89-1717), 1990 WL 505714, at *1. Internet sleuthing using the Florida Department of Corrections website was needed to discover Mr. Bostick's race. *See Inmate Release Information List*, FLA. DEP'T CORR: CORR. OFFENDER NETWORK,

lying down in the back of the bus when it stopped in Fort Lauderdale to pick up more passengers.[71] While in Fort Lauderdale, two police officers "wearing green 'raid jackets'" boarded the bus.[72] The bus driver closed the doors behind them, trapping the passengers on the bus with the officers.[73] Both officers were armed.[74] After eyeballing the passengers, the officers decided to approach Mr. Bostick.[75] One officer stood in the aisle in front of Mr. Bostick's seat, while the other stood a little further back.[76] The officer closest to Mr. Bostick flashed his badge and asked for Mr. Bostick's ticket and identification.[77] Mr. Bostick gave the officer both; everything was in order.[78] Unsatisfied, the officers told Mr. Bostick they were narcotics agents looking for drugs and asked if they could search his luggage.[79] The officers claimed they told Mr. Bostick he did not have to comply; that point was disputed.[80] It was also disputed whether Mr. Bostick next consented to the search.[81] Still, the officers ended up looking through Mr. Bostick's bag and finding cocaine.[82]

Mr. Bostick contended the officers violated his Fourth Amendment rights, arguing that he was unlawfully "seized" at the moment the officers searched his bag.[83] The State of Florida conceded that the police did not have reasonable suspicion to stop Mr. Bostick but maintained that the encounter was consensual—Mr. Bostick was free to terminate the encounter whenever he wished.[84]

The Florida Supreme Court held that Mr. Bostick was in fact seized when police searched his bag, concluding that "the Sherriff's Department's standard procedure of 'working the buses' [was] an investigative practice implicating the protections against unreasonable seizures."[85] The court reasoned that under the circumstances of the encounter, no "reasonable traveler" would "have felt that he was 'free to leave' or that he was 'free to disregard the questions and walk away.'"[86] Indeed, the court went on, in the tight quarters of a bus, there was "no place to which a reasonable traveler might leave and no place to which he or she might walk away."[87]

---

http://www.dc.state.fl.us/offendersearch/Search.aspx?TypeSearch=IR [https://perma.cc/NJ8Q-9JUB] (last visited Mar. 31, 2023) (enter "Bostick, Terrance" in search bars; then click "submit request").

71. Initial Brief of Petitioner, *supra* note 70.
72. Brief of Respondent, *supra* note 70.
73. *Id.* at *1–2.
74. *Id.* at *1.
75. Bostick v. State, 554 So. 2d 1153, 1154 (Fla. 1989).
76. *See* Brief of Respondent, *supra* note 70, at *4.
77. *Id.*
78. *Bostick*, 554 So. 2d at 1154.
79. *Id.*
80. *Id.*; Florida v. Bostick, 501 U.S. 429, 432 (1991).
81. *Bostick*, 501 U.S. at 432 (quoting *Bostick*, 554 So. 2d at 1154–55).
82. *See* Brief of Respondent, *supra* note 70, at *4.
83. *Id.* at *8.
84. *Bostick*, 501 U.S. at 433–34; *Bostick*, 554 So. 2d at 1156.
85. *Bostick*, 554 So. 2d at 1156.
86. *Id.* at 1157 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
87. *Id.*

The Supreme Court reversed. The Court held that the Florida Supreme Court "erred . . . in focusing on whether Bostick was 'free to leave' rather than on the principle that those words were intended to capture."[88] The Court conceded that Mr. Bostick was "confined" to the bus "in a sense" and thus technically could not leave.[89] But the Court reasoned that this fact alone does not mean that Mr. Bostick had been seized; instead, reasoned the Court, "this was the natural result of his decision to take the bus."[90] What matters when a person physically cannot leave due to no fault of police, held the Court, is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[91] The "reasonable person" under this test, the Court clarified, "presupposes an *innocent* person."[92] Although the Court refrained from deciding whether a seizure occurred based on the trial court's failure to make express factual findings, the Court made clear that based on the facts before it, the officers had not seized Mr. Bostick in violation of his Fourth Amendment rights.[93]

3. The Racial Critique

That *Bostick* ignored the inherent coerciveness of police–citizen encounters, and, more importantly for purposes of this Article, rendered invisible the different dynamics that come into play when the citizen is Black, has rightly received sustained scholarly attention.[94] Scholars have criticized the Court for not even acknowledging race and the often fraught relationship that Black people have with police.[95] And because the Court did not acknowledge race, it was "blind to the impact of its 'free to leave' test . . . on law-abiding citizens of color."[96] Ignoring race while articulating a "reasonable person" standard is particularly problematic, scholars have argued, because "race is a relevant consideration when trying to determine the reasonableness of a search or seizure."[97] Indeed, reasonable person standards have long been criticized by critical race and feminist legal theory scholars as really meaning a reasonably affluent, able-bodied, white man.[98]

88. *Bostick*, 501 U.S. at 435.
89. *Id.* at 436.
90. *Id.*
91. *Id.*
92. *Id.* at 438.
93. *See id.* at 437–38. Indeed, on remand, the Florida Supreme Court, based on the Supreme Court's decision, summarily affirmed the trial court's ruling denying Mr. Bostick's suppression motion. *See* Bostick v. State, 593 So. 2d 494, 495 (Fla. 1992) (per curiam).
94. *See, e.g.*, Jamelia Morgan, Essay, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 515–16 (2022) (collecting some of the critiques).
95. Capers, *supra* note 48, at 220; Maclin, *supra* note 12; Maclin, *supra* note 15, at 339; Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 2029–30 (1993).
96. Capers, *supra* note 48, at 221.
97. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1151–52 (2012).
98. Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1529 (2018); Morgan, *supra* note 94, at 516 ("[T]he normative reasonable

It is worth spending some time with Professor Devon Carbado's critique of *Bostick*.[99] Carbado argues that *Bostick* "obscures two significant racial dynamics: (1) the relationship between race and vulnerability to police encounters; and (2) the ways in which race mediates how people respond to such encounters."[100] The Court did not question why, when the officers scanned the passengers on the bus, their gaze settled on Mr. Bostick.[101] Nor did the Court engage with the reality that Black men, because of their identity, are more likely to have had several negative interactions with police, many of which would fall "outside . . . the Fourth Amendment" as constructed by the Court (for example, being asked for identification or having to explain their presence).[102]

Carbado continues: "Most, if not all, black people—especially black men—are apprehensive about police encounters. They grow up with racial stories of police abuse—witnessing them as public spectacles in the media, observing them firsthand in their communities, and experiencing them as daily realities."[103] Thus, when Terrance Bostick looked up to see two white police officers standing over him, that may have been just as arresting as the close confines of the bus he found himself on.[104] Carbado accuses the Court, by not acknowledging Mr. Bostick's Blackness (and the officers' whiteness), of subscribing to a "colorblind" ideology that renders Bostick's race and the race of the officers "irrelevant."[105] In so doing, the Court completely overlooked the racialized "social context within which Bostick and the officers were situated."[106] Thus, Carbado maintains that race is not simply "ignored" in *Bostick*; it is written out as irrelevant.[107]

---

person is not a person with intellectual, developmental, or physical disabilities."); Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 156 (2008) ("The Fourth Amendment's overarching standard of reasonableness and its epistemological stance of objectivity particularly embody male values and reflect a male perspective."); *see* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 98 (2017) ("Reasonableness masquerades as a 'point of viewlessness'—pure objectivity. However, in actuality, it reflects particular subject positions while simultaneously dissembling that reflection. Reasonableness 'legitimates selective viewpoints . . . while not treating them as viewpoints at all.'" (citation omitted)); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1775 (1993) (arguing that colorblind jurisprudence "ratifies existing white privilege by making it the referential base line").

99. For a detailed discussion of this critique, see Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 97–100 (2014).

100. Carbado, *supra* note 9, at 976.

101. *Id.* at 977.

102. *Id.*

103. *Id.* at 985.

104. *See id.*

105. *Id.* at 979. Carbado explains that this choice to render race irrelevant was a race-conscious one. *Id.* ("Describing Bostick as black is no more racially conscious than describing him as a man. Both descriptions send a particular message about race. In the former, that race is relevant. In the latter, that it is not. In both instances, attention is being paid to race. Neither description is race neutral.").

106. *Id.* at 981.

107. *Id.* at 978–79.

Professor Carbado's critique is powerful. But its energy (like most other critiques of the decision) focuses on "the *Supreme Court's* racial insensitivity" and "the *Court's* obfuscation" of racial dynamics.[108]

But what if Mr. Bostick did not racialize his interactions with the officers? What if Mr. Bostick, through his lawyers, litigated the case as if his race were irrelevant?

4. The Litigation

If you read Mr. Bostick's Supreme Court brief (or the briefing before the Florida Supreme Court), you would have no idea that Mr. Bostick was Black or, for that matter, that the officers who approached him were white.[109] Race is not mentioned at all in the briefing.[110]

In the briefing, race at times bubbles just under the surface. For instance, the brief repeatedly refers to "inter-city bus" transportation.[111] And it notes that it may be "a disfavored option" to leave the bus in order to avoid police presence "for those of limited financial resources or limited education, many of whom use buses as a means of long-distance transportation."[112] These references to people from lower socioeconomic backgrounds are the closest Mr. Bostick's brief comes to contemplating the influence race may have had in the case.

Then, at times, Mr. Bostick's brief seems to render race irrelevant. For instance, the brief argues that "a reasonable person would not have felt free to simply stonewall the officers' inquiries" based on "the officers' conduct" in the case.[113] But the brief does not take the analytical next step by arguing that this is especially true for Black people who are taught to comply with police as a survival tactic. The brief thus makes it seem that all people would have experienced this encounter the exact same way.

More remarkable still, the brief in one fell swoop erases the lived experiences of Black Americans. In arguing that the seizure here violated the Fourth Amendment, the brief makes the breathtaking statement that "[t]he facts of this case strike a familiar chord with most Americans, *not* because they have personally experienced this scenario, but precisely because they have not."[114]

---

108. *See id.* at 965, 976 (emphasis added); *see also* Capers, *supra* note 48, at 220 ("To say that the Supreme Court was blind to issues of race in these cases is an understatement."); Maclin, *supra* note 15, at 339 ("[T]he Court ignored evidence of racial impact."); Greene, *supra* note 95 ("The Court was blind in ignoring the significance of race in the targeting of Bostick.").

109. *See generally* Brief of Respondent, *supra* note 70; Initial Brief of Petitioner, *supra* note 70.

110. *See generally* Brief of Respondent, *supra* note 70; Initial Brief of Petitioner, *supra* note 70. Mr. Bostick was represented at the Court by Donald B. Ayer, a partner at Jones Day who had previously been appointed United States Attorney in Sacramento and, during the Reagan Administration, Principal Deputy Solicitor General. *See Donald B. Ayer*, GEORGETOWN L.: FACULTY, https://www.law.georgetown.edu/faculty/donald-b-ayer/ [https://perma.cc/8RAT-CMSD] (last visited Apr. 2, 2023); Brief of Respondent, *supra* note 70 (listing Donald B. Ayer as counsel of record).

111. *See, e.g.*, Brief of Respondent, *supra* note 70, at *12–13.

112. *Id.* at *11. It also explains (albeit in a footnote) that Greyhound bus ridership comprises primarily lower income people. *See id.* at *11 n.8.

113. *Id.* at *16.

114. *Id.* at *17 (emphasis added).

According to the brief, again filed on behalf of Mr. Bostick—a Black man—police subjecting people to "ad hoc inquiries, is [a practice] that we have been fortunate to regard as an abhorrent creature of authoritarian regimes."[115]

The "we" in this sentence gives up the game. Few Black people would write that sentence. The story of police conducting widespread "ad hoc inquiries" of Black people is as American as apple pie. The colonies had slave codes that required Black people "to carry papers when traveling outside of the plantation," and slave patrols would roam the streets looking for Black people trying to escape bondage.[116] After the Civil War and during the time of Black Codes, Black people bore the brunt of aggressive policing, with law enforcement weaponizing curfew, vagrancy, and other ill-defined laws designed to oppress Black people.[117] A hallmark of the Civil Rights Movement "was the mistreatment of African Americans by overwhelmingly white police departments."[118] Indeed, by the time of *Terry*, "the abuse of blacks by police using stops and frisks—the very technique at issue in *Terry*—had become . . . a pervasive experience in inner city neighborhoods."[119] Rather than taking the opportunity to educate the Court on how the situation Mr. Bostick faced was part of an unbroken thread of racialized American policing,[120] Mr. Bostick's lawyers undercut the reality that "race-based policing"—informed by generations of abuse—is part of the Black "collective consciousness."[121]

Picking up some of Mr. Bostick's lawyers' slack, an amicus brief filed by the American Civil Liberties Union (ACLU) briefly discusses how race may have factored into the encounter in *Bostick*. First, the brief asserts that the coercion that one would feel during a bus interdiction "is even greater when we realize that bus passengers are disproportionately poor and minority."[122] Then it maintains that "[s]tudies have suggested" that when officers have "unbounded discretion," it "may be exercised in a fashion that disproportionately affects

115. *Id.* at *17–18. The lawyer for Mr. Bostick before the Florida Supreme Court made a similar point by quoting a case that declared: "The spectre of American citizens being asked, by badge-wielding police, for identification, . . . is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa." Reply Brief of Petitioner, Bostick v. State, 554 So. 2d 1153 (Fla. 1989) (No. 70,996), 1987 WL 882196, at *3 (quoting State v. Kerwick, 512 So. 2d 347, 348 (Fla. Dist. Ct. App. 1987)).

116. Justin S. Conroy, *"Show Me Your Papers": Race and Street Encounters*, 19 NAT'L BLACK L.J. 149, 151, 155 (2005).

117. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935–41 (2019); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 219 (2001); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 84–86 (1997).

118. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 980 (1998).

119. *Id.* at 981.

120. Scholars have made the connection between slave patrols and modern-day policing. *See, e.g.*, Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1114 (2020).

121. Carbado, *supra* note 9, at 985.

122. Brief Amicus Curiae of the American Civil Liberties Union et al., in Support of Respondents, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89-1717), 1990 WL 10013128, at *13.

minorities."[123] Finally, in an accompanying footnote, the brief observes that "[i]nsofar as the facts of the reported bus interdiction cases indicate, the defendants all appear to be Black or Hispanic."[124]

Two sentences and one footnote in an amicus brief. That is the extent of the discussion of race in the *Bostick* briefing.[125] Meanwhile, race was up, down, and through *Bostick*. From the War on Drugs and inter-city bus interdictions, to two white officers targeting a Black man out of suspicion that he had crack on him, to the inherent need to comply (and likely outright dread) that Mr. Bostick must have felt as those two white armed officers stood over him. His lawyers missed this all.

B. THE FREEDOM TO FLEE AND *ILLINOIS V. WARDLOW*

1. The Context

The Chicago Police Department (Chicago PD) has historically had a turbulent relationship with the Black residents of the City.[126] The 1990s were no exception. Around that time, Chicago PD averaged over 2,000 excessive force complaints per year—"one of the nation's highest complaint rates."[127] With those complaints "[a]lmost always" came "allegations of 'racial insults and/or derogatory remarks.'"[128] Indeed, the racial aspects of excessive force claims were so commonplace that they were often only mentioned "casually in the course of a complaint about physical brutality."[129] These complaints were not frivolous. Between 1992 and 1997, Chicago paid more than $29 million to settle 1,657 excessive force, false arrest, and improper search lawsuits.[130] Indeed, in a particularly grisly example of the police misconduct rife in Chicago, from the 1970s through the 1990s, a Chicago police commander "ran a torture ring," widely torturing mostly Black suspects by shocking them, burning them, and staging mock executions of them to elicit false confessions.[131] The City of Chicago later vowed to pay reparations to victims of this officer's atrocities.[132]

---

123. *Id.* at *18.

124. *Id.* at *18 n.19.

125. The briefing before the Florida Supreme Court was also entirely silent on issues of race. *See generally* Initial Brief of Petitioner, *supra* note 70; Reply Brief of Petitioner, *supra* note 115. There was no discussion of the significance of race in the trial court either. *See* Joint Appendix, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89–1717), 1990 U.S. S. Ct. Briefs LEXIS 474* (providing the lower court record).

126. *See generally* FLINT TAYLOR, THE TORTURE MACHINE: RACISM AND POLICE VIOLENCE IN CHICAGO (2019).

127. *See, e.g.*, Pierre Thomas, *Police Brutality: An Issue Rekindled*, WASH. POST (Dec. 6, 1995), https://www.washingtonpost.com/archive/politics/1995/12/06/police-brutality-an-issue-rekindled/4950c797-80ec-420e-a7cb-9d30f9d45377/.

128. *Id.*

129. *Id.*

130. HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 253 (1998).

131. Aamer Madhani, *Chicago to Pay Reparations to Police Torture Victims*, USA TODAY (Apr. 15, 2015, 2:29 PM), https://www.usatoday.com/story/news/2015/04/14/chicago-to-pay-reparations-jon-burge-police-torture-victims/25766531/.

132. *Id.*

It was against this backdrop that Sam Wardlow—a forty-four-year-old Black man who happened to be unlawfully carrying a gun—ran when he saw a four-car police caravan heading his way in the middle of the day.[133]

2. The Case

Around lunchtime one September day in 1995,[134] a four-car police caravan carrying eight police officers descended on a "high crime" neighborhood on the West Side of Chicago.[135] This pack of officers was "investigat[ing] drug transactions" in the neighborhood because it was "known for heavy narcotics trafficking."[136] And they "were traveling together because they expected to find a crowd of people in the area, including lookouts and customers."[137]

Sam Wardlow was standing outside a building holding a bag when he saw the police caravan roll down the street.[138] Mr. Wardlow took off running.[139] Two officers turned their car around, watched Mr. Wardlow run down an alley, and "cornered him on the street."[140] One of the officers "immediately" searched him "for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions."[141] The officer squeezed and then searched the bag Mr. Wardlow was holding and discovered a gun.[142]

Mr. Wardlow argued that the officers violated his Fourth Amendment rights because they did not have reasonable suspicion that he committed a crime when they stopped and searched him.[143] The trial court denied Mr. Wardlow's motion to suppress, holding that "his presence in a high-crime area and flight from police" were enough to justify an investigatory stop.[144] The Illinois Supreme Court disagreed, unanimously holding that the police violated Mr. Wardlow's Fourth Amendment rights.[145] That court held that "neither a person's mere presence in an area where drugs are sold nor sudden flight alone will justify a *Terry* stop."[146]

The Supreme Court reversed. The Court reasoned that although "[a]n individual's presence in an area of expected criminal activity, standing alone, is not

133. *See* David Seawell, Wardlow*'s Case: A Call to Broaden the Perspective of American Criminal Law*, 78 DENV. U. L. REV. 1119, 1119 (2001); Brief for Respondent, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 607000, at *1–2.

134. Brief for Respondent, *supra* note 133, at *1, *28 n.23.

135. Illinois v. Wardlow, 528 U.S. 119, 121, 124 (2000).

136. *Id.* at 121.

137. *Id.*

138. *See id.* at 121–22.

139. *Id.* at 122. Neither the Supreme Court's opinion nor the Illinois appellate courts' opinions mention Mr. Wardlow's race. *See* Butler, *supra* note 9, at 250.

140. *Wardlow*, 528 U.S. at 122.

141. *Id.*

142. *Id.*

143. *See* People v. Wardlow, 701 N.E.2d 484, 486 (Ill. 1998).

144. *Id.*

145. *See id.* at 489.

146. *Id.* at 487 (citations omitted) (quoting People v. Wardlow, 678 N.E.2d 65, 67 (Ill. App. Ct. 1997)).

enough to support a reasonable, particularized suspicion that the person is committing a crime," police "are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[147] The Court held that "it was not merely [Mr. Wardlow's] presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police."[148] The Court determined that these two facts together "justified" the officers "investigating further."[149] The Court acknowledged "that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity."[150] Even so, "*Terry* accepts the risk that officers may stop innocent people."[151]

3. The Racial Critique

There are two common race-based critiques of *Wardlow*: the use of "high crime areas" in the reasonable suspicion calculus.[152] And the Court's failure to acknowledge that people of color, particularly Black people, may have any number of innocent reasons to run at the sight of police given America's history of racialized policing.[153]

Focusing on the second critique of *Wardlow*, scholars have criticized the decision for being "ostentatiously indifferent to African-American views of the police."[154] For instance, scholars have maintained that when Black people run from police, it is not "unprovoked"; it is based on a "well-founded and historically ingrained fear and distrust of law enforcement."[155] Thus, much like the reasonable person standard at issue in *Bostick*, *Wardlow*'s perception of flight from police rests on a white-centered perception of reality: "Whereas behaviors like flight and furtive gestures may reliably imply consciousness of guilt for some, there are too many innocent reasons for black [people] to be nervous and flee from police to infer criminal intent from those behaviors."[156]

147. *Wardlow*, 528 U.S. at 124.

148. *Id.*

149. *Id.* at 124–25.

150. *Id.* at 125.

151. *Id.* at 126.

152. For penetrating critiques of the use of "high crime areas" in the reasonable suspicion calculus, see Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 396 (2019) and Tracey L. Meares & Bernard E. Harcourt, *Supreme Court Review—Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 784–86 (2000).

153. *See, e.g.*, *supra* Section I.B.1.

154. Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2299 (2002).

155. Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 416–17 (2001); *see also* Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 138 (2002) (explaining that flight in the Black community "may be best understood not as behavior indicative of criminality or a basis of criminal suspicion, but as the communication of protest, disaffection, or merely a simple desire to be let alone").

156. Henning, *supra* note 98, at 1541.

Scholars argue that beyond being racially obtuse when considering the significance of flight from police, the Court's holding in *Wardlow* has far-reaching effects on Black people's ability to exist in the world. They explain that by holding that flight in a "high crime" neighborhood is enough to justify an investigatory stop, the Court effectively curtailed Black people's ability to avoid contact with police in their own communities.[157] Professor Elise Boddie powerfully makes this point:

> As a practical matter, no one will be free to run in a high-crime area if the police are around because one's "unprovoked flight" may be interpreted as evasion of the police. Knowing this, many may adjust their routines to avoid the hassle if they see the police or suspect that they are near. They might decide not to take a run around the neighborhood, or they might exercise caution when playing games with their friends in a park. They might avoid walking fast to make it home for dinner. This is the psychic cost of racial territoriality: the heightened sense that danger at the hands of the police is always around the corner, even during the most ordinary and mundane activities of day-to-day life.[158]

As these critiques show, the way that a person may react to a police officer may be dependent on race, including whether they may wish to avoid the police altogether by running away. But the Court's opinion does not actively account for this, even in the face of a vociferous dissent by Justice John Paul Stevens. But it is not solely the majority that did not focus on race, despite scholars suggesting just that.[159] Mr. Wardlow's lawyers also ignored the racialized aspects of their client's encounter with the Chicago PD.

4. The Litigation

Mr. Wardlow's Supreme Court brief and Illinois Supreme Court brief not only fail to meaningfully engage with race, but like Mr. Bostick's briefing, fail to even mention that Mr. Wardlow was Black.[160] And his lawyers[161] had every reason to

---

157. *See, e.g.*, Gardner, *supra* note 22, at 869.

158. Elise C. Boddie, *Racially Territorial Policing in Black Neighborhoods*, 89 U. CHI. L. REV. 477, 495 (2022).

159. *See, e.g.*, Ronner, *supra* note 155, at 418; Butler, *supra* note 9, at 247; Taslitz, *supra* note 154.

160. *See generally* Brief for Respondent, *supra* note 133; Brief for Defendant-Appellee, People v. Wardlow, 701 N.E.2d 484 (Ill. 1998) (No. 96-0094). Race was mentioned by the trial court in *Wardlow* but as a factor that *supported* reasonable suspicion. The trial court noted that

> this was a white officer . . . in a black area. . . . [W]hen the defendant realized the circumstances for which [the police were] there [and] does in fact flee[,] I think [the police] do have a right to stop and question and in doing so have a right to protect themselves by a patdown.

Joint Appendix, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 33612745, at *14a.

161. Counsel of record for Mr. Wardlow at the Supreme Court was James B. Koch, a co-founder of a Chicago law firm and former prosecutor. *See* Graydon Megan, *James Koch, Attorney Who Co-Founded Chicago Firm and Argued Cases Before U.S. Supreme Court, Dies*, CHI. TRIB. (Aug. 15, 2018, 11:25 AM), https://www.chicagotribune.com/news/obituaries/ct-met-james-koch-obituary-20180815-story.html; Brief for Respondent, *supra* note 133 (listing James B. Koch as counsel of record).

center Mr. Wardlow's (or at least a reasonable Black person in his position's) experience given the arguments made by the State. In its brief, the State of Illinois made sure to highlight the experience of the everyday police officer and how people supposedly react to police presence.[162] Illinois asserted that it was "important" for the Court "to attain a firm understanding" of an officer's "unique perspective."[163] The State claimed (with no support) that "[a] citizen's reaction to a uniformed police officer typically constitutes a glance. Those citizens, who feel reassured by the presence of the police in their community, may even greet an officer. Others, who are distrustful, may avoid eye contact or even sneer at the sight of an officer."[164] The State then said, again citing no supporting authority, that "most citizens, regardless of their personal attitude toward the police, do not react by fleeing at the mere sight of a clearly identifiable police officer."[165]

This would have been the perfect time for Mr. Wardlow's lawyers to rebut this assertion and explain why a Black Chicagoan on the West Side may flee at the sight of four police cars descending on their neighborhood in the middle of the day. The lawyers could have highlighted the longstanding abuses perpetrated by the Chicago PD against the city's Black residents. The lawyers could have explained why it was important for the Court "to attain a firm understanding" of the "unique perspective" of the Black residents of Chicago. But the experience of the everyday Black citizen, to counter the well-deployed narrative of the everyday police officer, was absent from Mr. Wardlow's briefing.

Instead, the discussion of race in Mr. Wardlow's brief was (perhaps?) reduced to a cryptic footnote asserting that "it has been argued that people also flee out of fear of misidentification, harassment, beatings or having evidence planted on them."[166] But even if this footnote were alluding to the plight of Black Americans, that one sentence grossly minimizes the everyday Black experience. It has not been "argued" that people flee from police for innocent reasons. It is fact. And it is not just "people" who may harbor legitimate fear of police. The point is that *Black* people in particular may legitimately harbor a fear of police given the racialized history of police brutality and harassment, especially in Chicago, such that they may want to avoid police contact at all costs.[167] Mr. Wardlow's lawyers failed to excavate this point for the Court.

---

162. *See* Brief for Respondent, *supra* note 133, at *20; Brief for Petitioner, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 451857, at *8.

163. Brief for Petitioner, *supra* note 162.

164. *Id.*

165. *Id.*

166. Brief for Respondent, *supra* note 133, at *15 n.10 (citing David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 680 (1994)).

167. In fact, the law review article by Professor David Harris that the brief cites makes this very point, explaining that "the criminal justice system treats African Americans and Hispanic Americans differently than it does whites," and therefore people of color may have a number of non-guilt-related reasons for running from police. Harris, *supra* note 166, at 679–80. Mr. Wardlow's brief ignores Professor Harris's central thesis.

But where Mr. Wardlow's lawyers fell short, his amici came through, as a number of civil rights groups filed briefs in support of Mr. Wardlow. An amicus brief filed by the NAACP Legal Defense & Educational Fund (LDF)—an organization that has "sought to eradicate the race discrimination that has long infected our Nation's criminal justice system"[168]—made sure to recount the facts, highlighting Mr. Wardlow's Blackness.[169] The LDF explained that "in many minority communities . . . youth and adults are to a staggering degree subjected to stops, frisk[s], beatings, and in some instances, to lethal injuries, in the absence of any wrongdoing on their part."[170] Collecting studies from across the country reflecting the disparate policing of Black people, LDF argued that because police harassing Black people "is an acute problem throughout this country," the "desire to avoid police contact is no longer a reliable indicator that criminality is afoot."[171]

The arguments of Mr. Wardlow's amici did not go unnoticed. They were echoed in the *Wardlow* dissent. Citing the LDF brief, Justice Stevens acknowledged that "[a]mong some citizens, particularly minorities and those residing in high crime areas, there is . . . the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."[172] But just as Mr. Wardlow's attorneys did not engage with these arguments, neither did the majority opinion.[173]

---

168. Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 606996, at *1.

169. *See id.* at *2–3.

170. *Id.* at *10.

171. *Id.* at *4–5. The ACLU made a similar point. Highlighting incidents of police misconduct from across the country, the ACLU argued that "these incidents and the perceptions they engender" provide "documented reasons" for why people might flee from police. Brief Amicus Curiae of the American Civil Liberties Union et al., in Support of Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 590721, at *20–24. Likewise, the Rutherford Institute provided data showing that "the 'wholesale harassment' by police of minority groups has intensified in recent years." Brief Amicus Curiae of the Rutherford Institute for Respondent, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 606993, at *11 (quoting Terry v. Ohio, 392 U.S. 1, 14–15 (1968)). Illinois responded to amici's arguments by asserting that applying different "standards to different races would actually inject racial profiling into the constitutional analysis," and "[t]he Fourth Amendment must remain color blind." Reply Brief for Petitioner, *Wardlow*, 528 U.S. 119 (No. 98-1036), 1999 WL 712587, at *16.

172. *Wardlow*, 528 U.S. at 132 & n.7 (Stevens, J., concurring in part and dissenting in part). Justice Stevens concurred in the majority's refusal to recognize any "bright-line rule" regarding flight. *Id.* at 126–27.

173. Another case that could have been discussed here is *California v. Hodari D.*, a case involving a group of young Black kids in Oakland, California, who ran when they saw police. *See* 499 U.S. 621, 622–23 (1991); Respondent's Brief on the Merits, *Hodari D.*, 499 U.S. 621 (No. 89–1632), 1990 WL 10012701, at *2. The question there was whether a youth—who was ultimately arrested after a chase—was seized "when he saw [a police officer] running towards him." *Hodari D.*, 499 U.S. at 623. The Supreme Court held that "since Hodari did not comply with that injunction he was not seized until he was tackled." *Id.* at 629. The Court's erasure of race has similarly been criticized by legal scholars. *See* Maclin, *supra* note 12, at 276. And yet, while Hodari D.'s brief at least mentions that he is Black, the brief does not make any argument about why that is relevant to the Fourth Amendment question at hand. *See* Respondent's Brief on the Merits, *supra*.

C. THE FREEDOM TO SAY NO AND *UNITED STATES V. DRAYTON*

1. The Context

Fast forward to the turn of the millennium. Perhaps spurred on by the Supreme Court's decision in *Bostick*, law enforcement agencies were still engaging in large-scale bus interdiction programs as a tool to ferret out unlawful drug activity.[174] But in the decade since the Court handed down *Bostick*, things had changed. Particularly, the understanding of the War on Drugs had evolved, and a spotlight was now shining on the carnage the War wrought on communities of color.

By the year 2000, over half a million Black people were incarcerated, comprising forty-six percent of the American prison population despite Black people comprising just twelve percent of the general population.[175] Black men were 7.7 times more likely to be incarcerated than white men.[176] And in some communities, one-third of the Black adult population could be found behind bars "at any given time."[177] Not only were more Black people in prison; they were being locked away for longer.[178] The War on Drugs was one driver behind these stark racial disparities and the ballooning number of incarcerated Black people,[179] with police departments across the country becoming increasingly more aggressive in the types of tactics they used to police Black communities and other communities of color.[180] Which brings us back to bus interdiction programs.

In 2002, the Supreme Court faced another bus interdiction case out of Florida—eerily similar to *Bostick*—*United States v. Drayton*.[181] Recall that in *Bostick*, although the Court focused on whether Mr. Bostick had been seized when the officers approached him on the bus, there was a second issue lurking in the case: whether he had voluntarily consented to the search of his bag.[182] It is this aspect of *Drayton* that is of interest here.

---

174. Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 300 (2016) (providing as examples that "[i]n one case, a single narcotics officer boarded eight hundred interstate busses in one year" and "[a] sheriff's officer in Jacksonville reported that 1500 Greyhound passengers were searched weekly (or over 75,000 annually)").

175. 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, 392 (2002).

176. *Id.*

177. *Id.*

178. *Id.* at 398.

179. *Id.* at 393.

180. *See, e.g.*, *id.* at 408–09; *see also* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1952 (1993) (describing "[s]treet sweeps," where police would conduct wholesale raids on communities of color, sometimes seizing hundreds of Black people at a time). It was also understood that there was a "psychology of compliance" showing that "the extent to which people feel free to refuse to comply [with police] is extremely limited." Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155.

181. 536 U.S. 194 (2002).

182. *See* Florida v. Bostick, 501 U.S. 429, 432, 437–38 (1991); *id.* at 450 (Marshall, J., dissenting).

2. The Case

Chris Drayton and Clifton Brown, both Black men,[183] boarded a Greyhound bus in Fort Lauderdale heading to Detroit.[184] The bus made a scheduled stop in Tallahassee.[185] While there, the bus driver, after taking the passengers' tickets, went inside the station to complete some paperwork.[186] While the driver was gone, three armed plainclothes police officers, with their badges on full display, boarded the bus.[187]

The officers set up their operation. One kneeled on the driver's seat facing the passengers so he could survey what was going on, while the other two officers walked to the back of the bus.[188] The officers did not announce what they were doing, nor did they inform the passengers that they did not have to cooperate with them.[189] Instead, they worked their way from the back of the bus to the front, asking select passengers for identification and consent to search their bags.[190]

The officers finally reached Mr. Drayton and Mr. Brown. Inches from Mr. Drayton's face, one of the officers held up his badge and announced that he was conducting a bus interdiction and "would like" Mr. Drayton's and Mr. Brown's "cooperation."[191] The officer then asked the two men if they had any luggage on the bus.[192] Mr. Brown pointed to a bag in the overhead rack.[193] The officer then asked if they could search it; Mr. Brown agreed.[194] The other officer grabbed the bag and rifled through it; he did not find any contraband.[195]

Undeterred, one of the officers then "noticed" the two men were wearing jackets, which the officer thought was weird because "the weather was warm" (never mind it was early February and the two men were heading to Detroit).[196] So the officer then asked Mr. Brown if he could check him for weapons.[197] Mr. Brown "leaned up" and opened his jacket.[198] The officer proceeded to "check[] the coat and then the waist area of Brown."[199] He then "check[ed] his groin area and touched an unknown object in that area."[200] After feeling "hard object[s]," the officer handcuffed Brown and removed him from the bus.[201]

183. Nadler, *supra* note 180, at 157 (identifying Mr. Drayton and Mr. Brown as Black).
184. *Drayton*, 536 U.S. at 197.
185. Brief of Respondents, *Drayton*, 536 U.S. 194 (No. 01-631), 2002 WL 463380, at *2.
186. *Drayton*, 536 U.S. at 197.
187. *Id.*
188. *Id.* at 197–98.
189. Brief of Respondents, *supra* note 185, at *4.
190. *Id.* at *4–5.
191. *Id.* at *5–6.
192. *Id.* at *6.
193. *Id.*
194. *Id.*
195. *Id.* at *7.
196. *Id.*
197. *Id.* at *8.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* (alteration in original).

After Mr. Brown had been taken away, the remaining officer turned back to Mr. Drayton and asked if he could check him, too.[202] Mr. Drayton lifted his hands off of his legs, and the officer began searching Mr. Drayton's groin area and felt hard objects.[203] Mr. Drayton was handcuffed and removed from the bus.[204] In the parking lot, the officers found drugs in their pants.[205]

Mr. Drayton and Mr. Brown argued that they did not voluntarily consent to the search of their persons; thus, the officers violated their Fourth Amendment rights.[206] The Eleventh Circuit agreed.[207] The Supreme Court did not.[208]

According to the Court, nothing that the searching officer "said indicated a command to consent to the search."[209] Rather, the officer "asked first" if he could search the two men, "thus indicating to a reasonable person that he or she was free to refuse."[210] After contending that police presence for many is "cause for assurance, not discomfort,"[211] the Court "rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."[212] The Court reasoned that "officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding."[213] Thus, the Court held that an officer asking for consent "dispels inferences of coercion."[214]

3. The Racial Critique

By now, the racial critique should sound familiar. Scholars have argued that *Drayton* and its conception of the reasonable person "ignore[] racial differences in how people respond to police."[215] They have asserted that the Court failed to understand that Black people "might feel particularly incapable of resisting the police officer's polite 'May I?'"[216] And they have explained how the Court completely overlooked "the current strain in police-black relations," and how that "give[s] black Americans little reason to be comforted by the presence of an

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at *9.
206. United States v. Drayton, 536 U.S. 194, 199 (2002). The Court also addressed the question of whether Mr. Drayton and Mr. Brown had been unlawfully seized, holding that they had not under the reasoning of *Bostick*. *See id.* at 203–05.
207. *Id.* at 200; United States v. Drayton, 231 F.3d 787 (11th Cir. 2000).
208. *Drayton*, 536 U.S. at 200.
209. *Id.* at 206.
210. *Id.*
211. *Id.* at 204.
212. *Id.* at 206.
213. *Id.* at 207.
214. *Id.* The dissent did not engage with the question of whether the search was voluntary, arguing that it "was not within the question the Court accepted for review." *Id.* at 208 n.1 (Souter, J., dissenting).
215. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1975 (2019).
216. Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 315.

armed officer" and every reason to comply with police.[217] Indeed, some scholars have called the Court's holding that Mr. Drayton and Mr. Brown acted voluntarily "absurd" given the inherent coerciveness of the encounter.[218]

Professor Bennett Capers takes particular issue with the Court's citizenship talk. Capers asserts that "racial minorities in particular find themselves facing a double-bind: To be regarded as 'good citizens' deserving of the treatment routinely accorded to privileged whites, these minority citizens have to first abjure or at least downplay their actual citizenship rights."[219] Black people are taught to be especially "deferential" to police in an attempt to offset the criminality associated with Blackness.[220] This reality is important to understand when conceiving of consent because for Black people, it may not be "voluntary" in the truest sense of the word. Instead, acquiescence to police authority may be a survival tactic.[221] In the words of Capers, "[p]artially as a result of the Court's jurisprudence," Black people "must perform . . . 'citizenship work'—being extra deferential, acquiescing to demands, relinquishing citizenship rights."[222]

Again, the critiques, although important, make it appear as if the Court was solely to blame for missing the racialized aspects of the case. The litigation was just as race oblivious.

4. The Litigation

There was no mention of race in the *Drayton* briefing in the Supreme Court or the court of appeals.[223] In response to the United States' assertion that "[n]othing the police officers said or did in this case would have communicated to a reasonable person that he had no choice but to cooperate,"[224] Mr. Drayton and Mr. Brown's lawyers did not rebut this assertion by explaining why, for two Black men, cooperation would have been the *only* reasonable choice; any other response could have been perceived as fatal. Indeed, their brief could not have made that argument because it completely elides that both men were Black.[225]

---

217. Henning, *supra* note 98, at 1553.

218. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005).

219. Capers, *supra* note 9, at 696.

220. *Id.*

221. *See id.* at 696–97.

222. *Id.* at 696.

223. *See generally* Brief of Respondents, *supra* note 185; Brief for Appellant, United States v. Drayton, 231 F.3d 787 (11th Cir. 2000) (No. 99-13814); Brief for Appellant, *Drayton*, 231 F.3d 787 (No. 99-15152-I). In the trial court, *the government* brought up race, asking one of the officers whether he "exclusively" searches Black people; the officer said no. Joint Appendix, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631), 2002 WL 32102931, at *71a. The trial court followed up by asking the officer whether race influenced the decision to approach Mr. Brown and Mr. Drayton; the trial court also noted that one of the officers was Black. *Id.* at *106a–107a, *132a.

224. Brief for the United States at 17, *Drayton*, 536 U.S. 194 (No. 01-631).

225. *See generally* Brief of Respondents, *supra* note 185. Before the Court, Mr. Drayton and Mr. Brown were represented by a federal public defender, the law firm Garcia & Seliger, and the law firm Sidley Austin. *See id.* (listing counsel for respondents).

However, issues of race were there if you wanted to see them. The Government's brief noted that the people on buses are "generally economically disadvantaged."[226] The officer who conducted the search testified that "the overwhelming majority of *these people* feel it is their duty to cooperate with [him]."[227] Yet rather than explain why Black people may legitimately want to avoid police but at the same time feel an inherent "duty" to comply, Mr. Drayton and Mr. Brown's brief deployed the same raced citizenship talk Professor Capers so eloquently warns about, agreeing that it may seem "rude or unpatriotic . . . to completely ignore a police officer[]" but arguing that the Fourth Amendment must protect this conduct anyways.[228] When in fact, the desire to avoid police interaction says nothing about Black people's "politeness" or "patriotism" and everything about a history of Black people being denied full citizenship guaranteed by the Constitution *despite* their patriotism.

In short, the litigation in *Drayton*, including the amicus briefing (only one amicus brief was filed in support of Mr. Drayton and Mr. Brown by the National Association of Criminal Defense Lawyers[229]), was not only completely silent on race; in some ways, it reified the harmful notion that all "good citizens" want to comply with police.

D. THE CHICKEN-AND-EGG PROBLEM

Of course, this is all said with the benefit of hindsight. Conversations around race and criminal law are far different now than they were when these three cases were litigated. The general litigation landscape is much different, too. Giving these lawyers the benefit of the doubt,[230] one could think of at least two plausible reasons why they would not raise race. One, during the Warren Court (and a couple of decades prior), Black criminal defendants (mostly from the South) were successful in criminal procedure cases without having to explicitly litigate race; thus, there was a tried and tested path of successful colorblind litigation.[231] Two, when lawyers *did* litigate race in criminal procedure cases, especially before the Burger and Rehnquist Courts, the result was often catastrophic in that the Court condoned various forms of race-based policing. Thus, avoiding discussions of

226. *Id.* at *3 n.4.

227. *Id.* (alteration in original) (emphasis added).

228. *Id.* at *23.

229. *See generally* Brief for Amicus Curiae National Association of Criminal Defense Lawyers in Support of Respondents, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631), 2002 WL 463375.

230. I had the chance to speak with lawyers involved in litigating some of the cases. Counsel for Mr. Bostick explained that the litigation strategy was driven by the compelling facts of the case and that it seemed clear from a neutral presentation of the facts that Mr. Bostick was not free to leave, without having to explain how Mr. Bostick's race was relevant or necessary to consider in resolving the question presented. Telephone Interview with Donald B. Ayer, Retired Partner, Jones Day (Oct. 17, 2022). Counsel for LDF, who filed an amicus brief in *Wardlow*, could not recall there being any coordination on Mr. Wardlow's part in terms of amicus strategy, and thus LDF filed the brief because it had little confidence that the real racial dynamics at the center of the case would be aired otherwise. E-mail from George H. Kendall to Daniel S. Harawa (Oct. 17, 2022) (on file with author). I was unable to speak with the lawyers involved in litigating *Drayton*.

231. *See infra* note 233 and accompanying text.

race could be viewed as the client-oriented strategy.[232] Although lawyers in these cases did not litigate race, perhaps this was in part because they received a strong signal from the Court that raising race was not a strong litigation strategy.

Turn first to the common narrative that the Warren Court was doing racial justice work when engaged in the "criminal procedure revolution."[233] As Professor Carol Steiker explains, though many of the cases most important to the Court's criminal justice revolution exemplify "the history of racial discrimination in the administration of criminal justice in the South[,] . . . . criminal procedure as a tool of racial equality is . . . absent from the formal decisions."[234] Thus, if lawyers looked to these cases as guides to litigation, then they would see that it was possible for the Court to issue sweeping criminal procedure decisions without dwelling on issues of race in cases where race was not just the subtext; it was the whole text.

Then there is *Terry*, which many view as the beginning of the retreat from the criminal procedure revolution.[235] Although Mr. Terry's lawyers did not focus on

---

232. I am grateful to Rachel Barkow, Mark Graber, David Gray, and Renée Hutchins for helping to crystallize my thinking on this Section.

233. *See, e.g.*, Sklansky, *supra* note 11, at 316 ("It is almost commonplace by now that much of the Court's criminal procedure jurisprudence during the middle part of this century was a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South. The Court's concern with race relations served as the unspoken subtext of many of its significant criminal procedure decisions . . . ." (footnote omitted)); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2002 (1998) ("Although the Supreme Court's initial forays into criminal procedure surely had been motivated in large part by concern with the racial unfairness of southern criminal justice, the Court developed a series of formally race-neutral rules for constraining police, prosecutors, and the courts."); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60, 85–86 (2010) (surveying the Warren Court's jurisprudence and explaining that "concern over racial injustice and state institutional failure was so intense during the[] twenty-one 'Warren years' that it played a significant role in shaping many of the most important constitutional decisions of the Supreme Court," and observing that "[p]erhaps the clearest evidence of the gravitational pull of race on Warren Court constitutional doctrine was in the areas of criminal law and procedure"). There are those who disagree with this narrative. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–65 (2004) (arguing, in essence, the criminal procedure revolution was not all that revolutionary and instead was mostly aligned with majority thought); Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4–5 (2010) (arguing that, when looking at the Warren Court's Fourth Amendment jurisprudence, it should be viewed as a rights-contracting Court). I do not wade into this debate.

Though, as Professor Michael Klarman notes, the revolution actually dated to the period between World Wars I and II. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 95 (2000) (discussing criminal procedure cases involving Black defendants decided during the interwar period).

234. Carol S. Steiker, *Introduction* to CRIMINAL PROCEDURE STORIES vii, viii–ix (Carol S. Steiker ed., 2006). For example, *Mapp v. Ohio*, 367 U.S. 643 (1961), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Duncan v. Louisiana*, 391 U.S. 145 (1968), all involved defendants of color. And although, as Steiker notes, the Court did not focus on issues of racial equality in issuing the decisions, see Steiker, *supra*, at ix, the Court did at least note the race of the defendants in *Duncan* and *Miranda*, even if it undersold the intensely racialized nature of those cases.

235. *See, e.g.*, Capers, *supra* note 26, at 30.

race in the principal brief,[236] an amicus brief filed by LDF laid bare the racial implications of a Court decision that condoned the practice of stop-and-frisk.[237] Perhaps to its credit, the *Terry* Court did not totally ignore race. Instead, as Professor Anthony Thompson observes, the Court dedicated "one sentence of the opinion and an accompanying footnote" to the topic.[238] *Terry* noted that "minority groups, particularly Negroes, frequently complain" of "wholesale harassment by certain elements of the police community."[239] But as Thompson notes, the "Court dismissed these considerations from its analysis," summarily concluding that Fourth Amendment doctrine and the remedy of suppression "would not prevent improper police activity of this sort."[240] Thus, although the Court in *Terry* did not go so far as to say that race is totally irrelevant in the Fourth Amendment context, one could be forgiven for assuming that the Court was not interested in explicitly addressing issues of race through Fourth Amendment doctrine.

Finally, there is the backlash that lawyers and their clients faced when they *did* litigate race in Fourth Amendment cases before both the Burger and Rehnquist Courts. For example, in *United States v. Brignoni-Ponce*, a case involving a border patrol stop near the Mexican border, and *Whren v. United States*, a case involving police stopping Black men in D.C., lawyers in both cases explicitly argued that law enforcement were engaging in unconstitutional racial profiling.[241] In response, the *Brignoni-Ponce* Court held that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in a seizure analysis,[242] and the *Whren* Court held that the officers' "[s]ubjective intentions play no role" in a Fourth Amendment analysis.[243] Thus, the *Brignoni-Ponce* Court essentially held that law enforcement *could* consider race when deciding whom to police, while the *Whren* Court held that racial profiling is an Equal Protection Clause issue, not a problem to be addressed by the Fourth Amendment.[244] These cases were an ominous sign for

236. *See generally* Brief for Petitioner, Terry, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67), 1967 WL 93600.

237. *See, e.g.*, Thompson, *supra* note 52, at 965–66 (discussing the LDF amicus brief filed in *Terry*). *Terry* was also argued by Louis Stokes, a famed civil rights lawyer who eventually went on to become the first African-American congressperson elected in Ohio. *See STOKES, Louis*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/People/Detail?id=22311 [https://perma.cc/CZ3U-P42Q] (last visited Apr. 4, 2023).

238. Thompson, *supra* note 52, at 965.

239. *Terry*, 392 U.S. at 14–15.

240. Thompson, *supra* note 52, at 965; *see Terry*, 392 U.S. at 30–31.

241. *See, e.g.*, Brief for Respondent at 46, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (No. 74-114) (arguing that the agents engaged in "invidious discrimination"); Brief for the Petitioners, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758, at *2–3, *14 (arguing that "individuals singled out for arbitrary enforcement on the basis of inarticulable hunches of some greater crime are disproportionately minorities").

242. *Brignoni-Ponce*, 422 U.S. at 886–87.

243. *Whren*, 517 U.S. at 813.

244. *Id.* For that reason, Professor Barry Friedman urges a robust application of equal protection doctrine to limit discriminatory policing. *See, e.g.*, BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 188–89 (2017).

any lawyer seeking to proactively litigate how race should factor into a Fourth Amendment analysis.[245]

In all, there could be plausible reasons for why the lawyers in the cases featured in this Part did not discuss their clients' race (although it is less clear why they would litigate the cases in ways that were incompatible with their clients' racialized lived experiences). As such, the point of this Part is not to lambast the individual lawyers. Rather, its goal is to explain that we should not be surprised that colorblind inputs have led to colorblind outputs. An accurate critique of the development of doctrine also requires a reflection on litigation choices. Criticizing one without discussing the other provides an incomplete picture of how we arrived where we are. Thus, the point of this Part is to learn from these lawyers because even if their whitewashing strategy was rational, in the end, it did not work.

It is important to take stock of the whitewashing happening today. Lawyers litigating Fourth Amendment cases in front of the Roberts Court are still erasing their clients' race even with our more evolved understanding of race and policing. *Arizona v. Gant*,[246] for example, is "a case . . . that cabined police officers' ability to search cars incident to arrest."[247] Scholars have criticized that decision for "fail [ing] to fully address racial profiling" and the Court's "refusal to mention race."[248] "But the briefing in *Gant* doesn't discuss racial profiling."[249] Indeed, taking a page from the old-litigation playbook, the briefing elides Mr. Gant's race (he was Black).[250]

Or look at *Kansas v. Glover*, a case about whether police can assume that the registered owner of a car is in fact its driver, and use that assumption to pull the car over if it turns out the owner's license has been revoked.[251] There was also a subsidiary question lurking in the case: why did police choose to run the plates in the first place? And as one scholar points out, "racial profiling [could] explain the officer's decision to run the vehicle's license plate," and given this risk, "the

245. Another example—in *INS v. Delgado*, the Court sanctioned so-called "factory surveys," where Immigration and Naturalization Service agents would enter workplaces under "warrants" and inquire about immigration status, provided there may have been undocumented people working there. 466 U.S. 210, 211–12 (1984). The lawyers in *Delgado* specifically argued that the practice discriminated against Hispanic workers, *see* Brief for the Respondents, *Delgado*, 466 U.S. 210 (No. 82-1271), 1983 U.S. S. Ct. Briefs LEXIS 601, yet this did not dissuade the Court from holding that the factory surveys were not a seizure under the Fourth Amendment. 466 U.S. at 220–21.

246. 556 U.S. 332 (2009). Mr. Gant was represented by Sidley Austin, including one of the same lawyers that represented Mr. Drayton and Mr. Brown. Brief of Respondent at 48, *Gant*, 556 U.S. 332 (No. 07-542) (identifying counsel for Mr. Gant); *see infra* note 270.

247. Harawa, *supra* note 6, at 735.

248. Cooper, *supra* note 9, at 117, 147.

249. Harawa, *supra* note 6, at 735.

250. *Id.*

251. 140 S. Ct. 1183, 1186 (2020). Mr. Glover was represented by Goldstein & Russell, P.C., a boutique law firm specializing in Supreme Court litigation, which became Goldstein, Russel & Woofter in 2023. *See* Brief for Respondent at 53, *Glover*, 140 S. Ct. 1183 (No. 18-556) (identifying counsel for Mr. Glover); *What We Do*, GOLDSTEIN, RUSSELL & WOOFTER LLC, https://www.goldsteinrussellwoofter.com/what-we-do [https://perma.cc/9P4X-J5NT] (last visited Apr. 4, 2023).

justices might have drawn attention to the problem."[252] But as that scholar goes on to note, the briefing in the case "did not focus primarily on the issue of racial profiling."[253] In fact, while some of the amicus briefs discussed racial disparities in police stops,[254] Mr. Glover's brief did not discuss race at all nor mention the fact he was Black.[255] The whitewashing problem is not just historical.

But times have changed since *Bostick*, *Wardlow*, and *Drayton* were litigated, especially when it comes to understandings of race and policing. Thus, litigation strategies must change too, or at least be seriously reassessed. Lawyers cannot uncritically run the same tired playbook.

What's changed? First, we have much more data on the racial disparities in policing, and that information has become part of the larger social consciousness.[256] Therefore, any arguments about race and policing made today can be grounded in empirical proof and are therefore less likely to be discounted outright. Second, we now have real-time visuals of the atrocities Black people have faced at the hands of police.[257] Before, tales of police abusing Black people could be dismissed as exaggerations or folklore. But now, given that there are videos of police beating and killing Black people circulating for the world to see, it is harder to dismiss fears that Black people may have of police as irrational or unreasonable.[258] Third, the country just experienced (or is in the midst of) a moment of racial reckoning.[259] And after the summer of 2020, almost half of the states'

252. *See* Neil S. Siegel, *The Supreme Court Is Avoiding Talking About Race*, ATLANTIC (Aug. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesnt-like-talkabout-race/614944/.

253. *Id.*

254. *Id.*; *see also The Supreme Court, 2019 Term—Fourth Amendment—Search and Seizure—Reasonable Suspicion*—Kansas v. Glover, 134 HARV. L. REV. 500, 509 (2020) (arguing that the "commonsense approach" taken by the Court in *Glover* "grants officers broad interpretive leeway that facilitates the very police abuses racial justice activists decry"). Justice Sotomayor briefly alluded to race in her dissent, arguing that the majority opinion "has paved the road to finding reasonable suspicion based on nothing more than a demographic profile." *Glover*, 140 S. Ct. at 1197 (Sotomayor, J., dissenting).

255. *See generally* Brief for Respondent, *supra* note 251.

256. *See* Drew DeSilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ [https://perma.cc/8C3Y-LJQQ] (noting that a majority of both Black and white Americans think Black people are treated less fairly than white people by police).

257. Lia Epperson, *Are We Still Not Saved? Race, Democracy, and Educational Inequality*, 100 OR. L. REV. 89, 99 (2021) ("With the advent of smartphone cameras and social media campaigns, horrific examples of this violence landed in the news feeds of individuals of all races, creeds, colors, and economic backgrounds across the United States and around the world.").

258. *See* Miles v. United States, 181 A.3d 633, 641 (D.C. 2018) (referring to the defendant's argument that "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests" illustrates that a Black person's fear of police cannot be characterized as "exaggerated").

259. *See* Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/58EX-9NRD]. That the reckoning might be waning does not radically change the arguments made in the Article.

judiciaries vowed to take steps to actively address how race influences the administration of justice.[260] Thus, now is the time to try something new.

* * *

Fourth Amendment doctrine is supposed to capture how the average person experiences law enforcement. But by erasing the experiences of their Black clients, the lawyers in these cases fell into the trappings of reasonable person standards more generally, which often do not adequately reflect the experiences of marginalized communities.[261] These lawyers defaulted to whiteness.[262]

The need to litigate race is especially pressing in the Fourth Amendment context. By the time a Fourth Amendment issue is litigated in a criminal case, the defendant has been found with evidence of criminal wrongdoing. Thus, when the defendant is Black, Fourth Amendment cases risk reinforcing the criminality of Blackness and justifying police overreach, while rendering invisible the abuses law-abiding Black people routinely face at the hands of police.[263] In this context, it is especially important to ensure that judges have a fuller picture of how Black people experience police to counter this perception of criminality. Lawyers *not* providing these broader insights leaves the presumption of criminality naturally attendant to Fourth Amendment cases completely unchecked. While scholars have roundly criticized the Supreme Court for its colorblind Fourth Amendment jurisprudence, lawyers deserve some of the blame too. Indeed, maybe lawyers deserve *more* blame because they have erased the experiences of their own clients (and the communities from which they hail) whose interests they were supposed to represent.

II. THE BENIGN NEGLECT OF RACE

Just as the Supreme Court's Fourth Amendment jurisprudence erases the experiences of Black people in America, the lawyers who litigate the cases sometimes erase the experiences of their Black clients. How does this happen? More importantly, how can we prevent this from happening? The answers to these questions in many ways turns both on who is telling our stories and on who is listening.

---

260. Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121, 2159 (2021).

261. Scholars have proposed adopting a reasonable Black person standard when addressing Fourth Amendment questions. *See, e.g.*, Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 349 (1994); Henning, *supra* note 98.

262. As Professor Richard Delgado discusses:

> white folks have a race too, although they rarely think about it or see themselves as racialized. By the same token, they sometimes speak in racialized narratives about themselves, although the narratives are so familiar that they strike both the speaker and the listener not as narratives at all, but the truth.

Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1579–80 (1999) (footnote omitted).

263. *See, e.g.*, United States v. Weaver, 975 F.3d 94, 109 (2d Cir. 2020) ("There may well be hundreds of situations in which searches like the one before us today turned up nothing. But surely no more than a handful will get to court.") (Calabresi, J., concurring), *vacated en banc*, 9 F.4th 129 (2d Cir. 2021).

If predominately white lawyers are talking to an audience of predominately white judges and their predominately white law clerks, then avoiding issues of race becomes not only easy, but also comfortable.[264] It is a vicious cycle. The lawyers do not talk about race, which creates a permission structure for the judges not to talk about race. And when the judges do not talk about race, then the lawyers have an excuse not to raise race either. This cycle of erasure needs to be disrupted. One way to disrupt this cycle is to reconsider who is telling the stories of Black people and revisit how those stories are being told. This disruption requires taking a hard look at the Supreme Court Bar and public defender offices nationwide and reflecting on how we have been litigating criminal cases thus far.

Counteracting the whitewashing of race also requires a recalibration of judicial appointments. It is no coincidence that the three Justices who have most candidly engaged race have been the three Justices of color.[265] If lawyers are not educating courts on how race may influence a case, then it is important that the judiciary reflect the broader population to ensure those nuances are not lost on the judges or so easily overlooked. It also requires professional diversity of the judiciary. The bench is overwhelmingly composed of former prosecutors, government lawyers, and corporate attorneys who often will not have the sustained exposure to the multifaceted issues many communities of color face with policing.[266] We need more public defenders on the bench because they are "the only actors in the criminal legal system who stand next to, and work on behalf of, those targeted by it; they see that system with a clarity that others working within it simply do not."[267]

---

264. *See* Litman et al., *supra* note 21; Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1539–42 (2016) (describing the ascendancy of the elite Supreme Court Bar).

265. *See, e.g.*, Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 1000 (2005) (discussing Justice Clarence Thomas); Paul Butler, *Mississippi Goddamn:* Flowers v. Mississippi*'s Cheap Racial Justice*, 2019 SUP. CT. REV. 73, 101–05 (same); Hasbrouck, *supra* note 45, at 678–79 (discussing Justice Sotomayor); Ronald Tyler, Utah v. Strieff*: A Bad Decision on Policing with a Gripping Dissent by Justice Sotomayor*, STAN. L. SCH.: SLS BLOGS (July 5, 2016), https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor/ [https://perma.cc/X4XM-UKZN] (same); O'Connor, *supra* note 33 (discussing Justice Marshall); Taunya Lovell Banks, *Thurgood Marshall, the Race Man, and Gender Equality in the Courts*, 18 VA. J. SOC. POL'Y & L. 15, 16 (2010) (same).

266. *See, e.g.*, Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://perma.cc/U555-KZP3]; Maggie Jo Buchanan, *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench*, CTR. FOR AM. PROGRESS (Aug. 13, 2020), https://www.americanprogress.org/article/pipelines-power-encouraging-professional-diversity-federal-appellate-bench/ [https://perma.cc/46VR-PLW7].

267. Premal Dharia, Opinion, *I Was a Public Defender for Over a Decade. KBJ's Empathy Is What Our Highest Court Needs*, CNN (Apr. 8, 2022, 8:23 PM), https://www.cnn.com/2022/04/08/opinions/ketanji-brown-jackson-confirmation-public-defender-dharia/index.html [https://perma.cc/624L-8YGU]; Robin Walker Sterling, *Narrative and Justice Reinvestment*, 94 DENV. L. REV. 537, 548 (2017) (arguing that a defense attorney is "the courtroom actor most likely to even appreciate the racial disparit[ies]" in the criminal legal system); *see also* Ben Miller, *Planning* Brady*'s Comeback: Public Defenders Are Needed as Judges to Lead the Restoration of* Brady*'s Lost Promise*, 59 AM. CRIM. L. REV. ONLINE 26,

Finally, this more complete story of whitewashing provides yet another reason to rethink the way we teach law. So long as law is taught in a vacuum without discussion of how it replicates power and perpetuates hierarchies, it should not be surprising that lawyers and judges can discuss criminal law and procedure without acknowledging how race deeply influences its operation. Students should leave law school clear-eyed about "the unjust realities of our legal system,"[268] having been forced to engage with these realities in the classroom with hope that this education will manifest in the courtroom.

There is plenty of blame to go around for the whitewashing of race. The upshot? There are also plenty of ways to be thoughtful about how to prevent legal whitewashing from happening.

A. LOOK WHO'S TALKING

1. Supreme Court Bar

When trying to counter the whitewashing of the law, it is important to consider who is doing the litigating. Around the mid-1980s, the modern Supreme Court Bar began to take shape, with veterans from the Solicitor General's Office forming law firm practices focused on Supreme Court litigation.[269] Two of the law firms that were early movers in this space, Jones Day and Sidley Austin, represented Mr. Bostick and Mr. Drayton and Mr. Brown before the Court.[270] Unsurprisingly, Black attorneys have been overwhelmingly shut out from the elite Supreme Court Bar.

Look at the numbers. A recent *Washington Post* study revealed that from 2017 to 2022, Black lawyers conducted only *one percent* of all oral arguments before the Supreme Court; Hispanic lawyers conducted only 2.3% of all arguments.[271] Another study of oral arguments before the Court found that between 2005 and 2016, Black lawyers argued only *twenty-four* times compared to the *1,869* oral arguments conducted by white lawyers.[272] And these numbers are an improvement

51–52 (2022) (arguing for more public defenders on the bench because of the unique perspectives they hold).

268. Ossei-Owusu, *supra* note 35.

269. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1499–1500 (2008).

270. *See id.* at 1500; *supra* notes 110, 225 (identifying counsel for Mr. Bostick, Mr. Drayton, and Mr. Brown).

271. Meyer & Raji, *supra* note 21. Only ten women of color argued before the Court over that period. *Id.*

272. *See* Austin Carsh, *Riddled with Exclusivity: The Homogeneity of the Supreme Court Bar in the Roberts Court*, *in* OPEN JUDICIAL POLITICS 4, 21 (Rorie Spill Solberg & Eric Waltenburg eds., 2d ed. 2021). Even these paltry numbers are misleading, however, because twelve of the twenty-four arguments presented by Black lawyers were presented by one Black attorney (now-Associate Justice of the Supreme Court of California Leondra Kruger, who was with the Solicitor General's Office). *See* Joan Biskupic, *Leondra Kruger: California Supreme Court Judge Breaking Barriers in the Golden State*, CNN (Feb. 2, 2022, 5:01 AM), https://www.cnn.com/2022/02/02/politics/leondra-kruger-supreme-court-profile/index.html [https://perma.cc/VQ98-RNPL] (noting that Justice Kruger argued before the Supreme Court twelve times while in the Solicitor General's Office). The numbers are no better for Latinx attorneys: Latinx lawyers presented only *twenty-eight* arguments over those same eleven years, and two Latinx attorneys had seven arguments each. Carsh, *supra*. And these numbers reflect progress!

from the last comprehensive study conducted in the early 1990s.[273] Moreover, most of the lawyers who argue before the Court will not have worked in close proximity to the disproportionately policed communities in criminal cases because just 3.54% of cases argued between 2005 and 2016 were argued by public defenders.[274] This means that white lawyers often are tasked with telling the stories of their non-white clients and that white lawyers with little professional proximity to communities of color have to explain to the Court the ramifications of its decisions on non-white communities.

This should give us pause.[275] This is not to say that white lawyers cannot adequately convey the plight of their clients of color (Part I notwithstanding). With adequate training, careful attention, and consultation with the client, of course white lawyers can competently represent clients of color. But it *is* to say that white lawyers may not intuitively appreciate the nuances of their indigent clients of color's experiences.[276] And even with the necessary training, they may view it as impolitic to raise issues of race when there is a tried and tested pathway to avoiding the uncomfortable discussion topic.[277] Thus, in the context of litigating Fourth Amendment issues, "underrepresented voices before the Court can raise viewpoints that might otherwise go unstated in the rarefied air of One First Street."[278] In fact, Black attorneys may feel the *obligation* to raise the racialized experiences of policing in America out of an "intense sense of connection to our

A study from 1993 showed that ninety-eight percent of the Supreme Court Bar was white. *See* KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 41 (1993).

273. *See* Carsh, *supra* note 272, at 21–22.

274. *Id.* at 28. This is despite criminal cases comprising a large chunk of the Court's merits docket. *See* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1475 (2020) (noting that approximately one-third of the Court's merits docket is composed of criminal cases).

275. As the introduction to the compelling anthology *Critical Race Judgments*, which rewrites core Supreme Court opinions implicating racial justice from a critical race lens, wryly states: "Given the Court's demographic makeup over time, perhaps the Court's historical marginalization of race should not surprise us." Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig, *Introduction* to CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 1, 4, 5 (Bennett Capers et al. eds., 2022). The Bar's demographic makeup should make the marginalization of race even less surprising.

276. *See* Roland Acevedo, Edward Hosp & Rachel Pomerantz, *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 18–19 (2000) (arguing that "a white attorney who represents a client of color may not be prepared to fully relate to the client if she approaches the client with a set of assumptions that do not apply beyond her dominant culture"); Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 149 (2018) ("Because the majority of defense lawyers have not been incarcerated and are not people of color, . . . they may be ill-equipped to effectively identify and address systemic racial inequities in our systems of imprisonment.").

277. *See* Harawa, *supra* note 6, at 740. Consider this anecdote provided by Professor Russell Pearce. He recalls a story where a Black client accused the police of stopping him "because he was black," and the judge accused the client of "hollering racism." That Black client's white lawyer then told the judge that although he "suspected that 'what happened . . . was a "racial incident," . . . as a lawyer [he] did not talk about "the case" that way, and therefore [he] ceased to think in terms of racial issues.'" Pearce, *supra* note 23 (alterations in original) (quoting Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1370–71 (1992)).

278. *See* Litman et al., *supra* note 21, at 65 (emphasis omitted).

racial community" and "a personal urgency to support and serve members of our race as individuals and to protect our racial collective."[279]

The erasure of race in the representation of criminal defendants is not remarked upon enough in legal scholarship. That is not to say that everyone thinks that criminal defendants are adequately represented before the High Court. Quite the opposite. Supreme Court Justices and scholars alike have complained about the representation that indigent criminal defendants receive at the Court.[280] But their criticisms are not based on advocates failing to fully flesh out the racialized aspects of any given case. Rather, these complaints focus on the likelihood that criminal defendants' lawyers are "outmatched" when they face veteran lawyers from the Solicitor General's Office; criminal defendants are more likely to be represented by Supreme Court novices, and the Court openly prefers a small cadre of repeat players that comprise the elite Supreme Court Bar.[281]

However, assume repeat Supreme Court players begin to litigate a higher percentage of criminal cases before the Court. It is not at all clear that would solve the whitewashing problem. In fact, that might only exacerbate it.

The Supreme Court Bar is dominated by white corporate lawyers who have every incentive to present a case in a way that is most palatable to the Court, which could often mean ignoring the stubborn reality that the law does not work equally for everyone. Consider that Justice Kagan praised the Supreme Court Bar as understanding "the way we think" and "the kinds of things that matter to us as we reach a decision."[282] Justice Kagan's statement signals to the Bar to keep doing what it has been doing. Here, ignoring race. The Court and its elite Bar are in a continual color-blind feedback loop. As former Fourth Circuit Judge Michael Luttig described it: the Supreme Court Bar's relationship with the Court is "a guild" where "a narrow group of elite justices and elite counsel talk[] to each other" in a way that is "detached and isolated from the real world, ultimately at the price of the healthy and

279. *See* Julie D. Lawton, *Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation*, 22 MICH. J. RACE & L. 13, 21–22 (2016). As one Black lawyer who recently argued a criminal case concerning sentencing for drug crimes explained:

> the vast majority of the people affected by the law were Black men . . . . so I think that having the opportunity to be a voice for those Black men in an environment where there's not many Black men to begin with was a real honor—and hopefully an opportunity that more diverse attorneys will get, especially when it comes to matters that affect diverse individuals in our country disproportionately.

Meyer & Raji, *supra* note 21.

280. *See, e.g.*, Epps & Ortman, *supra* note 274, at 1496; Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 2005 (2016).

281. *See* Crespo, *supra* note 280, at 2007–08. According to a study by Professor Andrew Manuel Crespo, around two-thirds of criminal cases are handled by Supreme Court novices. *Id.* The novice status of many lawyers representing criminal defendants before the Court may have an influence on the outcome of cases considering data showing that experienced attorneys are significantly more likely to prevail than novices. *See* Epps & Ortman, *supra* note 274, at 1497.

282. *See* Shaw, *supra* note 264, at 1542.

proper development of the law."[283] In this atmosphere, it may be seen as "uncivil" or gratuitous to litigate race outside of an explicit racial discrimination claim.

Indeed, the incentive structure of the Supreme Court Bar—concentrated in large corporate law firms—may militate against raising issues of race no matter how important they may be to understanding a client or their case. As Professor Matthew Fletcher details when discussing advocacy on behalf of Tribal clients, the "'Supreme Court bar' often measures success simply by the number of oral arguments made by counsel."[284] For that reason, the Bar aggressively pursues argument opportunities across all areas of law, pro bono and paid, and then markets that experience to other clients.[285] Thus, "the Supreme Court bar *wins* even if the client *loses*."[286] And because they are repeat players intent on building up a credibility cache, "a member of the Supreme Court bar may feel incentivized to concede highly divisive positions at oral argument in order to preserve the lawyer's credibility before the Court in future cases, likely cutting against the attorney's obligation to be a zealous advocate for the tribal client."[287] Thus, Fletcher concludes, given that "[t]ribal interests are among the least favored constituents of the Supreme Court, . . . the Supreme Court bar ha[s] less to lose when representing tribal interests and less to gain when tribal interests win."[288]

Apply this same thinking to Black people accused of crime. Candid discussions of race and criminal defendants hardly top the list of the Supreme Court's favorite things. The legal issues raised in criminal cases are often not going to be important to the wider (paying) client base of most of the firms Supreme Court repeat players come from.[289] And there is therefore little incentive to break the mold and actively litigate race—especially when race has been historically overlooked by both the bench and bar.

Finally, it is not at all clear that the current Supreme Court Bar as constituted is the right group of lawyers to explain the influence of race in policing given their professional experiences. A low percentage of the elite Supreme Court Bar has represented a criminal defendant, and, of those who have, "few are in fact experts in criminal law as a substantive subject-matter area in its own right" because they have only occasionally "dabble[d] in criminal defense work."[290] This matters

283. *See* Joan Biskupic, Janet Roberts & John Shiffman, *Special Report: At U.S. Court of Last Resort, Handful of Lawyers Dominate Docket*, REUTERS (Dec. 8, 2014, 5:47 AM), https://www.reuters.com/article/us-scotus-elites-special-report/special-report-at-u-s-court-of-last-resort-handful-of-lawyers-dominate-docket-idUSKBN0JM0ZX20141208 [https://perma.cc/EDA6-5TLV].

284. Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435, 1450.

285. *See id*. at 1451–52.

286. *Id*. at 1452.

287. *Id*.

288. *Id*. at 1452–53.

289. There are exceptions to this of course, including Supreme Court law school clinics and public interest organizations that regularly practice before the Court. *See, e.g.*, Crespo, *supra* note 280, at 2010–11 (explaining that Professor Jeffrey Fisher of the Stanford Law School Supreme Court Clinic can rightly be considered one of the only criminal defense experts in the Supreme Court Bar).

290. *See id*. To even the playing field with the Solicitor General's Office, Professors Epps and Ortman suggest creating "an Office of the Defender General that would be charged with advocating for the interests of criminal defendants as a class before the Supreme Court." Epps & Ortman, *supra* note 274, at 1472 (emphasis omitted). Presumably this Defender General could also provide the Court with a

because working regularly with indigent clients of color in the criminal legal system gives you an understanding of how policing works in marginalized communities that is hard to achieve otherwise. Most of the Supreme Court Bar lacks this professional education, which can translate into a failure to fully comprehend the way race influences the legal issues in a criminal case. This could explain how lawyers could think it "un-American" for police to harass people for no reason or could label the desire to avoid police "unpatriotic." There is a real gap in expertise that comes with a specialized (heavily corporate) Supreme Court Bar representing criminal defendants before the Court. The Supreme Court Bar as it stands is likely not best situated to fully air issues of race in Fourth Amendment cases.

2. Public Defender Offices

Given that the Supreme Court Bar only handles roughly one-third of criminal cases, a majority of criminal cases litigated at the Court are handled by criminal defense lawyers.[291] And of course the Supreme Court Bar is not necessarily involved in lower court litigation where race is also erased. It is therefore important to understand what is happening there, too.

Like the Supreme Court Bar, public defender offices across the country are also overwhelmingly white.[292] Public defenders, like all people, harbor biases, including racial biases,[293] and these biases can affect defense counsel functioning. For example, race can affect an attorney's interactions with their clients.[294] Race can make a difference in plea recommendations[295] and sentencing practices.[296] Race can even influence the way a defense attorney evaluates the evidence in their client's case.[297] The racial biases and racial weak spots of public defenders have received increasing scholarly attention. But more exploration must be done

more robust understanding of policing from a defendant's perspective to counter the pro-police narrative constantly proffered by the government.

291. *See supra* note 274.

292. *See* Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. (forthcoming 2023) (manuscript at 36) (on file with author); Hoag, *supra* note 20, at 1497; Adediran & Ossei-Owusu, *supra* note 19, at 6.

293. *See generally* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004) (modeling biases among "habeas lawyers, trial lawyers, and law students").

294. *See, e.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001) ("Lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur."); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 756–57 (2012) (providing an anecdote of a white public defender berating his client and contending that he "would never have spoken to a white . . . man in the same demeaning way").

295. *See* Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 422 (2011).

296. Ryan D. King, Kecia R. Johnson & Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC'Y REV. 1, 1 (2010).

297. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634–36 (2013); *see also* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 649, 659–60 (2017) (arguing that the same insights would apply to lawyers who represent juvenile clients).

on how the overwhelming whiteness of the public defense bar has contributed to the whitewashing of criminal law.

When discussing the benefits of Black lawyers representing Black criminal defendants, Professor Alexis Hoag speaks of "'embodied empathy'—the unspoken familiarity between Black people given their shared experience with the social meaning assigned to Black people in this country."[298] Drawing from social science literature on the effects of having teachers and therapists of the same race, Hoag argues that embodied empathy "may help establish trust and improve communication between Black indigent defendants and their lawyers, and may give Black public defenders opportunities to mitigate anti-Black bias their clients face within the criminal legal system."[299]

Building on Professor Hoag's thesis, beyond Black lawyers' ability to perhaps more effectively mitigate the anti-Black bias their Black clients face, they may also be more acutely aware of how their clients' Blackness shapes everyday life, including interactions with police. Black lawyers are not inoculated from racialized policing.[300] To put a finer point on it, a Black lawyer will likely not have to reach far into the recesses of their mind to understand why a client may have consented to a police search despite having every incentive not to, or why a client would have run from police when they saw an officer looking their way. That Black lawyer, like their Black client, would have heard tales, read stories, and, of late, seen videos, of people who look like them being brutalized by police with the officers suffering little to no repercussions. They, too, will likely have received "The Talk" about how to survive police interactions.[301] Their pulses are not immune from quickening at the sight of police heading their way.

For that reason, when litigating a Fourth Amendment issue involving a Black client, a Black lawyer will perhaps more readily bring to bear the racialized experiences of their client, and have a different perspective on how a "reasonable person" might feel when confronted by police.[302] It may also be easier for them to empathize with the fear, paralysis, compulsion, or disdain their Black client might have felt when confronted by police. This "embodied empathy" could result in a different litigation strategy, where the experiences of Black people are brought to the forefront rather than being left to lurk in the shadows if not ignored

298. Hoag, *supra* note 20, at 1525.

299. *Id.* at 1519–25, 1527.

300. *See, e.g.*, Carbado, *supra* note 9, at 953 (describing Professor Carbado's own encounter with police during a traffic stop); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 8–9 (2009) (describing Professor Butler's own encounter with police after being arrested outside of his home); Davis, *supra* note 13, at 438–40 (describing now-Circuit Judge Robert Wilkins's experience of being profiled by police while driving and the resulting lawsuit).

301. *See* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.").

302. *See, e.g.*, Pearce, *supra* note 23, at 2092 (arguing that a white lawyer may begin by "assuming the norm that race is not a factor" and "[t]herefore, they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client").

outright.[303] Moreover, a Black lawyer authentically relaying the experiences of Black people, including their Black client, could resonate differently for the decisionmaker and thus could serve as a powerful tool of persuasion.[304]

It matters who tells the story. As one of the founders of the Black Public Defender Association articulated when explaining why the organization was necessary, when you look around, "it's not usually Black people who are telling . . . the stories" of the disproportionately Black people ensnared in the criminal legal system.[305] Thus, in one way, the story of lawyers whitewashing race is a call to diversify both public defender offices and the Supreme Court Bar. There must be space for lawyers of color to make the arguments and uplift the experiences of people of color that white lawyers have been either unwilling to acknowledge or have innocently overlooked.

It also matters *how* the story is told. *All* lawyers, no matter their race and so long as it tracks the best interests of the client, should be willing to explore and explain how race may influence a case, especially when having to litigate ostensibly subjective issues such as what is "reasonable."[306] No matter who staffs public defender offices, lawyers of all races must be trained to identify how race impacts their client's case and how to competently litigate those issues in court. Lawyers must investigate their own biases and be taught to assess how their identity may shape their view of the facts, the world, and the law. And lawyers must be equipped to ask the tough but essential question of whether the decision not to address race is borne from client-centeredness, or whether it is instead a strategy of least resistance. That way, we can ensure that whatever litigation strategy is pursued matches *the client's* experiences and interests.[307]

---

303. *See supra* note 297 and accompanying text.

304. *See, e.g.*, KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 83–84, 108 (2012) (explaining how after witnessing Charles Houston's defense of a Black man charged with murder, "[o]ne upper-class local woman reportedly confessed that '[a]fter hearing that brilliant man, I can no longer hold the views I previously held of the Negro'" (second alteration in original)); *see also* King et al., *supra* note 296, at 8 ("[M]inority representation in the legal profession may elevate consciousness of racial disparities and thus keep the issue in the minds of decision makers in the adjudication process.").

305. *About Us*, BLACK PUB. DEF. ASS'N, http://blackdefender.org/about-us/ [https://perma.cc/5NHK-PSUF] (last visited Apr. 10, 2023).

306. *See* Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1018 (2013) (arguing that although there may be times when raising issues of implicit racial bias may diverge from the goals of the client, "because indigent defendants, disproportionately clients of color, so frequently bear the brunt of our system's racial biases, it will be the rare case where the lawyer's desire to promote racial justice will conflict with the client's interests").

307. Consistent with this idea, scholars, particularly clinical legal scholars, have advocated for lawyers to develop cross-cultural competency and race-conscious lawyering strategies. *See, e.g.*, Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 342–43 (2012); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1993); Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM. J. RACE & L. 55, 69 (2013); Robin Walker Sterling, *Defense Attorney*

That is not to say that lawyers must *always* raise race with no forethought.[308] There may be times when raising race is an unwise strategy for whatever reason. And criminal defense lawyers must always prioritize their clients over some larger social cause (although these two things are not always incompatible).[309] But the decision not to raise race must be *strategic*. Inadvertence or ignorance does not count. To that end, there may be inertia in public defender offices too when it comes to actively litigating racial issues. Whether trial or appellate public defenders, public defenders repeatedly appear before the same judge or judges. In this world, credibility matters in that it can help you achieve the best outcome for your client. Thus, in some ways, not rocking the boat may seem like not only the safer option, but the client-centered option. And many may think that talking about race is quintessential boat rocking.

So assume there are legitimate reasons to avoid discussions of race in criminal court. A lawyer should pursue this strategy in consultation *with the client*, especially when the lawyer is supposed to be telling the client's story. And assuming a client wants the lawyer to engage with racial issues, to ensure this strategy is pursued effectively, lawyers must be trained on how to recognize, discuss, and litigate race so that all lawyers, regardless of race, are prepared to fully convey their client's experiences. And when a lawyer chooses to *strategically* litigate race, that strategy must be tailored to the case, the courtroom, and the jurisdiction because there is hardly a one-size-fits-all approach to discussing race.

However, reflexively not telling the story should not be an option. Contemplate what that communicates to judges. If the lawyers representing Black defendants do not take the time to explain why, as a Black person, their client reacted to police in a certain way, then that signals to the court that race is unimportant. If the lawyers do not even bother to point out that the client is a Black man in their briefing (at least at the trial level the judge can see the client with their own eyes), then that is a sign that his race does not matter. If the lawyers treat race as if it is irrelevant, then that tacitly permits a court to treat race as irrelevant too.[310] This is especially

Resistance, 99 IOWA L. REV. 2245, 2263–71 (2014) (advocating for defense attorneys to incorporate race into ligation strategies); Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System Is Unjust*, 44 HOFSTRA L. REV. 1207, 1220–21 (2016) (arguing that defense counsel should speak out about how the criminal legal system is unjust); Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1558 (2013) (emphasizing "the importance of civil rights lawyers' voices in community efforts to eliminate racial inequalities"); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1103–04 (1997) (arguing for race-conscious lawyering); Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1157 (2014) (arguing for integrating race-conscious lawyering, which "requires confronting and naming race in the lawyering and criminal justice process, and recasting racial identity and narrative in the defense of clients and communities of color").

308. I plan to address the promise and peril of litigating race in future projects.

309. *See* Rapping, *supra* note 306.

310. Indeed, there are differing views about what judges should do when the parties fail to raise key arguments. *See generally* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 452–53 (2009) (arguing "that there are good reasons to promote judicial issue creation in certain categories of cases"); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1,

true when part of advocacy is educating. And educating is perhaps most important when the people sitting in judgment of a case have no connection to the client's lived experiences: particularly, here, how a person of color would experience police contact. Few Justices or judges would have personally understood how a person in Mr. Bostick's or Mr. Drayton's position would have felt when police descended on them on a bus. Or how a person in Mr. Wardlow's position would have felt when a four-car police caravan rolled through his neighborhood in the middle of the day. It is here where race-conscious advocacy matters most. Failing to advocate is to be complicit in the whitewashing of the law.

B. LOOK WHO'S DECIDING

1. Judges

Along with lawyers educating judges about the racialized aspects of the legal issues they confront, we need to have racially aware judges. Personal and professional diversity on the bench is important to the law developing in a way that captures the breadth of human experience, including how people of color may experience policing.

In a tribute to Justice Marshall, Justice Sandra Day O'Connor acknowledged that every Justice "come[s] to the Court with [their] own personal histories and experiences."[311] Justice Marshall's experiences, however, were "special."[312] Justice O'Connor candidly admitted that she "had not been personally exposed to racial tensions" that existed in America and "had no personal sense . . . of being a minority in a society that cared primarily for the majority."[313] Justice Marshall, on the other hand, had seen "the deepest wounds in the social fabric and used law to help heal them."[314] As Justice O'Connor so powerfully put it, Justice Marshall's perspective "made clear what legal briefs often obscure: the impact of legal rules on human lives."[315] He reminded his colleagues "that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."[316]

Justice O'Connor's insights capture the value of judicial diversity. As the first Black person on the Court, Justice Marshall saw the law differently, and that showed in his decisionmaking. As one judge described, "judges have to make determinations that draw not so much upon legal acumen, but on an understanding of people and of human experiences. Such experiences inform assumptions

53–68 (2011) (questioning "appellate courts' purported commitment to an adversarial system of justice, even as they rely on extra-record facts presented by nonparties"); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1191, 1227–34 (2011) (arguing that "the legal system should consider extending the degree to which it enables parties to control the legal issues decided by courts").

311. O'Connor, *supra* note 33.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 1218.

316. *Id.*

that affect legal decisions."[317] Or as put by another judge, "the absence of diversity creates (in fact) a judicial partiality to the values and stories of the group[] overrepresented—white men."[318] A racially diverse judiciary is important to the law developing in a way that reflects the richness of a diverse citizenry. As Sherrilyn Ifill explains, "a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making," and "minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities."[319]

Taking these lessons and applying them in the Fourth Amendment context, a Black judge may better understand how a reasonable Black person responds to police and construe the Fourth Amendment in a way that captures this perspective. Professor Tracey Maclin makes this point about Justice Marshall's Fourth Amendment jurisprudence, arguing that because of his personal experiences, "Justice Marshall had an acute awareness of the realities of police confrontations and a general distrust of police authority when directed at persons on the street. He recognized that police-citizen encounters are usually one-sided affairs where the police have the upper-hand."[320] Justice Sotomayor, the first Latina on the Court, has also been sensitive to how Black and Brown people may experience police in

317. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117 (2003).

318. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 781 (2004); *see also* Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1712 (2007) ("[E]ach of us harbors some bias in some degree, and . . . our bias may be impacting a given decision in ways in which we are simply not aware.").

319. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000). As Ifill elaborates, white judges, wittingly or not, "are steeped in and bound by narratives which appear not to be narratives at all because they are cloaked in the transparency of whiteness." *Id.* at 469. A study of Voting Rights Act cases by Professors Adam Cox and Thomas Miles helps illuminate this point. They look at all Section 2 Voting Rights Act cases decided between 1982 and 2004. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 8 (2008). They find that "an African-American judge is more than twice as likely as a non-African-American judge to vote for section 2 liability." *Id.* at 4 (emphasis omitted). When pondering reasons for the large disparity, they hypothesize "that judges . . . are influenced by their personal experiences, and that white and African-American judges tend to have different life experiences." *Id.* at 32. Indeed, Cox and Miles found that just the presence of a Black judge on an appellate panel tended to influence the vote of white judges, perhaps because a Black "judge may have different experiences or information relating to discriminatory practices, and this might lead the white judge to reevaluate his view." *Id.* at 35–36. *See generally* BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN & ANNA HARVEY, JUDICIAL DECISION-MAKING: A COURSEBOOK 176–77 (2020) (collecting studies reflecting that "Black judges appear to have distinctive preferences in areas in which race may be particularly salient, or in cases where they may have had distinctive experiences. Moreover, nonblack judges appear to respond to the presence of black judges on multijudge panels, moving closer to the preferences of black judges in these cases").

320. Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 729 (1992). A judge does not have to explicitly invoke race to bring their unique perspective to bear. For instance, in *Bostick*, the dissent by Justice Marshall does not focus on race other than mentioning in a footnote that some officers decide to approach people based on race. *See* Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting). But although race is absent from the dissent, it may still have colored the way Justice Marshall viewed the coerciveness of the encounter. *See* Carbado, *supra* note 9, at 985 n.160.

her Fourth Amendment jurisprudence.[321] Almost certainly, the way Justice Marshall and Justice Sotomayor conceive the Fourth Amendment stems at least in part from their personal backgrounds and experiences.

But it is not just racial diversity that is important to surfacing the experiences of people of color. Professional diversity can also help ensure this surfacing occurs.[322] Judge Harry Edwards described it as "inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."[323] So turning back to Justice Marshall as an example, Justice Marshall's unique professional experience was also critical to him seeing the law differently than his colleagues because he was the only Justice who spent the bulk of his career fighting for the equality of Black people. He had spent significant time representing Black people accused of crimes.[324] He was therefore professionally familiar with racialized problems inherent in policing.[325]

Appointing attorneys with significant experience representing people of color accused of crimes can also help counter the whitewashing of the law because although the attorneys themselves may not be Black, they may have professional experiences that have brought them in close proximity to Blackness. Defense attorneys (and some civil rights attorneys) likely better understand from experience the racialized nature of our criminal legal system. They have witnessed firsthand how the system treats their clients of color. They have greater reason to be skeptical of the government's, including police officers', self-serving assertions. As then-Judge Ketanji Brown Jackson—the first Justice with "significant experience" representing indigent criminal defendants on the Court since Justice Marshall[326]—explained during her confirmation hearings to the D.C. Circuit: "I think that actually having defender experience can help, not only the judge him or herself in considering the facts and circumstances in the case, but also help the system overall, in terms of [judges'] interactions with defendants and the way in which they proceed in the courtroom."[327]

---

321. *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting); *see also* Hasbrouck, *supra* note 45, at 678–79 (arguing that "Justice Sotomayor uses her personal experiences of discrimination to inform her opinions" and "is mindful of discrimination beyond her lived experiences").

322. *See, e.g.*, Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 908 (2003) (noting that "virtually all analyses show career path to be an important factor in explaining judicial decision making—from the votes justices cast to their respect for stare decisis").

323. *See* Edwards, *supra* note 33.

324. Blanco & Tan, *supra* note 28.

325. *See, e.g.*, Janet Cooper Alexander, *TM*, 44 STAN. L. REV. 1231, 1233 (1992) (noting that Justice Marshall's experiences before he was on the bench provided him with greater awareness of "police procedures [and] the interactions between law enforcement and criminal defendants").

326. Blanco & Tan, *supra* note 28.

327. *Confirmation Hearing for Judicial Nominees*, C-SPAN, at 1:02:11 (Apr. 28, 2021), https://www.c-span.org/video/?511313-1/confirmationhearing-judicial-nominees. A recent study showed that judges who are former public defenders handle criminal cases differently: they are less likely to send people to prison, and when they sentence a defendant to prison, they are more likely to hand down

A racially and professionally diverse bench is an important step to countering the whitewashing of the law (as the examples in Part III demonstrate).[328] It is *especially* important when considering the phenomenon of *lawyers* ignoring race because diverse judges with diverse experiences will likely be able to more easily identify the diverse perspectives that the lawyers on the case overlooked.

2. Law Clerks

Finally, beyond a diverse judiciary to offset the whitewashing of the law, it is worth diversifying the ranks of law clerks. Like other segments of the profession, studies show that judicial law clerks are also overwhelmingly white.[329] Studies also show that law clerks exert some influence over judicial decisionmaking.[330] But beyond studies showing direct influence over how judges vote, law clerks can voice perspectives in chambers that may otherwise be foreign or forgotten. They can share with their judges how their own personal experiences affect their view of a case. A Black law clerk from Southeast Washington, D.C. (a Black area of the city) may have a different view of a policing case than a white law clerk from Bethesda, Maryland (a wealthy white suburb).[331] These different perspectives are essential to consider when resolving legal issues that will ultimately have a disproportionate impact on communities otherwise not represented in the room.[332] Thus, even when lawyers whitewash their client of color's case, and even when a judge may not see the many ways in which a case may be racialized, diverse law clerks can voice the marginalized perspectives that so often are missed.

---

shorter sentences. *See* Allison P. Harris & Maya Sen, *Appointing Public Defenders as Judges Affects Their Decisions. Our Study Shows How.*, WASH. POST (Mar. 17, 2022, 10:17 AM), https://www.washingtonpost.com/outlook/2022/03/17/jackson-public-defender-courts/.

328. *See, e.g.*, Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 134–35 (2004) ("Studies suggest that African American judges may be better at recognizing discrimination, more likely to issue sentences to convicted criminal defendants without being influenced by racial stereotypes, and more likely to interpret sentencing guidelines less strictly.").

329. *See* Litman et al., *supra* note 21, at 53–54 (noting that 85% of law clerks at the Supreme Court between 2005 and 2017 were white and only 4.1% were Black).

330. *See, e.g.*, Adam Bonica, Adam Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J. L. ECON. & ORG. 1, 1 (2019); Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process*, 98 MARQ. L. REV. 75, 75 (2014); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008).

331. *See, e.g.*, John Woodrow Cox, *From Her Dad's Killing During the Crack Epidemic to a Supreme Court Clerkship*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/local/from-her-dads-killing-during-the-crack-epidemic-to-a-supreme-court-clerkship/2017/09/27/e631eb7c-8de0-11e7-8df5-c2e5cf46c1e2_story.html (recalling a time when a Black woman law clerk, Tiffany Wright, who was from Southeast D.C., was discussing a policing case with the judge she was clerking for, and how the judge remarked that she saw the case differently than he did).

332. *See* Deeva Shah & Greg Washington, *Beyond Symbolism: Accepting the Substantive Value of Diversity in Law Clerk Hiring*, 97 NOTRE DAME L. REV. REFLECTION 317, 319 (2022) ("The importance of diversity [in judicial clerkships] is not in demographics alone or the legitimacy that may flow from those numbers. Rather, the purpose is to ensure that the judiciary benefits from a range of perspectives that more accurately reflect those who are affected by the law.").

C. WHAT'S BEING TAUGHT

Perhaps the problem of lawyers whitewashing the Fourth Amendment stems from how criminal law is (or at least was) taught. For decades, scholars have pointed out the gap between how law is taught and how it operates in practice.[333] More recently, scholars have begun to explore how this gap in education has helped fuel our carceral state.

Start with Professor Alice Ristroph's critique of substantive criminal law—the course most law students take their first year.[334] Substantive criminal law is the first (and perhaps only) course that many law students take focusing on the criminal legal system.[335] As Ristroph explains, substantive criminal law was developed as "a deeply normative course premised on a specific model of what criminal law should be."[336] Ristroph argues that the canons of criminal law taught in most first-year courses are "color-blind, depicting an egalitarian system that imposes obligations without reference to race."[337] This model of criminal law, Ristroph concludes, "trains new lawyers to indulge the fantasy of a self-executing law that vindicates . . . neutral principles and never functions . . . as a 'naked power organ.'"[338] This fantastical version of criminal law makes criminal punishment much easier to impose because it does not require any hard critical thinking.[339]

Professor Shaun Ossei-Owusu picks up where Professor Ristroph left off, arguing that the problems identified by Ristroph permeate the entire criminal legal education curriculum, including evidence and criminal procedure courses.[340] Ossei-Owusu maintains that these courses are often taught in a way that "reproduce[s] the penal status quo by socializing students into understanding law primarily as a science that is superordinate to social, political, and economic concerns—particularly as it relates to marginalized groups."[341] When law schools train students to "think like a lawyer," they are often not encouraging them to investigate the assumptions and biases underlying legal doctrine.[342] "The

333. *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1988); Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 790 (2003) (reviewing RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMAN & DEBRA A. LIVINGSTON, COMPREHENSIVE CRIMINAL PROCEDURE (2001) and MARC L. MILLER & RONALD. F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (2001)); Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 5 (2014).

334. *See* Ristroph, *supra* note 34, at 1634.

335. *See id.* at 1651.

336. *Id.*

337. *Id.* at 1635. Of course, this is a generalization, and there are people who are and who have been teaching criminal law in a way that recognizes how it both recreates race and ensconces racial hierarchies. *See infra* note 346 and accompanying text.

338. *Id.* at 1679 (quoting Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959)).

339. *See id.*

340. *See* Ossei-Owusu, *supra* note 34, at 414–16.

341. *Id.* at 422.

342. *Id.* at 423.

'detached mastery' of legal education aggressively focuses on logical and analytical reasoning while denying the more dynamic and interpersonal dimensions of criminal justice matters."[343] Thus, in teaching law in this way, law schools are "socializ[ing]" law students—future prosecutors, defense attorneys, and judges—into believing that race is "irrelevant."[344]

Fortunately, things have started to change. Although some professors incorporated a critical lens in their teaching of criminal law courses long before such an approach was widely accepted,[345] many more now recognize that discussing the racialized realities of how criminal law operates on the ground is a necessary component of teaching any course on the criminal legal system.[346] For if we do not teach students to see the way race operates in the enforcement of criminal law, then there is no reason to expect those same students, once they become lawyers, to see how race operates in the enforcement of criminal law and then effectively convey that information in court.

In other words, the academy has been complicit in lawyers' whitewashing of the law. Law schools have been fertile training ground for lawyers to learn to discuss the law in a way that ignores the experiences of marginalized people and ignores how the law contributes to that marginalization.

III. THE NEED TO RECOGNIZE RACE

Even if lawyers begin litigating the racialized experiences of their clients, you may wonder what difference this would make if you believe the Supreme Court is intentionally colorblind. For example, Professor Paul Butler argues the Fourth Amendment as conceived by the Supreme Court is an intentional "project . . . to

---

343. *Id.* (quoting Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 531 (2007)).

344. *See id.* at 427; *see also* Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 74 (2022) (arguing that given the current model of law school teaching, a "student will likely begin to accept the message that she has received, that law, as found in the opinions she is reading, is normal and natural, largely static and unflinching, and something to be understood and sometimes critiqued, but not fundamentally disrupted"); M.K.B. Darmer, *Teaching* Whren *to White Kids*, 15 MICH. J. RACE & L. 109, 131 (2009) (advocating "moving beyond a narrow 'case law' method to an approach that provides richer context to our classrooms for a critical study of criminal justice").

345. *See generally* Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 261 (2009) (describing a 1940 casebook as "represent[ing] a rebellion against the case-centered, doctrine-dominated teaching method").

346. Today, many criminal law, criminal procedure, and evidence casebooks intentionally incorporate discussions of race and are updated frequently to make the conversations more robust depending on current circumstances. *See generally, e.g.*, CYNTHIA LEE & L. SONG RICHARDSON, CRIMINAL PROCEDURE: CASES AND MATERIALS (3d ed. 2022) (examining issues of race, class, gender, and sexual orientation throughout criminal procedure); SANFORD H. KADISH, STEPHEN SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (11th ed. 2022) (discussing abolitionist critiques of criminal law, racial profiling, and how abstract doctrines relate to pressing social justice issues); GEORGE FISHER, EVIDENCE (4th ed. 2022) (providing increased focus on racial justice issues); *see also About*, GUERRILLA GUIDES TO LAW TEACHING, https://guerrillaguides.wordpress.com/about/ [https://perma.cc/8LQ4-78E7] (last visited Apr. 10, 2023) (providing resources to help build marginalized perspectives into core law school courses).

expand the power of the police against people of color, especially blacks and Latinos."[347] If this is what you believe, you may argue race-conscious lawyering does not matter. The Court will do what it wants and other judges will, too.

Assume Butler is right. After all, race-conscious lawyering did not work in *Whren v. United States*, when the Court essentially condoned police engaging in racial profiling.[348] And this is the same Court that did not flinch in the face of evidence showing racial bias influenced capital punishment.[349] This Part still maintains that this does not absolve lawyers from raising race when it is critical to understanding their clients' cases. First, although the Supreme Court has been ignorant (purposefully or not) on issues of race, it only handles a tiny fraction of criminal cases, and will resolve an even smaller number of Fourth Amendment disputes. When race is raised in lower state and federal courts, judges have been receptive to acknowledging the experiences of Black people and other people of color with policing in America.[350] This is proof that it matters how lawyers tell their clients' stories. It also shows that who is on the bench matters too, because many of the judges who have been receptive to these arguments are judges of color or former defenders.

But even if the outcome would be the same, there is value to having a more accurate account of how we arrived where we are. In the words of Professor Derrick Bell, we must maintain "a hard-eyed view of racism" and not be deterred in "the struggle against [it or] else the erosion of black rights will become even worse than it is now."[351] And if we do not seek to better understand and unpack how the profession more broadly has been complicit in the whitewashing of the law, then the improbability of progress and the risk of regression only increase.

In short, regardless of the potential outcome, lawyers should not shy away from recognizing race, especially when it comes to the Fourth Amendment and their clients of color's interactions with police.

A. RACIALLY CONSCIOUS LAWYERING LEADING TO RACIALLY AWARE JUDGING

In the years since *Bostick*, *Wardlow*, and *Drayton*, lawyers have litigated whether their clients of color would have felt free to leave given their race. Lawyers have also challenged courts imputing suspicion on a client of color's flight from police given the often-tense relationship between police and many

347. Butler, *supra* note 9, at 246.

348. *See* Brief for the Petitioners, *supra* note 241, at *13–14 (arguing that allowing police to conduct traffic stops for any civil infraction will mean "that thousands of innocent motorists may be arbitrarily stopped based on the color of their skin or other improper criteria"); *see supra* note 243 & accompanying text.

349. *See* McCleskey v. Kemp, 481 U.S. 279, 286–87, 291 (1987).

350. This is in line with Justice William Brennan's argument that state courts may be better fora to vindicate individual liberties. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Harawa, *supra* note 260, at 2153–54 (arguing that federal courts should take a broad view of racial bias if it is not foreclosed by the Supreme Court, and that state courts should go further than the Supreme Court when construing their own constitutions).

351. Bell, *supra* note 46, at 378.

communities of color. When these arguments have been made, both federal and state courts have been receptive, proving it is not a fool's errand to racialize a Fourth Amendment case to more adequately account for a client's lived experiences.

Take *United States v. Smith* out of the Seventh Circuit.[352] Mr. Smith was cornered in an alley by two Milwaukee police officers and asked whether he had a weapon.[353] The question in the case was whether Mr. Smith was seized—would a reasonable person in his position have felt free to terminate the encounter and walk away.[354] In litigating the case, Mr. Smith's lawyer, a Black federal defender,[355] explicitly argued that

> [a] reasonable person in Mr. Smith's position—a young black male, living and walking at night in an urban area where police-citizen relations are strained for a variety of reasons—would not have felt free to simply walk away when law enforcement officers closed in on him in an alley and began asking whether he was armed or in possession of contraband.[356]

Mr. Smith's lawyer supported this assertion by citing studies—both local and national—showing that Black people were subject to disparate policing practices, and argued that this matters because "[i]t is clear that the view of whether one is free to go is dependent upon the actual circumstance."[357]

In agreeing that Mr. Smith had been seized, the Seventh Circuit, in an opinion by Judge Ann Claire Williams—the first Black judge on that court[358]—made sure to acknowledge this argument, asserting that the court "do[es] not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor . . . do[es] [it] ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system."[359] Thus, the court held that "race is 'not irrelevant' to the question of whether a seizure occurred."[360]

---

352. 794 F.3d 681 (7th Cir. 2015).

353. *See id.* at 682.

354. *Id.*

355. The lawyer on the case was Juval O. Scott, *id.*, the former Federal Defender for the Western District of Virginia, who believes in and trains lawyers on "litigat[ing] race related issues more aggressively and intentionally." Juval O. Scott, *The Myth of Objectivity in Fourth Amendment Jurisprudence*, A.B.A. CRIM. JUST. MAGAZINE, Sept. 2021, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2021/spring/the-myth-objectivity-fourth-amendment-jurisprudence/.

356. Brief and Required Short Appendix of Defendant-Appellant, Dontray Smith at 10, *Smith*, 794 F.3d 681 (No. 14-2982).

357. *Id.* at 12–15.

358. *Hon. Ann Claire Williams (Ret.)*, JONES DAY, https://www.jonesday.com/en/lawyers/w/judge-ann-claire-williams?tab=overview [perma.cc/EQ9F-WQD2] (last visited Apr. 10, 2023).

359. *Smith*, 794 F.3d at 682, 688.

360. *Id.* at 688 (quoting United States v. Mendenhall, 446 U.S. 544, 558 (1980)).

Or take a recent case decided by the Supreme Court of Washington, *State v. Sum*.[361] There, the court faced whether Mr. Sum, a person of color, was seized under the state constitution when police asked Mr. Sum for his identification while revealing that they were investigating a car theft.[362] Mr. Sum's lawyer specifically argued that "whether a reasonable person would feel free to ignore a police demand must explicitly reflect a more realistic approach to the 'reasonable person' than courts have typically taken. It is past time for race to be considered a prominent part of the totality of the circumstances."[363] Mr. Sum's lawyer also argued that "[a] reasonable person, aware of recent well-publicized events and patterns of policing in America, is aware of the risks a person of color takes by refusing contact with police."[364]

The Supreme Court of Washington agreed. In an opinion by Justice Mary Yu—the first Asian, Latina, and LGBTQ person on the court[365]—the Washington high court held that "an allegedly seized person's race and ethnicity are relevant to the question of whether they were seized by law enforcement."[366] The court reasoned that although "there is no uniform life experience or perspective shared by all people of color, heightened police scrutiny of the BIPOC community is certainly common enough to establish that race and ethnicity have at least some relevance to the question of whether a person was seized."[367] Thus, the court held that Mr. Sum had been seized by police, taking his race into account in the seizure analysis.[368]

When asked, courts have also considered race when deciding whether a person's flight from police supports reasonable suspicion. For instance, in *Miles v. United States*, the D.C. Court of Appeals had to decide whether Mr. Miles's running from police gave the police reasonable suspicion to stop him.[369] Mr. Miles's lawyer pressed the argument that a person may flee from police out of "the fear of

361. 511 P.3d 92 (Wash. 2022).

362. *Id.* at 97–99.

363. Supplemental Brief of Petitioner at 20, *Sum*, 511 P.3d 92 (No. 99730-6).

364. *Id.*

365. *Justice Mary I. Yu*, WASH. CTS., https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=Yu [https://perma.cc/3SYG-EZCD] (last visited Apr. 10, 2023).

366. *Sum*, 511 P.3d at 97, 101.

367. *Id.* at 105; *see also* United States v. Washington, 490 F.3d 765, 773–74 (9th Cir. 2007) (acknowledging "the publicized shootings by white Portland police officers of African-Americans" when resolving whether the appellant was seized); Appellant's Opening Brief at 12, *Washington*, 490 F.3d 765 (No. 06-30386) (noting that the shooting of Black motorists by Portland police was brought out at the suppression hearing); State v. Jones, 235 A.3d 119, 126 (N.H. 2020) (observing "that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis"); Brief for the Petitioner at 23–24, *Jones*, 235 A.3d 119 (No. 2019-0057) (explicitly arguing to the court that it should consider race when conducting a seizure analysis); Dozier v. United States, 220 A.3d 933, 944–45 (D.C. 2019) (considering that appellant was Black when conducting seizure analysis); *In re* J. M., 619 A.2d 497, 513–14 (D.C. 1992) (Mack, J., dissenting) ("I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team. I would also suggest that if this hypothetical man was neither innocent nor reasonable, and armed, the lives of innocent people might be endangered in the close confines of a bus." (footnote omitted)).

368. *See Sum*, 511 P.3d at 105, 108.

369. 181 A.3d 633, 635 (D.C. 2018).

police brutality or harassment."[370] And given "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests, the fear of police brutality or harassment can[not] . . . be naively described by courts as 'exaggerated.'"[371] In holding that Mr. Miles's flight did not give police reasonable suspicion to stop him, the court acknowledged this argument and, in an opinion by a former public defender,[372] explained that "though we lack adequate empirical grounds for fathoming the extent to which innocent people might flee . . . it seems safe to say that the number is not insignificant."[373] Citing several studies, the court also noted that data "suggest[] that an African-American man (like Mr. Miles) is statistically more likely to have police force used against him than members of other racial groups."[374]

The invocation of race by the lawyer in *Commonwealth v. Warren* was slightly more subtle, but gave the Supreme Judicial Court of Massachusetts enough room to also hold that race was a relevant factor when determining whether flight gives officers reasonable suspicion.[375] The briefing in that case made sure to point out more than once that Mr. Warren was a young Black man, and insinuated Mr. Warren's race and clothing (a hoodie and baggy pants) were the real reason police tried to stop him before he ran away.[376] The Massachusetts high court took it from there. In an opinion by Justice Geraldine Hines, a Black woman who had extensive experience as a public defender and as a prisoners' rights litigator,[377] the court held that "where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from . . . a pattern of racial profiling of black males in the city of Boston."[378] The court explained that when a Black man runs from police, he "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[379]

---

370. Brief for Appellant at 32–33, *Miles*, 181 A.3d 633 (No. 13-CF-1523).

371. *Id.* at 33.

372. *Miles*, 181 A.3d at 634, 641–43; *see The Honorable Corinne Beckwith*, D.C. CTS., https://www.dccourts.gov/sites/default/files/2017-03/DCCA_Bio_Beckwith.pdf [https://perma.cc/Q9JS-SLHV] (last visited Apr. 10, 2023).

373. *Miles*, 181 A.3d at 642.

374. *Id.* at 641 n.14.

375. *See* 58 N.E.3d 333, 342 (Mass. 2016).

376. *See* Brief and Record Appendix for the Defendant on Appeal from the Boston Municipal Court at 4–5, 8, Commonwealth v. Warren, 31 N.E.3d 1171 (Mass. App. Ct. 2015) (No. 2013-P-0820).

377. State House News Serv., *Geraldine Hines Nominated to Massachusetts Supreme Judicial Court; Would Become 1st Black Woman on State's Highest Court*, MASS LIVE (June 14, 2014, 12:31 AM), https://www.masslive.com/politics/2014/06/geraldine_hines_nominated_to_m.html [https://perma.cc/MU4P-E953].

378. *Warren*, 58 N.E.3d at 342.

379. *Id.*; *see also* United States v. Brown, 925 F.3d 1150, 1156–57 (9th Cir. 2019) ("In the almost twenty years since Justice Stevens wrote his concurrence in *Wardlow*, the coverage of racial disparities in policing has increased, amplifying awareness of these issues. This uptick in reporting is partly attributable to the availability of information and data on police practices. Although such data cannot replace the 'commonsense judgments and inferences about human behavior' underlying the reasonable suspicion analysis, it can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise. Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an 'innocent' explanation of

Thus, even if the Supreme Court is engaged in an intentional project to craft Fourth Amendment doctrines that subordinate people of color, some judges are not willing to go along. In fact, in the face of the Supreme Court's colorblind jurisprudence, when presented with the arguments, some judges are willing to take race into account when considering how a "reasonable person" would respond to certain police interactions. These cases are an important reminder to lawyers litigating cases to not erase their clients' racialized experiences because there are judges out there—especially judges of color and former public defenders—who are willing to be more capacious in their understanding of what is a rational response to police given the realities on the ground.[380]

Reflexively relegating arguments about race to amicus briefs in this context is insufficient. Although there is some data showing that amicus briefs may have varying degrees of influence over court decisionmaking, it is hard to predict how influential an amicus brief will be in any one case, especially in the Supreme Court, considering the sheer number of amicus briefs that are now regularly filed.[381] Thus, although it may be true that "voices of amici and their reactions to courts' precedents may be . . . important in dealing with controversial social issues such as race,"[382] if a party *truly* wants race to be addressed, it is unwise to leave the issue to amici. A judge may pick up an amicus brief, devour its arguments, and incorporate them in their opinion. Or a judge may never read it. If race is truly important to understanding a claim, there is no benefit to leaving it to chance.[383] Indeed, for race to be fully addressed and a client's plight to be most accurately understood, there needs to be a record built in the trial court that appellate counsel can work from and the court can rule on.

Leaving arguments on race to amici also presents a messaging problem. If arguments about race are left out of the parties' briefing but are included in amicus briefs, it signals that race is a somewhat tangential issue to the main dispute. Leaving arguments about race to amici risks silently supporting the idea that race is irrelevant.

This is not to downplay the yeoman's work certain civil rights groups have done to help amplify racial issues at the Supreme Court. Public interest organizations such as LDF and the ACLU have long highlighted how issues before the

---

flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop." (footnote omitted) (citations omitted)).

380. *See* Harawa & Hasbrouck, *supra* note 44, at 1028 (calling for the appointment of more "color-conscious" judges); Hasbrouck, *supra* note 45, at 635 ("American courts cannot whitewash the American people. Judges must turn their attentions to the people and see them in living color.").

381. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 828–29 (2000); Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC'Y REV. 807, 821–22 (2004).

382. Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J. COLL. & U.L. 503, 507 (2004).

383. There may be cases where issues of race *are* more tangential to the legal issues presented such that an amicus brief may be an appropriate vehicle for raising race arguments.

Court will impact communities of color. For decades, amici such as LDF and the ACLU have been sounding the alarm, connecting the criminal legal system to civil rights abuses and describing how the criminal legal system was being used as a tool of racial subordination. But when it is just the amici who bother to talk about race, it (1) gives an excuse to not address the issue under the general rule that arguments not raised by the parties are waived;[384] and (2) risks judges dismissing the briefs as purely self-interested, perceiving the arguments about race as a "Black issue" rather than an important issue to the development of the law writ large. It also burdens civil rights groups to fight for the recognition of people of color, when broader buy-in would surely send a more resounding message.

All scholars might not agree that lawyers should highlight their clients' race when litigating Fourth Amendment claims. In a thought-provoking essay, *Recognizing Race*, Professor Justin Driver highlights the under-explored phenomenon of judges invoking race even when unnecessary to resolving the case and explains how, depending on the situation, recognizing (or not recognizing) race can send problematic messages.[385] After engaging in this descriptive analysis, Driver provides prescriptions to guide judges for when it is appropriate to recognize race. One of his solutions is distinguishing between anticlassification and colorblind principles such that judges "do not classify individuals according to race, but nevertheless acknowledge the racial dynamics that exist in society."[386]

In providing this solution, Professor Driver turns to *Bostick* and asserts that Professor Carbado may have been wrong to argue that the Court erred in failing to recognize that Mr. Bostick was a Black man.[387] Driver suggests that "[i]nstead of emphasizing the narrower question of whether the Court recognizes the race of a particular individual, it may prove wiser to examine the broader question of whether the Court recognizes the racial dimension of a particular issue."[388] And Driver gives an example of this approach, pointing to Justice Stevens's dissent in *Wardlow*, where Stevens did not identify Mr. Wardlow as Black, but still "addressed the larger question of how race should enter into the Fourth Amendment's reasonableness calculus."[389] Driver maintains that "this strategic insight could prove vitally important for legal advocates who wish to have the Supreme Court recognize the continuing role that race plays in society."[390]

But when a case involves a client of color, it seems that the best approach is "yes and," rather than "either or." When a client is a person of color and the issue in the case revolves around how they experienced the police, their race is likely an important part of the story. Indeed, it is hard to see how the story can be told

384. *See, e.g.*, 5 C.J.S. *Appeal and Error* § 990 (2022) ("As a general rule, questions assigned as error are deemed to have been abandoned or waived where they are not urged or discussed on appeal by brief or argument.").

385. Justin Driver, Essay, *Recognizing Race*, 112 COLUM. L. REV. 404, 404, 442–43, 445–46 (2012).

386. *Id.* at 450–51.

387. *See id.* at 452–53.

388. *Id.* at 453.

389. *Id.* at 452.

390. *Id.* at 411.

without acknowledging the client's race. So even if the Court does not recognize the race of a particular party in this context, and instead adopts what Driver calls an "anticlassification" yet "color conscious[]" approach,[391] the lawyer does not have to conceal who their client is or the realities of what their client faced. But this also does not mean that the lawyer cannot then extrapolate from there to suggest what broader racial lessons the Court should learn from their client's experience. Not starting with the client's story, however, obscures the reality of the case. Indeed, as the examples earlier in this Part show, good lawyering frames the client's story within a broader racial narrative.

It is important to recognize, as Professor Driver points out, that there will be Fourth Amendment cases that have important ramifications for people of color, yet the party in the case is white.[392] *Utah v. Strieff* is a good example.[393] *Strieff* involved the scope of the exclusionary rule—a rule designed to deter police misconduct by requiring suppression of evidence acquired in violation of the Fourth Amendment.[394] Mr. Strieff was white.[395] In this case (or similar cases), it may not be (though it may well be) in the client's best interest to point out racial dynamics underlying the case that do not directly pertain to the client. In this situation, amicus briefs *could* help to elucidate the broader racial dimensions of the issue before the Court. For instance, Mr. Strieff's lawyers noted that "police stop . . . minority groups at disproportionately high rates."[396] Then the ACLU elaborated on this idea in an amicus brief, describing how "the social cost" of the Court ruling for the State would be borne by "young black and Latino men."[397] And Justice Sotomayor picked up on this line of argument in her dissent, explaining that "[t]he white defendant in this case shows that anyone's dignity can be violated[,] . . . . [b]ut it is no secret that people of color are disproportionate victims of this type of scrutiny."[398]

At bottom, it seems there is little excuse for lawyers to ignore the racialized aspects of police–citizen contacts in the Fourth Amendment context, especially when litigating on behalf of a client of color (other than the client's express wishes not to raise race or perhaps in the case where a lawyer is in a particularly hostile forum). Although raising race will not always succeed,[399] it seems essential to the client's story and may give judges who are open to acknowledging racial realities

391. *See id.* at 451.

392. *See id.* at 453–54 (giving the example of *Atwater v. City of Lago Vista*, in which "there was no indication" that the arrestee "was a racial minority").

393. 136 S. Ct. 2056 (2016).

394. *See id.* at 2060–61.

395. *See id.* at 2070 (Sotomayor, J., dissenting).

396. Brief for Respondent at 11, *Strieff*, 136 S. Ct. 2056 (No. 14-1373).

397. Brief of the American Civil Liberties Union & the National Ass'n of Criminal Defense Lawyers as *Amici Curiae* in Support of Respondent at 13, *Strieff*, 136 S. Ct. 2056 (No. 14-1373).

398. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (citation omitted).

399. *See, e.g.*, United States v. Knights, 989 F.3d 1281, 1288 (11th Cir. 2021) (refusing to consider a defendant's race when resolving a Fourth Amendment dispute), *cert. denied*, 142 S. Ct. 709 (2021); United States v. Easley, 911 F.3d 1074, 1081 (10th Cir. 2018) (same).

the ammunition they need to issue race-conscious decisions.[400] And even if that courageous judge cannot garner a majority, it may still help inspire dissent, which, as Professor Lani Guinier powerfully argues, can "become a portal by which those previously excluded can enter, engage with, and destabilize dominant (or majority) legal discourse."[401]

B. RACIAL REALISM AND TRUTH-TELLING

But even when unsuccessful, there is still value in truthfully relaying a client's experiences in court without minimizing race. Professor Derrick Bell argues that "racism is a permanent part of the American landscape."[402] Given the permanence of racism, Bell urges a form of "racial realism," where those interested in racial justice abandon traditional notions of racial equality.[403] Racial realism requires "a hard-eyed view of racism as it is and our subordinate role in it."[404] Such a stony-eyed approach "frees us to imagine and implement racial strategies that can bring fulfillment and even triumph."[405] And the triumph, Bell explains, can come from the satisfaction of struggle, because "[t]he fight in itself has meaning and should give us hope for the future."[406]

You do not have to agree with Bell's assessment of the permanence of racism to follow the wisdom of his teachings. Assuming that more race-conscious lawyering will not halt the pernicious colorblind project in which some scholars believe the Court is engaged, then the goals must change. First, as Bell teaches, there is value in the fight. And it is not a *true* fight for racial equity and for the law to recognize our full selves—race and all—if *lawyers* erase a client's race before a court even renders its decision. Clients of color may want their complete stories to be told, and often, especially when it comes to interactions with the police, that story prominently features race.[407] When we ignore race, and therefore ignore reality, we silence our clients and minimize their humanity.[408]

---

400. *Cf.* Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 34 (2008) (describing a race-conscious dissent authored by Justice Marshall).

401. *Id.* at 26.

402. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 92 (1992).

403. *See, e.g.*, *id.* at 97–99.

404. Bell, *supra* note 46, at 378.

405. *Id.* at 374 (emphasis omitted).

406. *Id.* at 378.

407. *See, e.g.*, Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 17 SEATTLE J. FOR SOC. JUST. 333, 339 (2019) (noting that, in the author's experience as a federal public defender, "many clients appreciate lawyers sensitive to racial prejudice and willing to do something about it within the system"); Sterling, *supra* note 267, at 545 ("Narrative is the most subversive element that defense attorneys can inject into a courtroom hearing.").

408. *See, e.g.*, David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 822 ("The advocate defends human dignity by giving the client voice and sparing the client the humiliation of being silenced and ignored."); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1244 (2004) (arguing that public defenders must "respect[] and embrac[e] the client's dignity, autonomy, and humanity").

Second, lawyers actively litigating race allows for a more accurate story to be told about who is to blame for the current state of the law. Right now, legal scholarship often treats the Supreme Court as solely to blame. True, maybe the Court would have reached the same result had the lawyers in *Bostick*, *Wardlow*, and *Drayton* made arguments that acknowledged how race influenced each case. But we can never know given the arguments were not presented by the parties. If we want to be more precise in our accounting of how whitewashing occurs, then that first requires lawyers to directly confront the Court with race. If, in the face of being confronted, the Court continues down the same colorblind path, then the intentionality of any Court "project" becomes much clearer.

Third, an accurate picture matters because that affects what happens next. Clarity about racism and the roots of subordination can influence actions and policies going forward.[409] For instance, a more accurate picture of the whitewashing of law can change the way lawyers litigate Fourth Amendment issues, with lawyers tailoring and refining their strategies based on successes and failures. A more accurate picture of how whitewashing occurs may bolster calls to diversify the bench or expand the Court,[410] especially given the differences in the way judges of different backgrounds may approach Fourth Amendment issues and race. And a more accurate understanding of how whitewashing happens could prompt legislation or court rules requiring courts to think about race and racial bias when deciding Fourth Amendment questions.[411]

Or a more accurate understanding of how whitewashing occurs may show that the system is in fact rotten at its core, and lend support to calls to radically reform the criminal legal system or to even tear it down and start from scratch.[412] This more accurate understanding may reinforce arguments some are making that the system as it stands will never be a situs for racial equity.[413] In other words, "[o]nce the political project within the courtroom is

409. *See* Bell, *supra* note 46, at 378.

410. For a discussion of various proposals of Supreme Court reform, see Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 172–205 (2019) (discussing various proposals for Supreme Court reform, then providing two of the authors' own proposals).

411. *Cf.* CAL. CIV. PROC. CODE § 231.7 (requiring judges to apply a reasonable person standard, where that "reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California" when resolving juror discrimination claims); WASH. CT. GEN. R. 37(f) (requiring judges to apply a reasonable observer standard and mandating that the reasonable observer "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State" when resolving juror discrimination claims).

412. Speaking of starting from scratch, Professor Brandon Hasbrouck argues for a new Constitution, designed by "people who look like a cross section of America." Brandon Hasbrouck, *Allow Me to Transform: A Black Guy's Guide to a New Constitution*, 121 MICH. L. REV. (forthcoming Apr. 2023) (manuscript at 17) (on file with author).

413. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 75.

clear, lawyers can draw thicker connections to political movements outside the courtroom."[414]

* * *

Lawyers' *not* telling the racialized truth allows for the perpetuation of color-blind doctrine without a full understanding of the violence that the law works on communities of color. Lawyers' *not* telling the racialized truth further marginalizes the people who were already marginalized to begin with, except this time the person doing the marginalizing is supposed to be a zealous advocate on their behalf. Lawyers' *not* telling the racialized truth is to feed into the fiction that race is irrelevant and that the world is postracial and thus law should be too.[415] *Not* telling the truth is therefore *not* a viable option absent harm to the client.[416]

CONCLUSION

Early in his legendary career, Professor Derrick Bell scrutinized the litigation strategies deployed by civil rights lawyers in the quest to integrate schools, and questioned whether they helped or exacerbated the racial inequalities in the American education system.[417] Bell's work was thought provoking. It was uncomfortable. And regardless of whether you agreed, what Bell did so brilliantly was shine a light on how the choices of *lawyers*, *even lawyers who are well-intentioned*, can help cement racial inequity.

Legal scholars often overlook litigation strategy when critiquing the courts and the development of the law, treating lawyers as secondary players. This is a mistake. Lawyers should be main characters in any story focusing on how the law entrenches existent power structures. Either lawyers are heroes of this story, fighting valiantly to ensure the law develops in a way that embraces a diversity of experiences. Or they are bystanders, or worse, villains, ignoring or purposefully erasing the reality that the law operates differently for different groups of people.

This project is a beginning of an effort to round out the story of how the law has been whitewashed. The word "beginning" is key. Whitewashing goes far beyond the Fourth Amendment, criminal law, and the Black–white binary. The

414. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1932–33, 1948 (2019) (urging a form of "resistance lawyering," using legal process "to undermine, confuse, or destroy that process altogether").

415. *See, e.g.*, Mario L. Barnes, *"The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2046 (2016) (arguing that the Supreme Court has adopted "a perspective that is now best described as being post-race"); Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 831 (2011) (arguing that "post-racialism tells us that racialized mass incarceration is not, in fact, a rank injustice").

416. *See, e.g.*, Gonçalves, Jr., *supra* note 407, at 338 ("A Race-conscious approach requires client-centered ideals in order to facilitate meticulous research into a client's life so as to present him/her in the best possible light.").

417. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515–16 (1976).

way that lawyers have contributed to the erasure of other people of color's experiences needs to be explored.[418]

Moreover, the ideas underlying whitewashing extend beyond race. We must also explore how lawyers have contributed to the "masculinizing" of the law—exalting the experiences of men to the exclusion of all others. Examine how much lawyers have contributed to the "straightening" of the law—erasing the experiences of queer people. Contemplate ableism in the law and how lawyers may have contributed to that. The list goes on. And we must be intersectional in our thinking too.[419] There is much work to be done.

In the end, the story goes like this: law professors often did not teach how race influences the operation of the law. Lawyers often did not litigate how race permeates their clients' cases. And courts often issued decisions that were oblivious to issues of race. What now? Do we rethink the way we teach the law? Do we rethink the way we litigate cases? Or do we rethink the judges we put on the courts? The answer has to be "yes" to all three if we ever want the law to fully reflect the pluralism of America. But where to start? This cycle of whitewashing needs to be disrupted somehow, and lawyers doing the disrupting while zealously advocating for their clients seems like a natural beginning point.[420] Hopefully those lawyers will have been taught the law in a way that allows them to more easily engage in this disruption.[421] And hopefully they will be in front of judges who are receptive to these arguments. But even if they have not had this education, or find themselves in a hostile forum, that alone does not give advocates an unreasoned excuse to ignore how race affects a client's case, especially when race and racism are at its roots.

---

418. For instance, in a recent article, Professor Rafael Pardo explores how race is litigated and discussed in bankruptcy law. *See* Rafael I. Pardo, *Racialized Bankruptcy Federalism*, 2021 MICH. ST. L. REV. 1299, 1341–42.

419. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991) (exploring the phenomenon of social justice discourse ignoring intersectional identities).

420. *See, e.g.*, Farbman, *supra* note 414. The courts are likely not the best immediate intervention point because, as Professor Andrew Manuel Crespo notes, the "process of constitutional criminal adjudication . . . inculcates in criminal courts a transactional myopia that frustrates their capacity to recognize, understand, and engage the broader institutional dynamics of the criminal justice system." Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051 (2016).

421. As Dean Danielle Conway remarked: "Though systemic racial inequality is embedded in America's system of laws, the duties and responsibilities of legal education, the legal academy, and the legal profession are to engage in action, reflection, and transformative change that will give meaning to the democratic ideals of equality and justice." Danielle M. Conway, *Antiracist Lawyering in Practice Begins with the Practice of Teaching and Learning Antiracism in Law School*, 2022 UTAH L. REV. 723, 725. Now, A.B.A. Standard 303 requires law schools to do at least some of this work by mandating that law schools "provide education to law students on bias, cross-cultural competency, and racism." STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. § 303(c) (AM. BAR ASS'N 2022–2023).